



# IOWA ADMINISTRATIVE BULLETIN

Published Biweekly

VOLUME XXII  
January 12, 2000

Iowa State Law Library  
State House  
Des Moines, Iowa 50319  
NUMBER 14  
Pages 1061 to 1108

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## PREFACE

The Iowa Administrative Bulletin is published biweekly in pamphlet form pursuant to Iowa Code chapters 2B and 17A and contains Notices of Intended Action on rules, Filed and Filed Emergency rules by state agencies.

It also contains Proclamations and Executive Orders of the Governor which are general and permanent in nature; Economic Impact Statements to proposed rules and filed emergency rules; Objections filed by Administrative Rules Review Committee, Governor or the Attorney General; and Delay by the Committee of the effective date of filed rules; Regulatory Flexibility Analyses and Agenda for monthly Administrative Rules Review Committee meetings. Other "materials deemed fitting and proper by the Administrative Rules Review Committee" include summaries of Public Hearings, Attorney General Opinions and Supreme Court Decisions.

The Bulletin may also contain Public Funds Interest Rates [12C.6]; Workers' Compensation Rate Filings [515A.6(7)]; Usury [535.2(3)"a"]; Agricultural Credit Corporation Maximum Loan Rates [535.12]; and Regional Banking—Notice of Application and Hearing [524.1905(2)].

**PLEASE NOTE:** *Italics* indicate new material added to existing rules; ~~strike-through letters~~ indicate deleted material.

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Fax: (515)242-5974

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## Schedule for Rule Making 2000

NOTICE SUBMISSION DEADLINE	NOTICE PUB. DATE	HEARING OR COMMENTS 20 DAYS	FIRST POSSIBLE ADOPTION DATE 35 DAYS	ADOPTED FILING DEADLINE	ADOPTED PUB. DATE	FIRST POSSIBLE EFFECTIVE DATE	POSSIBLE EXPIRATION OF NOTICE 180 DAYS
Dec. 24 '99	Jan. 12 '00	Feb. 1 '00	Feb. 16 '00	Feb. 18 '00	Mar. 8 '00	Apr. 12 '00	July 10 '00
Jan. 7	Jan. 26	Feb. 15	Mar. 1	Mar. 3	Mar. 22	Apr. 26	July 24
Jan. 21	Feb. 9	Feb. 29	Mar. 15	Mar. 17	Apr. 5	May 10	Aug. 7
Feb. 4	Feb. 23	Mar. 14	Mar. 29	Mar. 31	Apr. 19	May 24	Aug. 21
Feb. 18	Mar. 8	Mar. 28	Apr. 12	Apr. 14	May 3	June 7	Sept. 4
Mar. 3	Mar. 22	Apr. 11	Apr. 26	Apr. 28	May 17	June 21	Sept. 18
Mar. 17	Apr. 5	Apr. 25	May 10	May 12	May 31	July 5	Oct. 2
Mar. 31	Apr. 19	May 9	May 24	May 26	June 14	July 19	Oct. 16
Apr. 14	May 3	May 23	June 7	June 9	June 28	Aug. 2	Oct. 30
Apr. 28	May 17	June 6	June 21	June 23	July 12	Aug. 16	Nov. 13
May 12	May 31	June 20	July 5	July 7	July 26	Aug. 30	Nov. 27
May 26	June 14	July 4	July 19	July 21	Aug. 9	Sept. 13	Dec. 11
June 9	June 28	July 18	Aug. 2	Aug. 4	Aug. 23	Sept. 27	Dec. 25
June 23	July 12	Aug. 1	Aug. 16	Aug. 18	Sept. 6	Oct. 11	Jan. 8 '01
July 7	July 26	Aug. 15	Aug. 30	Sept. 1	Sept. 20	Oct. 25	Jan. 22 '01
July 21	Aug. 9	Aug. 29	Sept. 13	Sept. 15	Oct. 4	Nov. 8	Feb. 5 '01
Aug. 4	Aug. 23	Sept. 12	Sept. 27	Sept. 29	Oct. 18	Nov. 22	Feb. 19 '01
Aug. 18	Sept. 6	Sept. 26	Oct. 11	Oct. 13	Nov. 1	Dec. 6	Mar. 5 '01
Sept. 1	Sept. 20	Oct. 10	Oct. 25	Oct. 27	Nov. 15	Dec. 20	Mar. 19 '01
Sept. 15	Oct. 4	Oct. 24	Nov. 8	Nov. 10	Nov. 29	Jan. 3 '01	Apr. 2 '01
Sept. 29	Oct. 18	Nov. 7	Nov. 22	Nov. 24	Dec. 13	Jan. 17 '01	Apr. 16 '01
Oct. 13	Nov. 1	Nov. 21	Dec. 6	Dec. 8	Dec. 27	Jan. 31 '01	Apr. 30 '01
Oct. 27	Nov. 15	Dec. 5	Dec. 20	Dec. 22	Jan. 10 '01	Feb. 14 '01	May 14 '01
Nov. 10	Nov. 29	Dec. 19	Jan. 3 '01	Jan. 5 '01	Jan. 24 '01	Feb. 28 '01	May 28 '01
Nov. 24	Dec. 13	Jan. 2 '01	Jan. 17 '01	Jan. 19 '01	Feb. 7 '01	Mar. 14 '01	June 11 '01
Dec. 8	Dec. 27	Jan. 16 '01	Jan. 31 '01	Feb. 2 '01	Feb. 21 '01	Mar. 28 '01	June 25 '01
Dec. 22	Jan. 10 '01	Jan. 30 '01	Feb. 14 '01	Feb. 16 '01	Mar. 7 '01	Apr. 11 '01	July 9 '01
Jan. 5 '01	Jan. 24 '01	Feb. 13 '01	Feb. 28 '01	Mar. 2 '01	Mar. 21 '01	Apr. 25 '01	July 23 '01

### PRINTING SCHEDULE FOR IAB

<u>ISSUE NUMBER</u>	<u>SUBMISSION DEADLINE</u>	<u>ISSUE DATE</u>
16	Friday, January 21, 2000	February 9, 2000
17	Friday, February 4, 2000	February 23, 2000
18	Friday, February 18, 2000	March 8, 2000

**PLEASE NOTE:**

Rules will not be accepted after **12 o'clock noon** on the Friday filing deadline days unless prior approval has been received from the Administrative Rules Coordinator's office.

If the filing deadline falls on a legal holiday, submissions made on the following Monday will be accepted.

## PUBLICATION PROCEDURES

TO: Administrative Rules Coordinators and Text Processors of State Agencies  
FROM: Kathleen K. Bates, Iowa Administrative Code Editor  
SUBJECT: Publication of Rules in Iowa Administrative Bulletin

The Administrative Code Division uses Interleaf 6 to publish the Iowa Administrative Bulletin and can import documents directly from most other word processing systems, including Microsoft Word, Word for Windows (Word 7 or earlier), and WordPerfect.

1. To facilitate the processing of rule-making documents, we request a 3.5" High Density (not Double Density) IBM PC-compatible diskette of the rule making. Please indicate on each diskette the following information: agency name, file name, format used for exporting, and chapter(s) amended. Diskettes may be delivered to the Administrative Code Division, 1st Floor, Lucas State Office Building or included with the documents submitted to the Governor's Administrative Rules Coordinator.

2. Alternatively, if you have Internet E-mail access, you may send your document as an attachment to an E-mail message, addressed to both of the following:

[bcarr@legis.state.ia.us](mailto:bcarr@legis.state.ia.us)  
[kbates@legis.state.ia.us](mailto:kbates@legis.state.ia.us)

Please note that changes made prior to publication of the rule-making documents are reflected on the hard copy returned to agencies by the Governor's office, but not on the diskettes; diskettes are returned unchanged.

Your cooperation helps us print the Bulletin more quickly and cost-effectively than was previously possible and is greatly appreciated.

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*Guide to Rule Making, June 1995 Edition*, available upon request to the Iowa Administrative Code Division,  
Lucas State Office Building, First Floor, Des Moines, Iowa 50319.

**PUBLIC HEARINGS****To All Agencies:**

The Administrative Rules Review Committee voted to request that Agencies comply with Iowa Code section 17A.4(1)“b” by allowing the opportunity for oral presentation (hearing) to be held at least **twenty** days after publication of Notice in the Iowa Administrative Bulletin.

AGENCY	HEARING LOCATION	DATE AND TIME OF HEARING
<b>BLIND, DEPARTMENT FOR THE[111]</b>		
Variances and waivers of department for the blind administrative rules, ch 12 IAB 12/29/99 ARC 9574A	Director's Conference Room Department for the Blind 524 4th St. Des Moines, Iowa	January 18, 2000 1 p.m.
<b>ENVIRONMENTAL PROTECTION COMMISSION[567]</b>		
Title V operating permit fee, 22.106(1) IAB 12/15/99 ARC 9536A	Conference Rooms 1 to 4 Air Quality Bureau 7900 Hickman Rd. Urbandale, Iowa	January 14, 2000 1 p.m.
Emission standards for contaminants, 23.1(4) IAB 12/15/99 ARC 9535A	Conference Rooms 1 to 4 Air Quality Bureau 7900 Hickman Rd. Urbandale, Iowa	January 14, 2000 10 a.m.
<b>HUMAN SERVICES DEPARTMENT[441]</b>		
Disability services management, 25.11 to 25.19 IAB 12/29/99 ARC 9562A	Conference Room—6th Floor Iowa Bldg., Suite 600 411 3rd St. SE Cedar Rapids, Iowa	January 19, 2000 10 a.m.
	Administrative Conference Room 417 E. Kanessville Blvd. Council Bluffs, Iowa	January 19, 2000 10 a.m.
	Large Conference Room—5th Floor Bicentennial Bldg. 428 Western Davenport, Iowa	January 19, 2000 10 a.m.
	Conference Room 104 City View Plaza 1200 University Des Moines, Iowa	January 19, 2000 10 a.m.
	Liberty Room Mohawk Square 22 N. Georgia Ave. Mason City, Iowa	January 19, 2000 9 a.m.
	Conference Room 3 120 E. Main Ottumwa, Iowa	January 19, 2000 10 a.m.
	Fifth Floor 520 Nebraska St. Sioux City, Iowa	January 20, 2000 1:30 p.m.

**HUMAN SERVICES DEPARTMENT[441] (Cont'd)**

Conference Room 220 Pinecrest Office Bldg. 1407 Independence Ave. Waterloo, Iowa	January 19, 2000 10 a.m.
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**INSPECTIONS AND APPEALS DEPARTMENT[481]**

Quality award for nursing facilities, ch 54 IAB 1/12/00 ARC 9610A	Director's Conference Room Second Floor Lucas State Office Bldg. Des Moines, Iowa	February 8, 2000 10 a.m.
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**NATURAL RESOURCE COMMISSION[571]**

Operation of motor vehicles in meandered streams, 49.5 IAB 12/29/99 ARC 9581A	West Conference Room—4th Floor Wallace State Office Bldg. Des Moines, Iowa	January 19, 2000 1 p.m.
Scuba and skin spearing of rough fish in meandered streams, 83.2(1) IAB 12/29/99 ARC 9582A	West Conference Room—4th Floor Wallace State Office Bldg. Des Moines, Iowa	January 19, 2000 2 p.m.

**NURSING BOARD[655]**

Examinations, 2.10 IAB 1/12/00 ARC 9607A	Ballroom Kirkwood Civic Center Hotel 4th and Walnut Des Moines, Iowa	March 1, 2000 7 p.m.
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**REAL ESTATE COMMISSION[193E]**

Business conduct, 1.1, 1.27, 1.41, 1.42(6) IAB 1/12/00 ARC 9600A	Conference Room—2nd Floor Commerce Bldg. 1918 SE Hulsizer Ankeny, Iowa	February 1, 2000 9 a.m.
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**SECRETARY OF STATE[721]**

Signature requirements for nomination petitions for supervisor candidates, 21.601 IAB 1/12/00 ARC 9604A (See also ARC 9603A herein)	Office of the Secretary of State Second Floor Hoover State Office Bldg. Des Moines, Iowa	February 1, 2000 1:30 p.m.
Local option tax election, 21.800(3), 21.803(4) IAB 12/29/99 ARC 9560A	Office of the Secretary of State Second Floor Hoover State Office Bldg. Des Moines, Iowa	January 18, 2000 1:30 p.m.

Due to reorganization of state government by 1986 Iowa Acts, chapter 1245, it was necessary to revise the agency identification numbering system, i.e., the bracketed number following the agency name.

“Umbrella” agencies and elected officials are set out below at the left-hand margin in CAPITAL letters.

Divisions (boards, commissions, etc.) are indented and set out in lowercase type under their statutory “umbrellas.”

Other autonomous agencies which were not included in the original reorganization legislation as “umbrella” agencies are included alphabetically in small capitals at the left-hand margin, e.g., BEEF INDUSTRY COUNCIL, IOWA[101].

The following list will be updated as changes occur:

**AGRICULTURE AND LAND STEWARDSHIP DEPARTMENT[21]**

Agricultural Development Authority[25]

Soil Conservation Division[27]

**ATTORNEY GENERAL[61]**

**AUDITOR OF STATE[81]**

BEEF INDUSTRY COUNCIL, IOWA[101]

BLIND, DEPARTMENT FOR THE[111]

CITIZENS' AIDE[141]

CIVIL RIGHTS COMMISSION[161]

**COMMERCE DEPARTMENT[181]**

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Banking Division[187]

Credit Union Division[189]

Insurance Division[191]

Professional Licensing and Regulation Division[193]

Accountancy Examining Board[193A]

Architectural Examining Board[193B]

Engineering and Land Surveying Examining Board[193C]

Landscape Architectural Examining Board[193D]

Real Estate Commission[193E]

Real Estate Appraiser Examining Board[193F]

Savings and Loan Division[197]

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**CORRECTIONS DEPARTMENT[201]**

Parole Board[205]

**CULTURAL AFFAIRS DEPARTMENT[221]**

Arts Division[222]

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City Development Board[263]

Iowa Finance Authority[265]

**EDUCATION DEPARTMENT[281]**

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College Student Aid Commission[283]

Higher Education Loan Authority[284]

Iowa Advance Funding Authority[285]

Libraries and Information Services Division[286]

Public Broadcasting Division[288]

School Budget Review Committee[289]

EGG COUNCIL[301]

**ELDER AFFAIRS DEPARTMENT[321]**

EMPOWERMENT BOARD, IOWA[349]

ETHICS AND CAMPAIGN DISCLOSURE BOARD, IOWA[351]

**EXECUTIVE COUNCIL[361]**

FAIR BOARD[371]

**GENERAL SERVICES DEPARTMENT[401]**

HUMAN INVESTMENT COUNCIL[417]

**HUMAN RIGHTS DEPARTMENT[421]**

Community Action Agencies Division[427]

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Deaf Services Division[429]

Persons With Disabilities Division[431]

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Status of Women Division[435]

**HUMAN SERVICES DEPARTMENT[441]**

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  Employment Appeal Board[486]  
  Foster Care Review Board[489]  
  Racing and Gaming Commission[491]  
  State Public Defender[493]  
LAW ENFORCEMENT ACADEMY[501]  
LIVESTOCK HEALTH ADVISORY COUNCIL[521]  
MANAGEMENT DEPARTMENT[541]  
  Appeal Board, State[543]  
  City Finance Committee[545]  
  County Finance Committee[547]  
NARCOTICS ENFORCEMENT ADVISORY COUNCIL[551]  
NATIONAL AND COMMUNITY SERVICE, IOWA COMMISSION ON[555]  
NATURAL RESOURCES DEPARTMENT[561]  
  Energy and Geological Resources Division[565]  
  Environmental Protection Commission[567]  
  Natural Resource Commission[571]  
  Preserves, State Advisory Board[575]  
PERSONNEL DEPARTMENT[581]  
PETROLEUM UNDERGROUND STORAGE TANK FUND  
  BOARD, IOWA COMPREHENSIVE[591]  
PREVENTION OF DISABILITIES POLICY COUNCIL[597]  
PUBLIC DEFENSE DEPARTMENT[601]  
  Emergency Management Division[605]  
  Military Division[611]  
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RECORDS COMMISSION[671]  
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  Archaeologist[685]  
REVENUE AND FINANCE DEPARTMENT[701]  
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SECRETARY OF STATE[721]  
SEED CAPITAL CORPORATION, IOWA[727]  
SHEEP AND WOOL PROMOTION BOARD, IOWA[741]  
TELECOMMUNICATIONS AND TECHNOLOGY COMMISSION, IOWA[751]  
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  Workforce Development Center Administration Division[877]



## ARC 9598A

ECONOMIC DEVELOPMENT,  
IOWA DEPARTMENT OF [261]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 15.104 and 15.106 and Executive Order 11, the Department of Economic Development hereby gives Notice of Intended Action to adopt Chapter 104, "Uniform Waiver and Variance Rules," Iowa Administrative Code.

These rules describe the procedures for applying for, issuing or denying waivers and variances from Department rules. The purpose of these rules is to comply with Executive Order 11 which requires state agencies to adopt a uniform waiver rule.

Public comments concerning the proposed rules will be accepted until 4:30 p.m. on February 1, 2000. Interested persons may submit written or oral comments by contacting Melanie Johnson, Director's Office, Department of Economic Development, 200 East Grand Avenue, Des Moines, Iowa 50309-1819; telephone number (515)242-4862.

These rules are intended to implement Executive Order 11.

The following new rules are proposed.

## CHAPTER 104

## UNIFORM WAIVER AND VARIANCE RULES

**261—104.1(ExecOrd11) Applicability.** This chapter outlines a uniform process for the granting of waivers or variances from rules adopted by the department. The intent of this chapter is to allow persons to seek exceptions to the application of rules issued by the department.

**104.1(1) Definitions.**

"Board" or "IDED board" means the Iowa department of economic development board created by Iowa Code chapter 15.

"Department" or "IDED" means the Iowa department of economic development authorized by Iowa Code chapter 15.

"Director" means the director of the department of economic development or the director's designee.

"Director/board" means either the director or the board depending on which one has decision-making authority pursuant to rule 104.2(ExecOrd11).

"Person" means individual, corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any legal entity.

**104.1(2) Authority.**

a. A waiver or variance from rules adopted by the department may be granted in accordance with this chapter if (1) the department has exclusive rule-making authority to promulgate the rule from which waiver or variance is requested or has final decision-making authority over a contested case in which a waiver or variance is requested; and (2) no statute or rule otherwise controls the grant of a waiver or variance from the rule from which waiver or variance is requested.

b. No waiver or variance may be granted from a requirement which is imposed by statute. Any waiver or variance must be consistent with statute.

**261—104.2(ExecOrd11) Director/board discretion.** The decision on whether the circumstances justify the granting of a waiver or variance shall be made at the discretion of the director upon consideration of all relevant factors, except for the below-listed programs, for which the board shall make the decision, upon consideration of all relevant factors:

1. Community Economic Betterment Account (CEBA) program, 261—Chapter 53.

2. New Jobs and Income Program (NJIP), 261—Chapter 58.

3. Workforce Development Fund, 261—Chapter 75.

4. Accelerated Career Education Program Physical Infrastructure Assistance Program (ACE PIAP), 261—Chapter 20.

**104.2(1) Criteria for waiver or variance.** The director/board may, in response to a completed petition or on its own motion, grant a waiver or variance from a rule, in whole or in part, as applied to the circumstances of a specified situation if the director/board finds each of the following:

a. Application of the rule to the person at issue would result in hardship or injustice to that person; and

b. Waiver or variance on the basis of the particular circumstances relative to that specified person would be consistent with the public interest; and

c. Waiver or variance in the specific case would not prejudice the substantial legal rights of any person.

In determining whether waiver or variance should be granted, the director/board shall consider whether the underlying public interest policies and legislative intent of the rules are substantially equivalent to full compliance with the rule. When the rule from which a waiver or variance is sought establishes administrative deadlines, the director/board shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all licensees, grantees and constituents.

**104.2(2) Special waiver or variance rules not precluded.** These uniform waiver and variance rules shall not preclude the director/board from granting waivers or variances in other contexts or on the basis of other standards if a statute or other department rule authorizes the director/board to do so, and the director/board deems it appropriate to do so.

**261—104.3(ExecOrd11) Requester's responsibilities in filing a waiver or variance petition.**

**104.3(1) Application.** All petitions for waiver or variance must be submitted in writing to the Iowa Department of Economic Development, Office of the Director, 200 East Grand Avenue, Des Moines, Iowa 50309-1819, Attention: Legal Counsel. If the petition relates to a pending contested case, a copy of the petition shall also be filed in the contested case proceeding.

**104.3(2) Content of petition.** A petition for waiver or variance shall include the following information where applicable and known to the requester (for an example of a petition for waiver or variance, see Exhibit A at the end of this chapter):

a. A description and citation of the specific rule from which a waiver or variance is requested.

b. The specific waiver or variance requested, including the precise scope and operative period that the waiver or variance will extend.

c. The relevant facts that the petitioner believes would justify a waiver or variance.

## ECONOMIC DEVELOPMENT, IOWA DEPARTMENT OF[261](cont'd)

d. This petition shall include a signed statement from the petitioner attesting to the accuracy of the facts provided in the petition, and a statement of reasons that the petitioner believes will justify a waiver or variance.

e. A history of any prior contacts between the department and the petitioner relating to the regulated activity, license, grant, loan or other financial assistance affected by the proposed waiver or variance, including a description of each affected license, grant, loan or other financial assistance held by the requester, any notices of violation, contested case hearings, or investigative reports relating to the regulated activity, license, grant or loan within the last five years.

f. Any information known to the requester regarding the department's treatment of similar cases.

g. The name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question, or which might be affected by the grant of a waiver or variance.

h. The name, address, and telephone number of any person or entity who would be adversely affected by the grant of a petition.

i. The name, address, and telephone number of any person with knowledge of the relevant facts relating to the proposed waiver or variance.

j. Signed releases of information authorizing persons with knowledge regarding the request to furnish the department with information relevant to the waiver or variance.

**104.3(3) Burden of persuasion.** The petitioner shall assume the burden of persuasion when a petition is filed for a waiver or variance from a department rule.

**261—104.4 (ExecOrd11) Notice.** The department shall acknowledge a petition upon receipt. The department shall ensure that notice of the pendency of the petition and a concise summary of its contents have been provided to all persons to whom notice is required by any provision of law, within 30 days of the receipt of the petition. In addition, the department may give notice to other persons. To accomplish this notice provision, the department may require the petitioner to serve the notice on all persons to whom notice is required by any provision of law, and provide a written statement to the department attesting that notice has been provided.

**261—104.5(ExecOrd11) Department responsibilities regarding petition for waiver or variance.**

**104.5(1) Additional information.** Prior to issuing an order granting or denying a waiver or variance, the director/board may request additional information from the petitioner relative to the petition and surrounding circumstances. If the petition was not filed in a contested case, the director/board may, on its own motion or at the petitioner's request, schedule a telephonic or in-person meeting between the petitioner and the director/board, the director's/board's designee, a committee of the board, or a quorum of the board.

**104.5(2) Hearing procedures.** The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case hearings shall apply in three situations: (a) to any petition for a waiver or variance of rule filed within a contested case; (b) when the director/board so provides by rule or order; or (c) when a statute so requires.

**104.5(3) Ruling.** An order granting or denying a waiver or variance shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the order pertains, a statement of the relevant facts and reasons

upon which the action is based, and a description of the precise scope and operative period of the waiver if one is issued.

**104.5(4) Conditions.** The director/board may condition the grant of the waiver or variance on such reasonable conditions as appropriate to achieve the objectives of the particular rule in question through alternative means.

**104.5(5) Time for ruling.** The director/board shall grant or deny a petition for a waiver or variance as soon as practicable, but in any event, shall do so within 120 days of its receipt, unless the petitioner agrees to a later date. However, if a petition is filed in a contested case, the director/board shall grant or deny the petition no later than the time at which the final decision in that contested case is issued.

**104.5(6) When deemed denied.** Failure of the director/board to grant or deny a petition within the required time period shall be deemed a denial of that petition by the director/board.

**104.5(7) Service of order.** Within seven days of its issuance, any order issued under this chapter shall be transmitted to the petitioner or the person to whom the order pertains, and to any other person entitled to such notice by any provision of law.

**261—104.6(ExecOrd11) Public availability.** Subject to the provisions of Iowa Code section 17A.3(1)"e," the department shall maintain a record of all orders granting or denying waivers and variances under this chapter. All final rulings in response to requests for waivers or variances shall be indexed and available to members of the public at the Iowa Department of Economic Development, Office of the Director, 200 East Grand Avenue, Des Moines, Iowa 50309-1827.

**261—104.7(ExecOrd11) Voiding or cancellation.** A waiver or variance is void if the material facts upon which the request is based are not true or if material facts have been withheld. The director/board may at any time cancel a waiver or variance upon appropriate notice if the director/board finds that the facts as stated in the request are not true, material facts have been withheld, the alternative means of compliance provided in the waiver or variance have failed to achieve the objectives of the statute, or the requester has failed to comply with the conditions of the order.

**261—104.8(ExecOrd11) Violations.** Violation of conditions in the waiver or variance approval is the equivalent of violation of the particular rule for which the waiver or variance is granted and is subject to the same remedies or penalties.

**261—104.9(ExecOrd11) Defense.** After the director/board issues an order granting a waiver or variance, the order is a defense within its terms and the specific facts indicated therein for the person to whom the order pertains in any proceeding in which the rule in question is sought to be invoked.

**261—104.10(ExecOrd11,17A) Appeals.** Granting or denying a request for waiver or variance is final agency action under Iowa Code chapter 17A. An appeal to district court shall be taken within 30 days of the issuance of the ruling in response to the request unless a contrary time is provided by rule or statute.

These rules are intended to implement Executive Order 11.

Exhibit A

Sample Petition (request) for Waiver/Variance

ECONOMIC DEVELOPMENT, IOWA DEPARTMENT OF[261](cont'd)

BEFORE THE IOWA DEPARTMENT OF ECONOMIC DEVELOPMENT

Petition by (insert name of petitioner) for the waiver of (insert rule citation) relating to (insert the subject matter).



PETITION FOR WAIVER

Requests for waiver or variance from a department rule shall include the following information in the petition for waiver or variance where applicable and known:

- a. Provide the petitioner's (person asking for a waiver or variance) name, address, and telephone number.
b. Describe and cite the specific rule from which a waiver or variance is requested.
c. Describe the specific waiver or variance requested, include the exact scope and time period that the waiver or variance will extend.
d. Explain the important facts that the petitioner believes justify a waiver or variance.
e. Provide history of prior contacts between the department and petitioner relating to the regulated activity, license, grant, loan or other financial assistance that would be affected by the waiver or variance; include a description of each affected license, grant, loan or other financial assistance held by the petitioner, any notices of violation, contested case hearings, or investigative reports relating to the regulated activity, license, grant or loan within the last five years.
f. Provide information known to the petitioner regarding the department's treatment of similar cases.
g. Provide the name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question, or which might be affected by the grant of a waiver or variance.
h. Provide the name, address, and telephone number of any person or entity who would be adversely affected or disadvantaged by the grant of the waiver or variance.
i. Provide the name, address, and telephone number of any person with knowledge of the relevant or important facts relating to the requested waiver or variance.
j. Provide signed releases of information authorizing persons with knowledge regarding the request to furnish the department with information relevant to the waiver or variance.

I hereby attest to the accuracy and truthfulness of the above information.

Petitioner's signature

Date

Petitioner should note the following when requesting or petitioning for a waiver or variance:

- 1. The petitioner has the burden of proving the following to the director/board: (a) application of the rule to the petitioner would result in hardship or injustice to the petitioner; and (b) waiver or variance on the basis of the particular circumstances relative to the petitioner would be consistent with the public interest; and (c) waiver or variance in the specific case would not prejudice the substantial legal rights of any person.

2. The department may request additional information from or request an informal meeting with the petitioner prior to issuing a ruling granting or denying a request for waiver or variance.

3. All petitions for waiver or variance must be submitted in writing to the Iowa Department of Economic Development, Office of the Director, 200 East Grand Avenue, Des Moines, Iowa 50309-1827, Attention: Legal Counsel. If the petition relates to a pending contested case, a copy of the petition shall also be filed in the contested case proceeding.

ARC 9597A

HUMAN SERVICES DEPARTMENT[441]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 217.6, the Department of Human Services proposes to amend Chapter 1, "Departmental Organization and Procedures," appearing in the Iowa Administrative Code.

This amendment brings the Department of Human Services rule for exceptions to policy into compliance with Executive Order Number 11 issued by Governor Vilsack on September 14, 1999. Executive Order Number 11 directs each state agency to adopt a waiver rule as outlined in the order.

The Department has had a waiver (exception to policy) rule since 1987. The Department's rule is written in a format that is easy to understand for clients and providers that are requesting exceptions to policy. Therefore, the Department is making only those changes necessary to bring its existing rule into conformity with the Executive Order. The Department is also continuing to refer to its "waivers" as "exceptions to policy," to avoid confusion with the Home- and Community-Based waiver programs.

This amendment establishes a two-tier system for granting exception requests and clarifies that any exception granted must be consistent with state or federal law. A new subrule is added to establish when exceptions must be granted. The Director shall grant an exception to the administrative rule if the Director finds that the application of the rule would not, to any extent, serve any purposes of the rule.

Waiver of the rules governing waivers is not appropriate because all waivers should be subject to the same procedural and substantive rules.

Consideration will be given to all written data, views, and arguments thereto received by the Office of Policy Analysis, Department of Human Services, Hoover State Office Building, Des Moines, Iowa 50319-0114, on or before February 2, 2000.

This amendment is intended to implement Iowa Code section 217.6.

The following amendment is proposed.

Amend rule 441—1.8(217) as follows:

441—1.8(217) Exceptions ~~Waivers~~ of administrative rules (hereinafter referred to as exceptions to policy). Exceptions

## HUMAN SERVICES DEPARTMENT[441](cont'd)

to the department's rules may be granted in individual cases upon the director's own initiative or upon request. *No exception will be granted to a rule required by state statute or by federal statute or regulation. Any exception granted must be consistent with state and federal law.*

## 1.8(1) Procedures for requests.

a. Requests for exceptions must be submitted in writing to the ~~Bureau of Policy Analysis Appeals Section~~, Department of Human Services, Hoover State Office Building, Des Moines, Iowa 50319-0114.

b. A request for an exception is independent from a departmental appeal under 441—Chapter 7. However, a request for an exception may be combined with an appeal of a proposed decision to the director under 441—Chapter 7. A request for an exception made prior to an appeal under 441—Chapter 7 may be denied pending an appeal where factual matters need to be developed.

c. *A party requesting an exception must establish that the exception is appropriate.* A request for an exception should include the following information where applicable and known to the requester:

(1) The name, address, and case number or state identification number of the person or entity for whom an exception is being requested and the person requesting the exception, if different from the person for whom an exception is being requested.

(2) The specific rule to which an exception is requested or the substance thereof.

(3) The specific exception requested.

(4) Facts relevant to the factors listed in ~~subrule~~ *subrules 1.8(2) and 1.8(3).*

(5) A history of the department's action on the case.

(6) Any information known to the requester regarding the department's treatment of similar cases.

(7) The name, address, and telephone number of any person inside or outside the department with knowledge of the matter with respect to which the exception is requested.

(8) Releases of information authorizing persons with knowledge regarding the request to furnish the department information pertaining to the request.

d. Requests for exceptions shall be acknowledged ~~immediately within 7 days and shall be responded to in writing within 120 days of receipt.~~ *The department may give notice of the request to other affected parties. The department may also request additional information from the applicant.*

e. *The department shall issue a written decision on the request for an exception to policy within 120 days of receipt, unless the applicant agrees to a later date. If a request for an exception to policy has been filed in a contested case proceeding, the department may pend the request until after a final decision is issued.*

f. A denial of a request for an exception is absolutely final and is not appealable under 441—Chapter 7.

g. A request for an exception does not delay the time to request an appeal under 441—Chapter 7 or for filing a petition for judicial review of a final decision in a contested case under Iowa Code section 17A.19.

h. A request for an exception is not required to exhaust administrative remedies before judicial review of department action under Iowa Code section 17A.19.

i. The department shall maintain a deidentified record of exceptions granted and denied indexed by rule available for public inspection.

*1.8(2) Mandatory exceptions. In response to the filing of a request for an exception to policy, the director shall grant an exception to the administrative rule, in whole or part, as*

*applied to the particular circumstances of the applicant, if the director finds that the application of the rule would not, to any extent, serve any purposes of the rule. Any exception granted must be consistent with state or federal law.*

~~1.8(2)~~ 1.8(3) Policy Discretionary exceptions.

a. *Except to the extent prohibited by state or federal law, the director may grant an exception if the director finds that:*

(1) *Failure to grant the exception would result in hardship or injustice to that person; and*

(2) *The exception would be consistent with the public interest; and*

(3) *The exception would not substantially affect another person in an adverse manner.*

b. ~~Exceptions are granted~~ *The decision on whether an exception should be granted will be made at the complete discretion of the director after consideration of all relevant factors including, but not limited to, the following:*

a. (1) *The need of the person or entity directly affected by the exception. Exceptions will be granted only in cases of extreme need.*

b. (2) *Whether there are exceptional circumstances justifying an exception to the general rule applicable in otherwise similar circumstances.*

c. (3) *Whether granting the exception would result in net savings to the state or promote efficiency in the administration of programs or service delivery. Net savings or efficiency will make an exception more likely.*

d. (4) *In the case of services, assistance, or grants, whether other possible sources have been exhausted. Exceptions will not generally be granted if other sources are available.*

e. (5) *The cost of the exception to the state and the availability of funds in the department's budget.*

This rule is intended to implement Iowa Code section 217.6.

ARC 9610A

INSPECTIONS AND APPEALS  
DEPARTMENT[481]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 135C.14, the Department of Inspections and Appeals gives Notice of Intended Action to adopt Chapter 54, "Quality Award for Nursing Facilities," Iowa Administrative Code.

The proposed rules implement 1999 Iowa Acts, chapter 132, which established an annual Governor's Quality Care Award for a health care facility that demonstrates a high quality of care and commitment to its residents. These rules establish the guidelines by which health care facilities applying for the quality award will be evaluated.

Any interested person may make written comments or suggestions on the proposed chapter on or before February 1, 2000. Written comments should be addressed to the Director, Department of Inspections and Appeals, Lucas State Office Building, East 12th and Grand Avenue, Des Moines,

## INSPECTIONS AND APPEALS DEPARTMENT[481](cont'd)

Iowa 50319-0083, or faxed to (515)242-6863. E-mail may be sent to [jkomos@dia.state.ia.us](mailto:jkomos@dia.state.ia.us).

A public hearing will be held on February 8, 2000, at 10 a.m. in the Director's Conference Room, Second Floor, Lucas State Office Building, East 12th and Grand Avenue, Des Moines, Iowa. Persons may present their views orally or in writing at the public hearing.

These rules are intended to implement Iowa Code chapter 135C as amended by 1999 Iowa Acts, chapter 132.

The following new chapter is proposed.

## CHAPTER 54

## QUALITY AWARD FOR NURSING FACILITIES

**481—54.1(135C) Purpose.** This program is intended to recognize quality health care services being provided to facility residents by Iowa long-term care facilities, residential care facilities, and intermediate care facilities for the mentally retarded or persons with mental illness. The specific objective of the program is to establish a governor's award for quality care to recognize a health care facility in the state which demonstrates provision of the highest quality care to residents.

**481—54.2(135C) Definitions.**

"Advisory council" means the council appointed by the director to review all nominations received by the department. Members of the council shall include the director, or the director's designee, and members selected to represent the general public, health care providers, resident advocates, the long-term care ombudsman's office, residents, and other groups as deemed necessary by the director. When making appointments to the advisory council, the director may consult with the Iowa Partners for Resident Care or other groups representing the nursing home associations and resident advocates that oversee operation of a facility or group of facilities. No member of the advisory council shall be a provider of services to a facility or under contract to provide services to a facility.

"Community living training services" means those activities provided to assist a person to acquire or sustain the knowledge and skills essential to independent functioning to the person's maximum potential in the physical and social environment.

"Department" means the department of inspections and appeals.

"Director" means the director of the department of inspections and appeals, or the director's designee.

"Health care facility" or "facility" means a residential care facility, a nursing facility, an intermediate care facility for persons with mental illness, or an intermediate care facility for persons with mental retardation.

"Nursing care" means those services which can be provided only under the direction of a registered nurse or a licensed practical nurse.

"Nursing facility" means an institution or a distinct part of an institution housing three or more individuals not related to the administrator or owner within the third degree of consanguinity, which is primarily engaged in providing health-related care and services, including, but not limited to, rehabilitative services, personal care, or community living training services for a period exceeding 24 consecutive hours for individuals who, because of a mental or physical condition, require nursing care and other services in addition to room and board.

"Personal care" means assistance with the activities of daily living which the recipient can perform only with difficulty. Examples are help in getting in and out of bed, assis-

tance with personal hygiene and bathing, help with dressing and feeding, and supervision over medications which can be self-administered.

"Rehabilitative services" means services to encourage and assist restoration of optimum mental and physical capabilities of the individual resident of a health care facility.

"Resident" means an individual admitted to a health care facility in the manner prescribed by Iowa Code section 135C.23.

"Social services" means services relating to the psychological and social needs of the individual in adjusting to living in a health care facility, and minimizing stress arising from that circumstance.

**481—54.3(135C) Nomination.** The director will prepare and make available a nomination application no later than June 30, 2000, and June 30 of each year thereafter.

**481—54.4(135C) Deadline for submission of nominations.** Nominations will be taken during the last quarter of the 2000 fiscal year and each fiscal year thereafter. Deadline for receipt of nominations is July 1, 2000, and July 1 of each year thereafter.

**481—54.5(135C) Applicant eligibility.** Eligible nominations shall be made by a resident, family member of a resident, member of a resident advocacy committee, or another health care facility having no corporate relationship with the nominee. A health care facility cannot nominate itself for the award; however, this prohibition shall not apply to facilities with common ownership. Only health care facilities licensed pursuant to Iowa Code chapter 135C shall be eligible for nomination.

**481—54.6(135C) Administration.** The quality awards program shall be administered by the director or the director's designee.

**481—54.7(135C) Priority.** All nominations submitted to the department and received on or before the deadline for receipt of nominations shall be given consideration.

**481—54.8(135C) Nomination.** Applications for the governor's quality award shall include but not be limited to the following information:

**54.8(1)** The reasons that the nominated facility should be considered.

**54.8(2)** Any unique or special care or services provided by the facility to its residents. Care or services include any unique or special nursing care, personal care, rehabilitative services, social services, or community living training services provided by the facility for its residents, or involvement with the local community.

**54.8(3)** Activities conducted by the facility to enhance the highest quality of life for its residents.

**481—54.9(135C) Evaluation.** The director shall appoint an advisory council to review all nominations received by the department. The members shall review all nominations and select no more than five finalists based upon the material(s) provided in the nomination forms. The council shall also consider the following factors in making its selections:

**54.9(1)** The facility report card completed pursuant to Iowa Code section 135C.20A.

**54.9(2)** Any unique services provided by a facility to its residents to improve the quality of care in the facility.

**54.9(3)** Any information submitted by resident advocacy committee members, residents, a resident's family members,

## INSPECTIONS AND APPEALS DEPARTMENT[481](cont'd)

or facility staff with regard to the quality of care provided by the facility to its residents.

**54.9(4)** Whether the facility accepts residents for whom costs are paid under Iowa Code chapter 249A.

**481—54.10(135C) Awarding of certificate.** Prior to the final selection of a facility, representatives from the department and the governor's office will tour all five finalists to determine the winner. The department will select the winner of the governor's quality award from the five facilities recommended by the advisory council. The winner will receive a framed certificate in recognition of its designation as the quality health care provider of the year. The certificate shall be awarded by the governor or the governor's designee to the facility's administrator in a recognition ceremony held at the facility's place of business.

These rules are intended to implement Iowa Code chapter 135C as amended by 1999 Iowa Acts, chapter 132.

**ARC 9594A****INSURANCE DIVISION[191]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of 1999 Iowa Acts, chapter 41, section 20, and Iowa Code section 505.8, subsection 2, the Insurance Division gives Notice of Intended Action to amend Chapter 35, "Accident and Health Insurance," Chapter 71, "Small Group Health Benefit Plans," Chapter 75, "Iowa Individual Health Benefit Plans," and Chapter 76, "External Review," and to rescind Chapter 100, "Community Health Management Information System," Iowa Administrative Code.

The amendments to Chapters 35, 71, and 75 provide for required reconstructive surgery following a mastectomy as passed in Public Law 105-277, the Omnibus Appropriations Bill for Fiscal Year 1999 (Women's Health and Cancer Rights Act of 1998). The amendment to Chapter 76 clarifies the licensing requirement for a health care professional who is not a medical professional. Chapter 100 is being rescinded as it is intended to implement Iowa Code chapter 144C which was repealed effective February 28, 1999.

Any interested person may make written suggestions or comments on these proposed amendments on or before February 1, 2000. Written comments should be submitted to Susan Voss, Deputy Commissioner, Insurance Division, 330 Maple Street, Des Moines, Iowa 50319. Comments may also be transmitted by fax to (515)281-5692 or by E-mail to [susan.voss@comm6.state.ia.us](mailto:susan.voss@comm6.state.ia.us).

These amendments are intended to implement H.R. 4328, Public Law 105-277, 1999 Iowa Acts, chapter 41, and 1998 Iowa Acts, chapter 1119, section 5.

The following amendments are proposed.

**ITEM 1.** Amend 191—Chapter 35 by adopting the following **new** rule:

**191—35.35(509) Reconstructive surgery.**

**35.35(1)** A carrier or organized delivery system that provides medical and surgical benefits with respect to a mastec-

tomy shall provide the following coverage in the event an enrollee receives benefits in connection with a mastectomy and elects breast reconstruction:

a. Reconstruction of the breast on which the mastectomy has been performed;

b. Surgery and reconstruction of the other breast to produce a symmetrical appearance; and

c. Prostheses and coverage of physical complications at all stages of a mastectomy including lymphedemas.

**35.35(2)** The benefits under this rule shall be provided in a manner determined in consultation with the attending physician and the enrollee. The coverage may be subject to annual deductibles and coinsurance provisions that are consistent with other benefits under the plan or coverage.

**35.35(3)** Written notice of the availability of coverage in this rule shall be provided to the enrollee upon enrollment and then annually.

**35.35(4)** A carrier or organized delivery system shall not deny an enrollee eligibility or continued eligibility to enroll or renew coverage under the terms of the health insurance solely for the purpose of avoiding the requirements of this rule. A carrier or organized delivery system shall not penalize, reduce or limit the reimbursement of an attending provider or induce the provider to provide care in a manner inconsistent with this rule.

This rule is intended to implement Public Law 105-277.

**ITEM 2.** Amend 191—Chapter 71 by adopting the following **new** rule:

**191—71.23(513B) Reconstructive surgery.**

**71.23(1)** A carrier or organized delivery system that provides medical and surgical benefits with respect to a mastectomy shall provide the following coverage in the event an enrollee receives benefits in connection with a mastectomy and elects breast reconstruction:

a. Reconstruction of the breast on which the mastectomy has been performed;

b. Surgery and reconstruction of the other breast to produce a symmetrical appearance; and

c. Prostheses and coverage of physical complications at all stages of a mastectomy including lymphedemas.

**71.23(2)** The benefits under this rule shall be provided in a manner determined in consultation with the attending physician and the enrollee. The coverage may be subject to annual deductibles and coinsurance provisions that are consistent with other benefits under the plan or coverage.

**71.23(3)** Written notice of the availability of coverage in this rule shall be provided to the enrollee upon enrollment and then annually.

**71.23(4)** A carrier or organized delivery system shall not deny an enrollee eligibility or continued eligibility to enroll or renew coverage under the terms of the health insurance solely for the purpose of avoiding the requirements of this rule. A carrier or organized delivery system shall not penalize, reduce or limit the reimbursement of an attending provider or induce the provider to provide care in a manner inconsistent with this rule.

This rule is intended to implement Public Law 105-277.

**ITEM 3.** Amend 191—Chapter 75 by the adopting the following **new** rule:

**191—75.17(513C) Reconstructive surgery.**

**75.17(1)** A carrier or organized delivery system that provides medical and surgical benefits with respect to a mastectomy shall provide the following coverage in the event an en-

## INSURANCE DIVISION[191](cont'd)

rollee receives benefits in connection with a mastectomy and elects breast reconstruction:

- a. Reconstruction of the breast on which the mastectomy has been performed;
- b. Surgery and reconstruction of the other breast to produce a symmetrical appearance; and
- c. Prostheses and coverage of physical complications at all stages of a mastectomy including lymphedemas.

**75.17(2)** The benefits under this rule shall be provided in a manner determined in consultation with the attending physician and the enrollee. The coverage may be subject to annual deductibles and coinsurance provisions that are consistent with other benefits under the plan or coverage.

**75.17(3)** Written notice of the availability of coverage in this rule shall be provided to the enrollee upon enrollment and then annually.

**75.17(4)** A carrier or organized delivery system shall not deny an enrollee eligibility or continued eligibility to enroll or renew coverage under the terms of the health insurance solely for the purpose of avoiding the requirements of this rule. A carrier or organized delivery system shall not penalize, reduce or limit the reimbursement of an attending provider or induce the provider to provide care in a manner inconsistent with this rule.

This rule is intended to implement Public Law 105-277.

ITEM 4. Amend paragraph **76.9(1)“c”** as follows:

- c. A health care professional who is not a *medical* physician shall also hold a current certification by the professional's respective *licensing or specialty* board if applicable.

ITEM 5. Rescind **191—Chapter 100**.

## ARC 9605A

## MEDICAL EXAMINERS BOARD[653]

### Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 147.76 and 272C.3, the Board of Medical Examiners hereby gives Notice of Intended Action to adopt new Chapter 3, “Uniform Waiver and Variance,” and to amend Chapter 11, “Licensure Requirements,” Iowa Administrative Code.

The Board proposes to rescind a subrule regarding waivers that apply only to licensure applications. This subrule will be replaced by the proposed new chapter on waivers.

Proposed Chapter 3 adopts procedures for petitions for waiver or variance from rules and adopts uniform rules regarding petitions for waiver or variance from provisions of Board rules. Executive Order Number 11 directs state rule-making authorities to adopt uniform rules regarding waivers and variances from rules of the authority.

The Board approved the proposed changes at its regular meeting on December 16, 1999.

Any interested person may present written comments, data, views, and arguments on the proposed amendments not later than 4 p.m. on February 1, 2000. Such written materials should be sent to Ann E. Mowery, Executive Director, Board

of Medical Examiners, 400 S.W. 8th Street, Suite C, Des Moines, Iowa 50309-4686.

These amendments are intended to implement Iowa Code sections 17A.22, 147.76, 272C.3, and 272C.4.

The following amendments are proposed.

ITEM 1. Adopt the following **new** chapter:

### CHAPTER 3 UNIFORM WAIVER AND VARIANCE

**653—3.1(147) Applicability.** This chapter outlines a uniform process for the granting of waivers or variances from rules adopted by the board.

**3.1(1) Board authority.** A waiver or variance from rules adopted by the board may be granted in accordance with this chapter if (a) the board has exclusive rule-making authority to promulgate the rule from which waiver or variance is requested or has final decision-making authority over a contested case in which a waiver or variance is requested; and (b) no statute or rule otherwise controls the grant of a waiver or variance from the rule from which waiver or variance is requested.

**3.1(2) Interpretive rules.** This chapter shall not apply to rules that merely define the meaning of a statute or other provisions of law or precedent if the board does not possess delegated authority to bind the courts to any extent with its definition.

**653—3.2(147) Compliance with statute.** No waiver or variance may be granted from a requirement which is imposed by statute. Any waiver or variance must be consistent with statute.

**653—3.3(147) Criteria for waiver or variance.** The board may issue an order, in response to a completed petition or on its own motion, granting a waiver or variance from a rule adopted by the board, in whole or in part, as applied to the circumstances of a specified person if the board finds that:

1. Application of the rule to the person at issue would result in hardship or injustice to that person; and
2. Waiver or variance on the basis of the particular circumstances relative to that specified person would be consistent with the public interest; and
3. Waiver or variance in the specific case would not prejudice the substantial legal rights of any person.

In determining whether waiver or variance would be consistent with the public interest under “2,” the board shall consider whether, if the waiver or variance is granted, the public health and safety will be protected by other means that are substantially equivalent to full compliance with the rule.

**3.3(1) Board discretion.** The decision on whether the circumstances justify the granting of a waiver or variance shall be made at the discretion of the board, upon consideration of all relevant factors.

**3.3(2) Mandatory waivers or variances.** In response to the timely filing of a completed petition requesting a waiver or variance, the board shall grant a waiver or variance from a rule, in whole or in part, as applied to the particular circumstances of a specified person, if the board finds that the application of all or a portion thereof to the circumstances of that specified person would not, to any extent, advance or serve any of the purposes of the rule.

**3.3(3) Burden of persuasion.** The petitioner shall assume the burden of persuasion when a petition is filed for a waiver or variance from a board rule.

**3.3(4) Special waiver or variance rules not precluded.** This chapter shall not preclude the board from granting

## MEDICAL EXAMINERS BOARD[653](cont'd)

waivers or variances in other contexts or on the basis of other standards if a statute or other board rule authorizes the board to do so, and the board deems it appropriate to do so.

**3.3(5) Administrative deadlines.** When the rule from which a waiver or variance is sought establishes administrative deadlines, the board shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all licensees.

**653—3.4(147) Filing of petition.** A petition for a waiver or variance must be submitted in writing and mailed to the Executive Director, Board of Medical Examiners, 400 S.W. 8th St., Suite C, Des Moines, Iowa 50309-4686.

**3.4(1) License application.** If the petition relates to a license application, the petition shall be filed as part of the license application process.

**3.4(2) Contested cases.** If the petition relates to a pending contested case, the petition shall be filed in the contested case proceeding.

**3.4(3) Other.** If the petition does not relate to a license application or a pending contested case, the petition may be submitted to the board's executive director.

**653—3.5(147) Content of petition.** A petition for waiver or variance shall include the following information where applicable and known to the requester:

1. The name, address, and telephone number of the person or entity for whom a waiver or variance is being requested, and the case number of any related contested case.

2. A description and citation of the specific rule from which a waiver or variance is requested.

3. The specific waiver or variance requested, including the precise scope and operative period for which the waiver or variance will extend.

4. The relevant facts that the petitioner believes would justify a waiver or variance. This statement shall include a signed statement from the petitioner attesting to the accuracy of the facts provided in the petition, and a statement of reasons that the petitioner believes will justify a waiver or variance.

5. A history of any prior contacts between the board and the petitioner relating to the regulated activity or license affected by the proposed waiver or variance, including a description of each affected license held by the requester, any notices of violation, contested case hearings, or investigative reports relating to the regulated activity or license within the last five years.

6. Any information known to the petitioner regarding the board's treatment of similar cases.

7. The name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question, or which might be affected by the grant of a waiver or variance.

8. The name, address, and telephone number of any person or entity who would be adversely affected by the grant of a petition.

9. The name, address, and telephone number of any person with knowledge of the relevant facts relating to the proposed waiver or variance.

10. Signed releases of information authorizing persons with knowledge regarding the request to furnish the board with information relevant to the waiver or variance.

**653—3.6(147) Additional information.** Prior to issuing an order granting or denying a waiver or variance, the board may request additional information from the petitioner relative to the petition and surrounding circumstances. If the petition was not filed in a contested case, the board may, on its own

motion or at the petitioner's request, schedule a telephonic or in-person meeting between the petitioner and the board's executive director, a committee of the board, or a quorum of the board.

**653—3.7(147) Notice.** The board shall acknowledge a petition upon receipt. The board shall ensure that notice of the pendency of the petition and a concise summary of its contents have been provided to all persons to whom notice is required by any provision of law within 30 days of the receipt of the petition. In addition, the agency may give notice to other persons. To accomplish this notice provision, the board may require the petitioner to serve the notice on all persons to whom notice is required by any provision of law, and provide a written statement to the agency attesting that notice has been provided.

**653—3.8(147) Hearing procedures.** The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case hearings shall apply to any petition for a waiver or variance of rule filed within a contested case, and shall otherwise apply to agency proceedings for a waiver or variance only when the board so provides by rule or order or is required to do so by statute.

**653—3.9(147) Ruling.** An order granting or denying a waiver or variance shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the order pertains, a statement of the relevant facts and reasons upon which the action is based, and a description of the precise scope and operative period of the waiver if one is issued.

**3.9(1) Conditions.** The board may condition the grant of the waiver or variance on such reasonable conditions as appropriate to achieve the objectives of the particular rule in question through alternative means.

**3.9(2) Time for ruling.** The board shall grant or deny a petition for a waiver or variance as soon as practicable but, in any event, shall do so within 120 days of its receipt, unless the petitioner agrees to a later date. However, if a petition is filed in a contested case, the board shall grant or deny the petition no later than the time at which the final decision in that contested case is issued.

**3.9(3) When deemed denied.** Failure of the board to grant or deny a petition within the required time period shall be deemed a denial of that petition by the board.

**3.9(4) Service of order.** Within seven days of its issuance, any order issued under this chapter shall be transmitted to the petitioner or the person to whom the order pertains, and to any other person entitled to such notice by any provision of law.

**653—3.10(147) Public availability.** Subject to the provisions of Iowa Code section 17A.3(1)"e," the board shall maintain a record of all orders granting and denying waivers and variances under this chapter. All final rulings in response to requests for waivers or variances shall be indexed and available to members of the public at the board office.

**653—3.11(147) Voiding or cancellation.** A waiver or variance is void if the material facts upon which the request is based are not true or if material facts have been withheld. The board may at any time cancel a waiver or variance upon appropriate notice and hearing if the board finds that the facts as stated in the request are not true, material facts have been withheld, the alternative means of compliance provided in the waiver or variance have failed to achieve the objectives of the statute, or the petitioner has failed to comply with the conditions of the order.



## MEDICAL EXAMINERS BOARD[653](cont'd)

**653—3.12(147) Violations.** Violation of conditions in the waiver or variance approval is the equivalent of violation of the particular rule for which the waiver or variance is granted and is subject to the same remedies or penalties.

**653—3.13(147) Defense.** After the board issues an order granting a waiver or variance, the order is a defense within its terms and the specific facts indicated therein for the person to whom the order pertains in any proceeding in which the rule in question is sought to be invoked.

**653—3.14(147) Appeals.** Any request for an appeal from a decision granting or denying a waiver or variance shall be in accordance with the procedures provided in Iowa Code chapter 17A and board rules. An appeal shall be taken within 30 days of the issuance of the ruling in response to the request unless a contrary time is provided by rule or statute.

ITEM 2. Rescind subrule 11.9(3).

## ARC 9607A

## NURSING BOARD[655]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 17A.3 and 147.76, the Board of Nursing hereby gives Notice of Intended Action to amend Chapter 2, "Nursing Education Programs," Iowa Administrative Code.

These amendments establish a performance standard for graduates of board-approved programs on the national licensure examination (NCLEX) for registered nurses and licensed practical nurses.

Any interested person may make written comments or suggestions on or before March 1, 2000. Such written materials should be directed to the Executive Director, Board of Nursing, RiverPoint Business Park, 400 S.W. 8th Street, Suite B, Des Moines, Iowa 50309-4685. Persons who want to convey their views orally should contact the Executive Director at (515)281-3256 or in the Board office at the above address.

There will be a public hearing on March 1, 2000, at 7 p.m. in the Ballroom, Kirkwood Civic Center Hotel, Fourth and Walnut, Des Moines, Iowa. Persons may present their views at the public hearing either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record and to confine their remarks to the subject of the proposed amendments.

These amendments are intended to implement Iowa Code section 152.5.

The following amendments are proposed.

ITEM 1. Amend rule 655—2.1(152) by adopting the following new definition in alphabetical order:

NCLEX. NCLEX means National Council Licensure Examination, the currently used examination.

ITEM 2. Adopt the following new rule 655—2.10(152) and renumber rule 655—2.10(152) as 655—2.11(152):

**655—2.10(152) Results of graduates who take the licensure examination for the first time.** The program shall notify the board when the program or district national licensure examination passing percentage is lower than 95 percent of the national passing percentage for two consecutive calendar years. The NCLEX passing percentage shall be based on all first-time applicants for RN or LPN licensure in any jurisdiction who take the examination within six months of graduation. Upon notification by the program, the board shall implement the following process:

1. The program shall submit to the board within six months an institutional plan for assessment and improvement of NCLEX results, including outcomes and time lines. The plan shall address administration, faculty, students, curriculum, resources, policies and the nursing advisory committee.

2. The program shall submit annual progress reports to the board while the NCLEX passing percentage remains below 95 percent of the national passing percentage.

3. The board may initiate provisional program approval as specified in subrule 2.2(3) if the program or district NCLEX average does not equal or exceed 95 percent of the national passing percentage within two calendar years.

## ARC 9600A

## REAL ESTATE COMMISSION[193E]

## Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code sections 543B.9 and 543B.18, the Real Estate Commission hereby gives Notice of Intended Action to amend Chapter 1, "Business Conduct," Iowa Administrative Code.

These amendments are proposed to comply with changes made to Iowa Code section 543B.34(9a) and new section 543B.60A regarding restrictions on payment of commission to others.

The amendments to Chapter 1 add a new definition for "Referral fee" or "finder's fee." New rule 193E—1.41(543B) clarifies the Commission's position relating to payment of rebates and inducements by licensees. Subrule 1.27(1) was amended to reflect the amount of personal funds allowable in the trust account as set in Iowa Code section 543B.46(4). New subrule 1.27(15) clarifies record retention requirements and record availability for trust account and compliance audits.

Consideration will be given to all written suggestions or comments on the proposed amendments received on or before February 1, 2000. Comments should be addressed to Roger L. Hansen, Executive Secretary, Real Estate Commission, 1918 S.E. Hulsizer, Ankeny, Iowa 50021, or faxed to (515)281-7411. E-mail may be sent to [rhansen@max.state.ia.us](mailto:rhansen@max.state.ia.us).

A public hearing will be held on February 1, 2000, at 9 a.m. in the Professional Licensing Conference Room, Second Floor, Department of Commerce Building, 1918 S.E. Hulsizer, Ankeny, Iowa.

## REAL ESTATE COMMISSION[193E](cont'd)

These amendments are intended to implement Iowa Code sections 543B.9 and 543B.18.

The following amendments are proposed.

ITEM 1. Amend rule 193E—1.1(543B) by adopting the following new definition in alphabetical order:

“Referral fee” or “finder’s fee” means any fee or other valuable consideration paid by a licensee to any unlicensed person or entity for the purpose of procuring prospects for the sale, exchange, purchase, rental or leasing of real estate.

ITEM 2. Amend subrule 1.27(1), paragraph “c,” as follows:

c. A broker shall not commingle personal funds in a trust account; provided, however, that not more than \$100, ~~or the amount specified in Iowa Code section 543B.46(4), \$500~~ of the broker’s personal funds may be maintained in each separate account if (1) such personal funds are separately accounted for and (2) such personal funds are intended to be used by the broker to pay for expenses directly related to maintaining the account.

The broker shall ensure that personal funds are deposited to cover bank service charges as specified in Iowa Code section 543B.46, and that at no time are trust moneys used to cover any charges. Upon notification that the broker’s personal funds are not sufficient to cover service charges initiated by the bank that are above the normal maintenance charges, the broker shall deposit personal funds to correct the deficiency within 15 days of the closing date of that bank statement.

ITEM 3. Amend rule 193E—1.27(543B) by adopting the following new subrule:

1.27(15) Every broker shall retain for a period of at least five years true copies of all business books; accounts, including voided checks; records; contracts; closing statements; disclosures; signed documents; and correspondence relating to each real estate transaction that the broker has handled and each property managed. The records shall be made available for inspection by the commission, staff, and its authorized representatives at all times during usual business hours at the broker’s regular place of business. If the brokerage closes, the records shall be made available for inspection by the commission, staff, and its authorized representatives upon request.

ITEM 4. Adopt the following new rule:

**193E—1.41(543B) Rebates and inducements.** With proper disclosure, rebates and inducements may be paid to a party to the transaction, consistent with Iowa Code sections 543B.6 and 543B.34(9a), provided such party does not engage in any activity that requires a real estate license. No rebate or inducement shall be made without first obtaining the written permission of the client when required and without making the required disclosures to the parties as provided in 193E—1.42(543B).

1.41(1) A licensee shall not pay a commission, any part of the commission, or valuable consideration to an unlicensed third party for performing brokerage functions or engaging in any activity that requires a real estate license. Referral fees or finder’s fees paid to unlicensed third parties for performing brokerage activities or engaging in any activity that requires a real estate license are prohibited.

1.41(2) In a listing contract, the broker is principal party to the contract. The broker may, with proper disclosure, pay a portion of the commission earned to an unlicensed seller or landlord that is a principal party to the listing contract. This is merely a reduction in the amount of the earned commission.

1.41(3) Payment to an unlicensed buyer or tenant is often referred to as “rebating,” and a broker’s intention to pay money to the buyer or tenant is sometimes advertised and promoted as a sales inducement. The payment to the buyer or tenant is permissible, when disclosed, because the broker is licensed to negotiate and the buyer or tenant may negotiate on the buyer’s or tenant’s own account.

1.41(4) A licensee may present gratuitous gifts, such as flowers, a door knocker, or dinner to the buyer or tenant subsequent to closing and not promised or offered as an inducement to buy or lease. The permission and disclosure requirements of 193E—1.42(543B) do not apply as long as any client relationship has terminated.

1.41(5) A licensee may present free gifts, such as prizes, money, free lodging or other valuable consideration to a potential party to a transaction or lease, prior to signing a contract to purchase or lease and not promised or offered as an inducement to buy or lease. The permission and disclosure requirements of 193E—1.42(543B) do not apply as long as no client relationship has been established with the buyer or lessee.

1.41(6) The offering of a free gift, prize, money, or other valuable consideration as an inducement shall be free from deception and shall not serve to distort the true value of the real estate service being promoted.

1.41(7) No broker shall pay a commission or other valuable consideration to another broker knowing that part will be paid to an unlicensed person or party for performing any activity for which a real estate license is required, or which otherwise constitutes a referral fee or finder’s fee requested after a bona fide offer to purchase has been accepted or a bona fide listing agreement or buyer’s brokerage agreement has been signed, or which constitutes an undisclosed rebate or inducement.

1.41(8) A licensee may make donations to a charity, or other not-for-profit organization, for each listing or closing the licensee has during a specific time period. The receiving entity may be selected by the licensee or by a party to the transaction. The contribution may be in the name of the licensee or in the name of a party to the transaction. Contributions are permissible only if the following conditions are met:

- a. There are no restrictions placed on the payment;
- b. The donation is for a specific amount;
- c. The receiving entity does not participate in any manner that would require a license;
- d. The licensee exercises reasonable care to ensure that the organization or fund is legitimate;
- e. The licensee exercises reasonable care to ensure that the promotional materials clearly explain the terms under which the donations will be made; and
- f. All required disclosures are made.

ITEM 5. Amend subrule 1.42(6) by adopting the following new paragraphs “i” and “j”:

i. The provisions of this rule and subrules do not apply to a gratuitous gift, such as flowers, a door knocker, or dinner to a buyer or tenant subsequent to closing and not promised or offered as an inducement to buy or lease as long as any client relationship has been terminated.

j. The provisions of this rule and subrules do not apply to a free gift such as prizes, money, free lodging or other valuable consideration to a potential party to a transaction or lease prior to signing a contract to purchase or lease and not promised or offered as an inducement to sell, buy, or lease as long as no client relationship has been established with the buyer or lessee.

**ARC 9604A****SECRETARY OF STATE[721]****Notice of Intended Action**

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)"b."

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 47.1, the Secretary of State hereby gives Notice of Intended Action to amend Chapter 21, "Election Forms and Instructions," Iowa Administrative Code.

This amendment provides procedures for calculating the number of signatures required for nomination petitions filed by candidates in counties where supervisors are elected by and from supervisor districts and in which the number of supervisors has recently been increased or decreased. The signature requirements for nomination petitions in Iowa Code section 43.20(1)"d" are based upon the number of votes cast in each supervisor district at the previous general election. The signature requirements for nomination petitions in Iowa Code section 45.1(6) are based upon the number of registered voters in each supervisor district on July 1 of the year preceding the election. There is no provision for calculating the number of signatures for the first primary, general or special election held after an increase or decrease in the number of supervisors. This new rule requires that these signature calculations be made by first dividing either the total number of votes cast or the total number of registered voters, as appropriate, by the new number of supervisors, and then proceeding with the appropriate formula.

Any interested person may make written suggestions or comments on the proposed amendment on or before Tuesday, February 1, 2000. Written comments should be sent to the Elections Division, Office of the Secretary of State, Second Floor, Hoover State Office Building, Des Moines, Iowa 50319-0138; fax (515)242-3932. Anyone who wishes to comment orally may telephone the Elections Division at (515)281-5823 or visit the office on the second floor of the Hoover Building.

There will be a public hearing on Tuesday, February 1, 2000, at 1:30 p.m. at the office of the Secretary of State, Second Floor, Hoover State Office Building. Persons may comment orally or in writing. All who speak at the hearing will be asked to give their names and addresses for the record and to confine their remarks to the subject of the amendment.

This amendment is intended to implement Iowa Code sections 43.20(1)"d," 45.1(6), 331.203 and 331.204.

This amendment was also Adopted and Filed Emergency and is published herein as **ARC 9603A**. The content of that submission is incorporated by reference.

**TRANSPORTATION  
DEPARTMENT[761]****Public Notice**

Executive Order Number 8 requires each state agency to comprehensively review its rules and submit a report to the Governor's Office no later than November 1, 2001. The De-

partment invites interested persons to participate in the review of its rules.

Any person who wishes to participate shall submit a request on or before February 9, 2000, to Julie Fitzgerald, Director's Staff Division, Department of Transportation, 800 Lincoln Way, Ames, Iowa 50010; fax: (515)239-1639; Internet E-mail address: [jfitzge@max.state.ia.us](mailto:jfitzge@max.state.ia.us). A request shall include the requester's name, mailing address, and telephone number, and the specific rules of interest.

Requesters will be contacted and asked to submit comments when the rules for which they have expressed an interest are reviewed.

Following is a list of the Department's chapters of rules that will be reviewed:

<u>Chapter No.</u>	<u>Chapter Title</u>
<b>TRANSPORTATION DEPARTMENT[761]</b>	
<b>GENERAL</b>	
4	Public Records and Fair Information Practices
20	Procurement of Equipment, Materials, Supplies and Services
25	Competition with Private Enterprise
27	Interest on Retained Funds
40	Recovery of Damages to Highways or Highway Structures
<b>HIGHWAYS</b>	
101	Farm-to-Market Review Board
105	Holiday Rest Stops
106	Promotion of Iowa Agricultural Products at Rest Areas
<b>RIGHT-OF-WAY AND ENVIRONMENT</b>	
110	Highway Project Planning
111	Real Property Acquisition and Relocation Assistance
112	Primary Road Access Control
115	Utility Accommodation
116	Junkyard Control
117	Outdoor Advertising
118	Logo Signing
119	Tourist-Oriented Directional Signing
120	Private Directional Signing
121	Adopt-a-Highway Program
<b>CONSTRUCTION</b>	
125	General Requirements and Covenants for Highway and Bridge Construction
126	Contracts Set Aside for Disadvantaged Business Enterprises
128	Construction Projects
<b>TRAFFIC OPERATIONS</b>	
130	Signing Manual
131	Signing on Primary Roads
132	Iowa Scenic Byway Program
136	Lighting
140	Traffic Signals, School Signals and Beacons on Primary Roads
142	Speed Zoning on Primary Highways
143	Traffic Signal Synchronization
<b>PRIMARY ROAD EXTENSIONS</b>	
150	Improvements and Maintenance on Primary Road Extensions
151	City Requests for Closure of Primary Road Extensions

## TRANSPORTATION DEPARTMENT[761](cont'd)

## SPECIAL HIGHWAY PROGRAMS

- 160 County and City Bridge Construction Funds
- 161 Federal-Aid Highway Bridge Replacement and Rehabilitation Program
- 163 RISE Program
- 164 Traffic Safety Improvement Program
- 165 Recreational Trails Program

## LOCAL SYSTEMS

- 170 Allocation of Farm-to-Market Road Funds
- 172 Availability of Instructional Memorandums to County Engineers
- 173 Preparation of Secondary Road Construction Programs, Budgets, and County Engineers' Annual Reports
- 174 Reimbursable Services and Supplies

## INTERMODAL

- 201 Intermodal Pilot Project Program

## VEHICLES

- 400 Vehicle Registration and Certificate of Title
- 401 Special Registration Plates
- 405 Salvage
- 410 Special Mobile Equipment
- 411 Persons with Disabilities Parking Permits
- 415 Driver's Privacy Protection—Certificates of Title and Vehicle Registration
- 421 Mobile Home Dealers, Manufacturers and Distributors
- 424 Transporter Plates
- 425 Motor Vehicle and Travel Trailer Dealers, Manufacturers, Distributors and Wholesalers
- 430 Motor Vehicle Leasing Licenses
- 431 Vehicle Recyclers
- 450 Motor Vehicle Equipment
- 451 Emergency Vehicle Permits
- 452 Flashing Lights and Warning Devices on Slow-Moving Vehicles
- 453 Weight Equalizing Hitch and Sway Control Devices for Trailers
- 454 Towing Wrecked or Disabled Vehicles
- 480 Abandoned Vehicles

## MOTOR CARRIERS

- 500 Interstate Registration and Operation of Vehicles
- 505 Interstate Motor Vehicle Fuel Permits
- 511 Special Permits for Operation and Movement of Vehicles and Loads of Excess Size and Weight
- 513 Compacted Rubbish Vehicle Permits
- 520 Regulations Applicable to Carriers
- 524 For-Hire Intrastate Motor Carrier Authority
- 529 For-Hire Interstate Motor Carrier Authority

## DRIVER LICENSES

- 600 General Information
- 601 Application for License
- 602 Classes of Driver's Licenses
- 604 License Examination
- 605 License Issuance
- 607 Commercial Driver Licensing
- 610 Computerized Driver License Records
- 611 Driver's Privacy Protection—Driver's License and Nonoperator's Identification Card
- 615 Sanctions
- 620 OWI and Implied Consent

- 625 Driver's Licenses for Undercover Law Enforcement Officers
- 630 Nonoperator's Identification
- 635 Motorcycle Rider Education (MRE)
- 640 Financial Responsibility
- 641 Financial Liability Coverage Cards

## AERONAUTICS

- 700 Aeronautics Administration
- 710 Airport Improvement Program
- 715 Commercial Air Service Marketing Program
- 716 Commercial Air Service Airport Infrastructure Program
- 720 Iowa Airport Registration
- 750 Aircraft Registration

## RAILROADS

- 800 Items of General Application
- 801 Relationship with Iowa Railway Finance Authority
- 802 Reporting of Railroad Accidents/Incidents
- 810 Railroad Safety Standards
- 811 Highway-Railroad Grade Crossing Warning Devices
- 812 Classifications and Standards for Highway-Railroad Grade Crossings
- 820 Highway Grade Crossing Safety Fund
- 821 Highway-Railroad Grade Crossing Surface Repair Fund
- 830 Rail Assistance Program

## PUBLIC TRANSIT

- 910 Coordination of Public Transit Services
- 920 State Transit Assistance
- 921 Advanced Allocations of State Transit Assistance Funding
- 922 Federal Transit Assistance
- 923 Capital Match Revolving Loan Fund

## RAILWAY FINANCE AUTHORITY[765]

- 1 Organization and Operation
- 2 Items of General Applicability
- 3 Financial Assistance
- 4 Projects

## NOTICE—USURY

In accordance with the provisions of Iowa Code section 535.2, subsection 3, paragraph "a," the Superintendent of Banking has determined that the maximum lawful rate of interest shall be:

December 1, 1998 — December 31, 1998	6.50%
January 1, 1999 — January 31, 1999	6.75%
February 1, 1999 — February 28, 1999	6.75%
March 1, 1999 — March 31, 1999	6.75%
April 1, 1999 — April 30, 1999	7.00%
May 1, 1999 — May 31, 1999	7.25%
June 1, 1999 — June 30, 1999	7.25%
July 1, 1999 — July 31, 1999	7.50%
August 1, 1999 — August 31, 1999	8.00%
September 1, 1999 — September 30, 1999	8.00%
October 1, 1999 — October 31, 1999	8.00%
November 1, 1999 — November 30, 1999	8.00%
December 1, 1999 — December 31, 1999	8.00%
January 1, 2000 — January 31, 2000	8.00%

## ARC 9599A

ENVIRONMENTAL PROTECTION  
COMMISSION[567]

## Adopted and Filed Emergency

Pursuant to the authority of Iowa Code section 455B.200, the Environmental Protection Commission hereby amends Chapter 65, "Animal Feeding Operations," Iowa Administrative Code.

The first amendment extends for one year the period during which the owner of a confinement feeding operation may remove and apply manure from a manure storage structure in accordance with a manure management plan that has been submitted but not yet approved by the Department of Natural Resources. The second amendment makes Department rules consistent with 1999 Iowa Acts, chapter 114, section 30, by which a part-time employee of a confinement site manure applicator is exempt from being certified as a confinement site manure applicator if under direct supervision of a certified confinement site manure applicator.

In compliance with Iowa Code section 17A.4(2), the Commission finds that notice and public participation are impracticable for the first amendment because many owners of confinement feeding operations need to land apply manure during the winter and early spring months; normal rule-making procedures would preclude land application after December 31, 1999, until the proposed amendment could become effective. Notice and public participation are also contrary to the public interest in that a delay in extending the manure application date may result in overflow from manure storage structures and other improper manure disposal practices. Regarding the second amendment, notice and public participation are unnecessary because the amendment merely harmonizes rule language with the statutory provision.

In compliance with Iowa Code section 17A.5(2)"b"(2), the Commission finds that these amendments confer a benefit on a portion of the public and that the normal effective date of the amendments should be waived and these amendments should be effective upon filing on December 21, 1999.

These amendments are intended to implement Iowa Code section 455B.203 and 1999 Iowa Acts, chapter 114, section 30.

These amendments became effective December 21, 1999. The following amendments are adopted.

ITEM 1. Amend subrule 65.16(3) as follows:

**65.16(3)** Manure shall not be removed from a manure storage structure, which is part of a confinement feeding operation required to submit a manure management plan, until the department has approved the plan. As an exception to this requirement, ~~during calendar year 1999~~ *until December 31, 2000*, the owner of a confinement feeding operation may remove and apply manure from a storage structure in accordance with a manure management plan which has been submitted to the department, but which has not been approved within the required 60-day period. Manure shall be applied in compliance with rule 65.2(455B).

ITEM 2. Amend subrule 65.19(6), paragraph "b," subparagraph (1), as follows:

(1) A part-time employee of a confinement site manure applicator and is acting under direct instruction and control of a certified ~~commercial~~ *confinement site* manure applicator who is physically present at the manure application site by

being in sight or hearing distance of the supervised person where the certified ~~commercial~~ *confinement site* manure applicator can physically observe and communicate with the supervised person at all times.

[Filed Emergency 12/21/99, effective 12/21/99]

[Published 1/12/00]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 1/12/00.

## ARC 9603A

## SECRETARY OF STATE[721]

## Adopted and Filed Emergency

Pursuant to the authority of Iowa Code section 47.1, the Secretary of State hereby amends Chapter 21, "Election Forms and Instructions," Iowa Administrative Code.

This amendment provides procedures for calculating the number of signatures required for nomination petitions filed by candidates in counties where supervisors are elected by and from supervisor districts and in which the number of supervisors has recently been increased or decreased. The signature requirements for nomination petitions in Iowa Code section 43.20(1)"d" are based upon the number of votes cast in each supervisor district at the previous general election. The signature requirements for nomination petitions in Iowa Code section 45.1(6) are based upon the number of registered voters in each supervisor district on July 1 of the year preceding the election. There is no provision for calculating the number of signatures for nomination petitions for the first primary, general or special election held after an increase or decrease in the number of supervisors. This new rule requires that these signature calculations be made by first dividing either the total number of votes cast or the total number of registered voters, as appropriate, by the new number of supervisors, and then proceeding with the appropriate formula.

In compliance with Iowa Code section 17A.4(2), the Secretary of State finds that notice and public participation are impracticable because of the immediate need to provide signature calculation methods for nomination petitions to candidates and the county auditor of Adair County, which recently increased the number of supervisors from three to five. Changes in the number of supervisors by counties, such as Adair, which elect their supervisors by and from districts are rare. The discovery of the absence of applicable statutory guidance was not made until it was too late to adopt and implement rules through the standard notice and comment process and have them in place before the filing period for the 2000 primary election begins on March 6, 2000. In order to provide information to all candidates considering seeking election to the board of supervisors in 2000, the new rule includes formula provisions for nonpartisan candidates, whose filing period is later. The earliest possible effective date for rules filed under Notice at the present time is April 12, 2000.

In compliance with Iowa Code section 17A.5(2)"b"(2), the Secretary of State finds that the normal effective date should be waived and the rule made effective upon filing with the Administrative Rules Coordinator because the rule provides a benefit to the public by providing unambiguous and uniform procedures for all candidates seeking nomination to the county boards of supervisors in counties where a

SECRETARY OF STATE[721](cont'd)

recent change in the number of supervisors makes the nomination process unclear.

This amendment is also published herein under Notice of Intended Action as **ARC 9604A** to allow public comment. This emergency filing permits the Secretary of State to immediately implement the uniform election procedures needed to prepare for the approaching election.

This amendment is intended to implement Iowa Code sections 43.20(1)"d," 45.1(6), 331.203 and 331.204.

This amendment became effective December 22, 1999.  
The following amendment is adopted.

Amend 721—Chapter 21 by adopting the following **new** rule:

**721—21.601(43) Plan III supervisor district candidate signatures after a change in the number of supervisors.** After the number of supervisors has been increased or decreased pursuant to Iowa Code section 331.203 or 331.204, the signatures for candidates at the next primary and general elections shall be calculated as follows:

**21.601(1) Primary election.** Divide the total number of votes cast in the county at the previous general election for

the office of president or for governor, as applicable, by the number of supervisor districts and multiply the quotient by .02. If the result of the calculation is less than 100, the result shall be the minimum number of signatures required. If the result of the calculation is greater than or equal to 100, the minimum requirement shall be 100 signatures.

**21.601(2) Nominations by petition.** If the effective date of the change in the number of districts was later than the date specified in Iowa Code section 45.1(6), divide the total number of registered voters in the county on the date specified in Iowa Code section 45.1(6) by the number of supervisor districts and multiply the quotient by .01. If the result of the calculation is less than 150, the result shall be the minimum number of signatures required. If the result of the calculation is greater than or equal to 150, the minimum requirement shall be 150 signatures.

[Filed Emergency 12/22/99, effective 12/22/99]

[Published 1/12/00]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 1/12/00.

## ARC 9596A

**AGRICULTURE AND LAND  
STEWARDSHIP DEPARTMENT[21]**

**Adopted and Filed**

Pursuant to the authority of Iowa Code section 160.9, the Department of Agriculture and Land Stewardship amends Chapter 22, "Apiary," Iowa Administrative Code.

These amendments are intended to prohibit honeybees from being transported into Iowa from the states of Florida, Georgia, South Carolina and North Carolina because these states are known to be infested with the small hive beetle, *Aethina tumida*, a recently introduced, serious pest of honeybee colonies. The current prohibition expires on February 18, 2000. These amendments extend the prohibition to bees imported into Iowa from New Jersey, Ohio, Pennsylvania and specified counties in Minnesota. The amended rule will remain effective until February 18, 2001, unless further extended by administrative rule. The amendments also establish an inspection requirement for the sale of honeybee colonies, beeswax comb and used beekeeping equipment. In addition, the amendments require that these items must also be apparently free of American foulbrood disease in order to be sold.

Notice of Intended Action was published in the Iowa Administrative Bulletin on November 3, 1999, as **ARC 9462A**. No comments were received concerning the proposed amendments. These amendments are identical to those published under Notice of Intended Action.

These amendments are intended to implement Iowa Code section 160.9.

These amendments shall become effective on February 16, 2000.

The following amendments are adopted.

ITEM 1. Amend rule 21—22.10(160) as follows:

**21—22.10(160) Prohibit movement of bees from designated states.** A person shall not directly or indirectly transport or cause to be transported into the state of Iowa honeybees originating in the states of Florida, Georgia, *New Jersey*, North Carolina, *Ohio*, *Pennsylvania*, and South Carolina and the counties of *Faribault*, *Freeborn*, *Mower* and *Steele* in *Minnesota*. As used in this rule, "honeybees" shall include, but not be limited to, the following: colonies, nucs, packages, banked queens and queen battery boxes. However, the shipping of honeybee queens and attendants in individual queen cages will be allowed when accompanied by a valid certificate of health indicating that the bees are from an apiary free of small hive beetles. This rule shall remain effective until February 18, 2000 2001.

ITEM 2. Adopt new rule 21—22.11(160) as follows:

**21—22.11(160) Inspection required for the sale of bees, comb, or used equipment.** All honeybee colonies, beeswax comb and used beekeeping equipment offered for sale in Iowa shall meet the following requirements:

1. Be inspected for infectious bee diseases and parasites by the Iowa department of agriculture and land stewardship or another state's department of agriculture not more than 60 days prior to the sale.

2. Be apparently free of American foulbrood disease.

[Filed 12/22/99, effective 2/16/00]

[Published 1/12/00]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 1/12/00.

## ARC 9601A

**ENGINEERING AND LAND  
SURVEYING EXAMINING  
BOARD[193C]**

**Adopted and Filed**

Pursuant to the authority of Iowa Code section 542B.6, the Engineering and Land Surveying Examining Board hereby amends Chapter 2, "Minimum Standards for Property Surveys," Iowa Administrative Code.

These amendments clarify and revise the standards for measurement for land surveys and add rules regarding preparing and recording U.S. Public Land Survey Corner Certificates.

Waiver of these rules can be sought pursuant to 193C—Chapter 7, "Waivers or Variances from Rules."

Notice of Intended Action was published in the Iowa Administrative Bulletin on October 20, 1999, as **ARC 9436A**. The following change has been made based upon public comment: The phrase "but not limited to" has been added to subparagraphs 2.8(3)"c"(1) and (2) to clarify that the criteria listed are the minimum requirements and not all-inclusive.

These amendments are intended to implement Iowa Code sections 355.3 and 542B.2.

These amendments will become effective February 16, 2000.

The following amendments are adopted.

ITEM 1. Amend subrule 2.5(3) as follows:

**2.5(3)** The plat shall show and identify all monuments necessary for the location of the parcel and shall indicate whether such monuments were found or placed and shall include an accurate description of each monument consisting of *but not limited to* size, shape, material type, capped with license number, and color as applicable.

ITEM 2. Amend rule 193C—2.6(542B) as follows:

**193C—2.6(542B) Measurements.**

**2.6(1) and 2.6(2)** No change.

**2.6(3)** The unadjusted closure for all *closed traverse* surveys shall be not greater than 1 in 5,000 and, for subdivisions *subdivision boundaries*, 1 in 10,000.

**2.6(4)** No change.

**2.6(5)** *The unadjusted error of field measurements shall not be greater than 1 in 5,000.*

**2.6(6)** *The relative positional tolerance at the 95 percent confidence level shall be as follows:*

a. *For subdivision boundaries:  $\pm(0.13 \text{ feet} + 1:10,000)$ .*

b. *For all other land surveying:  $\pm(0.26 \text{ feet} + 1:5,000)$ .*

## ENGINEERING AND LAND SURVEYING EXAMINING BOARD[193C](cont'd)

**2.6(5 7)** Bearings or angles on any property survey plat shall be shown to the nearest one minute; distance shall be shown to the nearest one-tenth foot.

ITEM 3. Amend 193C—Chapter 2 by adopting the following **new** rule:

**193C—2.8(355) U.S. Public Land Survey Corner Certificate.**

**2.8(1)** A corner is considered a part of the U.S. Public Land Survey System if it has the status of a corner of a:

- a. Quarter-quarter section or larger aliquot part of a section.
- b. Fractional quarter-quarter section or larger fractional part of a section.
- c. Government lot.

**2.8(2)** A U.S. Public Land Survey Corner Certificate shall be prepared by the surveyor as part of any land surveying which includes the use of a U.S. Public Land Survey System corner if one or more of the following conditions exist:

- a. There is no certificate for the corner on file with the recorder of the county in which the corner is located.
- b. The surveyor in responsible charge of the land surveying accepts a corner position which differs from that shown in the public records of the county in which the corner is located.
- c. The corner monument is replaced or modified in any way.
- d. The reference ties in an existing public record are incorrect or missing.

**2.8(3)** A U.S. Public Land Survey Corner Certificate shall comply with the following requirements:

- a. The identity of the corner, with reference to the U.S. Public Land Survey System, shall be clearly indicated.
- b. The certificate shall contain a narrative explaining:
  - (1) The reason for preparing the certificate.
  - (2) The evidence and detailed procedure used in establishing or confirming the corner position whether found or placed.
  - (3) The monumentation found or placed perpetuating the corner position with an accurate description of each monument including but not limited to size, shape, material type, capped with license number, and color.
  - (4) The extent of the search for an existing monument when the corner is reset as obliterated or lost.
- c. The certificate shall contain a plan-view drawing depicting:

(1) Relevant monuments including, but not limited to, the reference monumentation and an accurate description thereof.

(2) Physical surroundings including, but not limited to, highway and street center lines, fences, structures and other artificial or natural objects as applicable that would facilitate recovery of the corner.

(3) Reference ties in sufficient detail to enable recovery of the corner. There shall be at least three reference ties from the corner to durable physical objects near the corner which are located so that the intersection of any two of the ties will yield a strong corner position recovery. All ties shall be measured to one-hundredth of a foot.

d. The certificate shall contain a certification statement, seal, signature and date by the surveyor in accordance with rule 193C—1.30(542B).

**2.8(4)** The surveyor shall record the required U.S. Public Land Survey Corner Certificate and forward a copy to the

county engineer of the county in which the corner is located within 30 days after completion of the surveying.

[Filed 12/21/99, effective 2/16/00]

[Published 1/12/00]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 1/12/00.

**ARC 9602A****GENERAL SERVICES  
DEPARTMENT[401]****Adopted and Filed**

Pursuant to the authority of Iowa Code sections 17A.3 and 18.27, the Department of General Services hereby amends Chapter 5, "Printing Division," Iowa Administrative Code.

The amendment sets the maximum allowable fees newspapers may charge to publish public notices, orders, citations, or other official publications in Fiscal Year 2001, beginning July 1, 2000.

Notice of Intended Action and a fiscal impact statement were published in the Iowa Administrative Bulletin on November 17, 1999, as **ARC 9471A**. One comment was received from the public in support of the amendment.

The amendment is intended to implement Iowa Code section 618.11 which requires the Superintendent of Printing to annually review and adjust allowable fees paid to newspapers for publications required or allowed by law.

The amendment is identical to that published under Notice of Intended Action.

This amendment will become effective on February 16, 2000.

The following amendment is adopted.

Amend rule 401—5.21(618) as follows:

**401—5.21(618) Fees paid to newspapers.** The fees paid to newspapers for official publications, notices, orders, citations or other publications required or allowed by law shall not exceed the following rates:

~~1. Fiscal year 1999—31 cents for one insertion and 21 cents for each subsequent insertion, for each line of eight-point type two inches in length, or its equivalent.~~

~~2. Fiscal year 2000—33 cents for one insertion and 23 cents for each subsequent insertion, for each line of eight-point type two inches in length, or its equivalent.~~

~~2. Fiscal year 2001—34 cents for one insertion and 23 cents for each subsequent insertion, for each line of eight-point type two inches in length, or its equivalent.~~

[Filed 12/22/99, effective 2/16/00]

[Published 1/12/00]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 1/12/00.



## ARC 9609A

### INSURANCE DIVISION[191]

#### Adopted and Filed

Pursuant to the authority of Iowa Code section 508.35(3)"a"(3)(c), the Insurance Division hereby adopts Chapter 47, "Valuation of Life Insurance Policies," Iowa Administrative Code.

This new chapter establishes rules concerning the valuation of plans with nonlevel premiums or benefits, and the valuation of universal life products with secondary guarantees. Additionally, these rules contain new tables of select mortality factors.

Notice of Intended Action was published in the Iowa Administrative Bulletin on September 8, 1999, as **ARC 9345A**. A public hearing was held on September 28, 1999. These rules are identical to those published under Notice of Intended Action.

These rules were adopted by the Insurance Division on October 13, 1999.

These rules are intended to implement Iowa Code section 508.35(3)"a"(3)(c).

These rules shall become effective February 16, 2000.

EDITOR'S NOTE: Pursuant to recommendation of the Administrative Rules Review Committee published in the Iowa Administrative Bulletin, September 10, 1986, the text of these rules [Ch 47] is being omitted. These rules are identical to those published under Notice as **ARC 9345A**, IAB 9/8/99.

[Filed 12/23/99, effective 2/16/00]  
[Published 1/12/00]

[For replacement pages for IAC, see IAC Supplement 1/12/00.]

## ARC 9606A

### PROFESSIONAL LICENSURE DIVISION[645]

#### Adopted and Filed

Pursuant to the authority of Iowa Code sections 147.76 and 272C.3, the Board of Dietetic Examiners hereby amends Chapter 80, "Board of Dietetic Examiners," Iowa Administrative Code.

Items 1 and 2 pertain to changes in the process for examination completion and obtaining a temporary license. These amendments revise the process for obtaining a temporary license to be consistent with the changes in the process for completion of the required examination. The examination required for licensure candidates in Iowa is the Commission on Dietetic Registration (CDR) examination. The CDR examination has been changed to an automated format to increase accessibility for candidates to complete the examination.

Items 3 through 7 revise the continuing education requirements to be consistent with the new CDR process for recertification. The new requirements will allow for the consideration of additional continuing education activities that may not currently be recognized for continuing education credit

in Iowa, if the activities are included in the individual licensee's CDR professional development portfolio.

Item 8 revises the dates pertaining to the review and response to continuing education applications.

Item 9 revises the record retention and reporting requirement for continuing education providers.

Notice of Intended Action was published in the Iowa Administrative Bulletin on October 6, 1999, as **ARC 9408A**. A public hearing was held on October 26, 1999, from 10 a.m. to 12 noon in the Fifth Floor Conference Room, Department of Public Health, Bureau of Professional Licensure, Lucas State Office Building, Des Moines, Iowa. There were no written or oral comments received in response to the proposed amendments. These amendments are identical to the Notice of Intended Action.

These amendments were adopted by the Board of Dietetic Examiners at a Board meeting on December 10, 1999.

These amendments will become effective February 16, 2000.

These amendments are intended to implement Iowa Code chapters 152A and 272C and Iowa Code section 147.55.

The following amendments are adopted.

ITEM 1. Amend subrule 80.5(1) as follows:

**80.5(1)** An applicant who will be taking the written examination ~~at the next regularly scheduled examination with-~~ *in four months following graduation* may be granted a temporary license if evidence of completion of the required academic and experience requirements for licensure is included with the application to the board. *The applicant must provide verification of the date of the scheduled examination to the board.*

ITEM 2. Amend subrule 80.5(4) as follows:

**80.5(4)** Applicants shall ~~notify the board, in writing, submit a notarized copy~~ of the results of the examination within two weeks of receipt of the results. Results shall be sent to the Board of Dietetic Examiners, Department of Public Health, Lucas State Office Building, ~~Fourth~~ *Fifth* Floor, Des Moines, Iowa 50319-0075.

ITEM 3. Amend subrule 80.100(4) as follows:

**80.100(4)** Hours of continuing education credit may be obtained by attending ~~and participating in~~ a continuing education ~~activity program~~ offered within the state of Iowa which has prior approval by the board, *or through participation in other types of activities identified in the individual licensee's professional development portfolio for Commission on Dietetic Registration (CDR) certification. Programs or activities not otherwise prior approved by the board shall be subject to approval in the event of an audit.*

ITEM 4. Amend subrule 80.101(1) as follows:

**80.101(1)** Obtaining continuing education. Hours of continuing education credit may be obtained by *one of the following:*

a. ~~attending~~ *Attending* and participating in a continuing education activity offered within the state of Iowa which has prior approval by the board. If the continuing education activity is attended outside the state of Iowa, the continuing education hours can be accrued if the session meets the criteria of the board for subject matter. ~~and is approved by the Commission on Dietetic Registration of the American Dietetic Association.~~

b. *Attending or participating in continuing education activities that are identified to meet specified objectives in conjunction with the Commission on Dietetic Registration (CDR) professional development portfolio for the licensee.*

## PROFESSIONAL LICENSURE DIVISION[645](cont'd)

*Programs or activities not otherwise approved by the board shall be subject to approval in the event of an audit.*

ITEM 5. Amend subrule **80.101(2)** by adopting the following **new** paragraph "**d**":

d. Dietetic practice related to community health care needs.

ITEM 6. Amend subrule 80.101(3) as follows:

**80.101(3)** Standards for approval of continuing professional education, programs and activities. *Program offerings must be conducted by individuals who have specialized education, training and experience by reason of which said individuals should be considered experts concerning the subject matter of the program.* A continuing education activity shall be qualified for approval if the board determines that:

a. ~~It constitutes an organized program of learning (including a workshop or symposium) which contributes directly to the professional competency of the licensee; and~~

b. ~~It pertains to subject matters which relate integrally to the practice of dietetics, and is in compliance with the continuing education guidelines of the board; and~~

c. ~~It is conducted by individuals who have a special education, training and experience by reason of which said individuals should be considered experts concerning the subject matter of the program.~~

ITEM 7. Adopt the following **new** subrule:

**80.101(8)** Other professional education activities. Unless otherwise addressed in these rules, activities designed to address learning needs documented in the individual licensee's CDR professional development portfolio will be reviewed based on the following:

1. A narrative of how the activity relates to the individual learning plan.

2. A summary of how the activity will be evaluated to ensure achievement of the planned outcomes.

ITEM 8. Amend subrule 80.102(1) as follows:

**80.102(1)** Prior approval of activities. An organization or person ~~which that~~ seeks prior approval of a course, ~~or program~~ program, or activity shall apply to the board for approval on a form provided by the board at least ~~60~~ 30 days in advance of the commencement of the activity. The application shall state the dates, subjects offered, objectives for the activity, total hours of instruction, names and qualifications of speakers and other pertinent information. The board shall approve or deny such application within ~~90~~ 60 days of receipt of the application. ~~The provider shall submit an attendance list of Iowa-licensed persons attending within 30 days after the conclusion of the program to the board office.~~

ITEM 9. Amend rule 645—80.104(152A) as follows:

**645—80.104(152A) Report of providers and retention of records. Retention of continuing education records.** Each continuing education provider shall ~~submit a list~~ maintain a record by course offering of Iowa-licensed dietitians and number of continuing education hours earned ~~on a form provided by the board within 30 days after the program is completed for a minimum of four years from the date of the program.~~ The licensee shall maintain a record of proof of attendance at each continuing education program for a period of at

least four years from the date of completing the continuing education.

[Filed 12/23/99, effective 2/16/00]

[Published 1/12/00]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 1/12/00.

**ARC 9608A**

**REVENUE AND FINANCE  
DEPARTMENT[701]**

**Adopted and Filed**

Pursuant to the authority of Iowa Code section 421.14, the Department of Revenue and Finance hereby adopts amendments to Chapter 39, "Filing Return and Payment of Tax," Chapter 40, "Determination of Net Income," Chapter 42, "Adjustments to Computed Tax," Chapter 43, "Assessments and Refunds," and Chapter 46, "Withholding," Iowa Administrative Code.

Notice of Intended Action was published in IAB Volume XXII, Number 10, page 806, on November 17, 1999, as **ARC 9487A**.

Item 1 amending subrule 39.2(4) specifies when interest is to start to accrue on overpayments on individual income tax returns when the returns are filed in the six-month extended period after the due date and at least 90 percent of the income tax liability was paid by the due date.

Item 2, which adopts new subrule 40.18(9), provides that net operating losses from farm businesses for tax years beginning on or after January 1, 1998, may be carried back five years. The amendment also provides that in cases where taxpayers have net operating losses from farm businesses and make a valid federal election to carry back the net operating losses two or three years, the taxpayers can carry back the net operating losses two or three years for Iowa income tax purposes.

Item 3, which amends subrule 42.2(6), provides that the 1998 changes in the federal research activities credit are applicable in computing the Iowa credit for increasing research activities that is available for individual taxpayers. Also, in Item 3, new subrule 42.2(10) describes the Investment Tax Credit that is directly related to new jobs created by the location and expansion of an eligible business. This credit is granted for the purchase of machinery or equipment or the cost of real property, buildings, structures or improvements to real property that are involved in the expansion of a business. In addition, this subrule provides that if a taxpayer, within five years of purchase of a property for which an investment credit was claimed, sells, disposes of, razes, or otherwise renders unusable, all or a part of the property, the income tax liability of the taxpayer is increased by an amount shown in a schedule included in the subrule.

Item 4 amends the rule for livestock production refunds for certain cow-calf operations so the refunds for the cow-calf operations are determined solely on the number of certain types of cattle in inventory on December 31 of the tax year.

## REVENUE AND FINANCE DEPARTMENT[701](cont'd)

In Item 5, new paragraph "e" is added to subrule 46.3(3) to describe the Verified Summary of Payments Report that is to be filed with the Department of Revenue and Finance by the end of the second month following the year in which Iowa income tax was withheld. The new paragraph shows how the Verified Summary of Payments Report is to be filed and to show if and when W-2 forms and 1099 forms are to be submitted with the summary report.

These amendments are identical to those published under Notice of Intended Action.

These amendments will become effective February 16, 2000, after filing with the Administrative Rules Coordinator and publication in the Iowa Administrative Bulletin.

These amendments are intended to implement Iowa Code chapter 422 as amended by 1999 Iowa Acts, chapters 95 and 151, and Iowa Code section 15.333 as amended by 1999 Iowa Acts, chapter 172.

EDITOR'S NOTE: Pursuant to recommendation of the Administrative Rules Review Committee published in the Iowa Administrative Bulletin, September 10, 1986, the text of these amendments [39.2, 40.18, 42.2, 43.8, 46.3] is being omitted. These amendments are identical to those published under Notice as **ARC 9487A**, IAB 11/17/99.

[Filed 12/23/99, effective 2/16/00]  
[Published 1/12/00]

[For replacement pages for IAC, see IAC Supplement 1/12/00.]

**ARC 9593A****TRANSPORTATION  
DEPARTMENT[761]****Adopted and Filed**

Pursuant to the authority of Iowa Code sections 307.10 and 307.12, the Department of Transportation, on December 14, 1999, adopted amendments to Chapter 830, "Rail Assistance Program," and adopted new Chapter 831, "Railroad Revolving Loan Fund," Iowa Administrative Code.

Notice of Intended Action for these amendments was published in the October 20, 1999, Iowa Administrative Bulletin as **ARC 9427A**.

The amendments to Chapter 830 delete obsolete provisions and update the names of the Department offices that receive applications for rail assistance projects and rail economic development projects. Waiver provisions are not applicable.

New Chapter 831 implements the Railroad Revolving Loan Fund Program. The railroad revolving loan fund is established in Iowa Code section 327H.20A. The program provides funding in the form of loans for railroad-related improvement projects. This chapter does not provide for waivers because the chapter's provisions are written broadly and are meant to cover a wide variety of projects.

These amendments are identical to those published under Notice of Intended Action.

These amendments are intended to implement Iowa Code chapter 327H.

These amendments will become effective February 16, 2000.

EDITOR'S NOTE: Pursuant to recommendation of the Administrative Rules Review Committee published in the Iowa Administrative Bulletin, September 10, 1986, the text of these amendments [830.2(2), 830.3(1), 830.3(2), 830.4(2), 830.4(4)"b," 830.6(4), 830.6(5), Ch 831] is being omitted. These amendments are identical to those published under Notice as **ARC 9427A**, IAB 10/20/99.

[Filed 12/14/99, effective 2/16/00]  
[Published 1/12/00]

[For replacement pages for IAC, see IAC Supplement 1/12/00.]

**ARC 9595A****VOTER REGISTRATION  
COMMISSION[821]****Adopted and Filed**

Pursuant to the authority of Iowa Code sections 47.8 and 17A.3, the Voter Registration Commission hereby amends Chapter 1, "Organization, Purpose, Procedures and Definitions," Iowa Administrative Code.

This amendment updates the rule to conform to Iowa Code section 47.7(1), which was amended to change the person designated to be the State Registrar of Voters from the senior administrator of the applications, systems and programming division of the Department of General Services to the State Commissioner of Elections.

Notice of Intended Action was published in the October 20, 1999, Iowa Administrative Bulletin as **ARC 9431A**. The adopted amendment is identical to the one published under Notice.

This amendment was approved by the Voter Registration Commission on December 16, 1999.

This amendment will become effective on February 16, 2000.

This amendment is intended to implement Iowa Code section 47.7(1).

The following amendment is adopted.

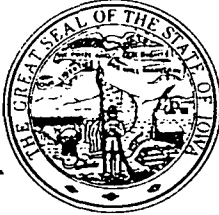
Amend rule 821—1.2(47) as follows:

**821—1.2(47) State registrar of voters.** ~~The senior administrator of the applications, systems and programming division of the department of general services~~ *state commissioner of elections is designated* the state registrar of voters. The state registrar is responsible for the regulation of the preservation, preparation and maintenance of voter registration records and the preparation of precinct election registers for all elections administered by any county commissioner of elections. This regulation activity is in accordance with the policies of the voter registration commission.

*This rule is intended to implement Iowa Code section 47.7(1).*

[Filed 12/16/99, effective 2/16/00]  
[Published 1/12/00]

EDITOR'S NOTE: For replacement pages for IAC, see IAC Supplement 1/12/00.



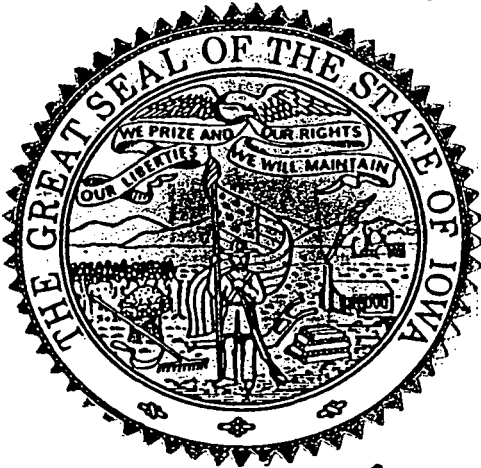
State of Iowa  
Executive Department

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF IOWA

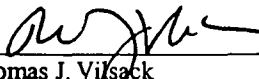
**\*EXECUTIVE ORDER NUMBER TWELVE**

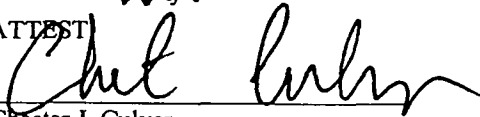
- WHEREAS, on April 22, 1977, Governor Robert D. Ray formally established by Executive Order Number Twenty-three the Governor's Science Advisory Council; and
- WHEREAS, the Governor's Science Advisory Council was principally established to advise the governor on energy, environmental, and natural resource issues; and
- WHEREAS, Executive Order Number Twenty-three directed the Council to convene on an informal basis, at the request of the governor, or with the governor's approval; and
- WHEREAS, the Iowa Department of Natural Resources, and other state agencies, now advise state government officials on energy, environmental, and natural resource issues; and
- WHEREAS, the emergence of scientific expertise, among state agencies, on energy, environmental, and natural resource issues has made the existence of an independent interdisciplinary science council unnecessary.

NOW, THEREFORE, I, Thomas J. Vilsack, Governor of the State of Iowa, hereby rescind and nullify Executive Order Number Twenty-three issued by Governor Robert D. Ray on April 22, 1977.



IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the Great Seal of Iowa to be affixed. Done in Des Moines, Iowa on this the 9th day of December in the year of our Lord one thousand nine hundred and ninety-nine.

  
 \_\_\_\_\_  
 Thomas J. Vilsack  
 Governor

ATTEST  
  
 \_\_\_\_\_  
 Chester J. Culver  
 Secretary of State



State of Iowa  
Executive Department

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF IOWA

**\*EXECUTIVE ORDER NUMBER THIRTEEN**

- WHEREAS,** Iowa Code section 1.17 empowers the governor, by appropriate executive order, to accept on behalf of the state full or partial cession or retrocession of federal jurisdiction over lands offered by appropriate federal authority; and
- WHEREAS,** 10 U.S.C. section 2683 authorizes the U.S. Department of the Army to offer to relinquish or retrocede its exclusive legislative jurisdiction over the Iowa Army Ammunition Plant located in Des Moines County, Iowa, as necessary to permit the State of Iowa to exercise concurrent jurisdiction over the subject federal enclave; and
- WHEREAS,** by letter from Deputy Assistant Secretary of the Army Paul W. Johnson to Governor Terry E. Branstad, dated July 28, 1997, the U.S. Department of the Army offered to retrocede federal legislative jurisdiction over the Iowa Army Ammunition Plant in Des Moines County, Iowa; and
- WHEREAS,** the Department of the Army's revised legal description and map of the subject real estate, attached and marked respectively as Exhibits "A" and "B," indicates that the subject real estate consists of 18,970.06 acres of land; and
- WHEREAS,** the acceptance of the offer of retrocession will enable the State of Iowa and its political subdivisions to enforce state laws that regulate activities, which occur on the subject federal enclave; and
- WHEREAS,** acceptance of the offer of retrocession would be consistent with the state's interest in ensuring the uniform enforcement of state laws as provided in Iowa Code section 1.17.

NOW, THEREFORE, I, Thomas J. Vilsack, Governor of the State of Iowa by the power vested in me by the laws and constitution of the State of Iowa, hereby accept the offer from the U.S. Department of the Army to retrocede exclusive legislative jurisdiction over the Iowa Army Ammunition Plant, located in Des Moines County, Iowa and legally described as shown on attached Exhibits "A" and "B," as necessary to permit the State of Iowa to exercise concurrent legislative jurisdiction over the subject federal enclave.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the Great Seal of Iowa to be affixed. Done in Des Moines, Iowa on this the 9th day of December in the year of our Lord one thousand nine hundred and ninety-nine.



Thomas J. Vilsack  
Thomas J. Vilsack  
Governor

ATTEST:

Chester J. Culver

Chester J. Culver  
Secretary of State

\* SUMMARY OF DECISIONS  
THE SUPREME COURT OF IOWA  
FILED DECEMBER 22, 1999

*Note:* Copies of these opinions may be obtained from the Supreme Court Clerk, State Capitol Building, Des Moines, IA, 50319, for a fee of 40 cents per page.

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**No. 99-1349. IOWA SUPREME CT. BD. OF PROF'L ETHICS & CONDUCT v. FREEMAN.**

On review of the report of the Grievance Commission. **LICENSE SUSPENDED.** Considered by McGiverin, C.J., and Carter, Lavorato, Neuman, and Ternus, JJ. Opinion by Ternus, J. (11 pages \$4.40)

The Board of Professional Ethics and Conduct filed a complaint against the respondent, Richard Freeman, alleging that he had violated several disciplinary rules by neglecting legal matters entrusted to him, by failing to withdraw from representation and return files upon the request of his client, and by failing to respond to inquiries from the Board. The Grievance Commission found that the Board had proved the alleged violations and recommended that Freeman be publicly reprimanded. **OPINION HOLDS:** We find that the Board proved the alleged ethical violations by a convincing preponderance of the evidence. We disagree, however, with the recommended discipline. Based on the seriousness of Freeman's neglect of a client's discrimination claim, resulting in the expiration of the statute of limitations prior to suit being filed, we believe a three-month suspension is warranted. Upon any application for reinstatement, Freeman must prove that he has withdrawn from the Gibbs matters and has returned his client's files. If Freeman intends to engage in the private practice of law upon reinstatement, he must show that he will maintain office practices that will assist him in performing future work in a timely manner. Costs shall be taxed to Freeman.

**No. 99-706. IOWA SUPREME CT. BD. OF PROF'L ETHICS & CONDUCT v. WALTERS.**

On review of the report of the Grievance Commission. **LICENSE SUSPENDED.** Considered by Carter, P.J., and Lavorato, Snell, and Cady, JJ., and Schultz, S.J. Opinion by Snell, J. (10 pages \$4.00)

This matter comes before the court for our de novo review of a Grievance Commission report and recommendation concerning attorney N. LeRoy Walters. The Commission found Walters violated several disciplinary rules and recommended his license be suspended for at least six months. **OPINION HOLDS:** We find Walters committed ethical violations by borrowing money from former clients without full disclosure, writing a bad check as part of a settlement with the same clients, and then failing to make the check good, engaging in an impermissible conflict of interest, and failing to respond to ethics board inquiries. We suspend Walters' license to practice law in Iowa with no possibility of reinstatement for at least three months. As a condition of reinstatement, Walters must pay in full the judgment obtained against him by his former clients in their action to collect on the promissory notes securing his indebtedness. Costs are assessed to Walters.

**No. 99-1350. IOWA SUPREME CT. BD. OF PROF'L ETHICS & CONDUCT v. STEIN.**

On review of the report of the Grievance Commission. **LICENSE SUSPENDED.** Considered by Larson, P.J., and Lavorato, Snell, and Cady, JJ., and Harris, S.J. Opinion by Cady, J. (5 pages \$2.00)

This is an attorney disciplinary proceeding involving Jeffrey L.L. Stein of Waverly, Iowa. The action arose from Stein's neglect of a real estate transaction and subsequent attempts to conceal the neglect. Our Grievance Commission recommended Stein be suspended for at least five years based on his persistent deception and misrepresentation, neglect, and failure to cooperate with the Board of Professional Ethics and Conduct. **OPINION HOLDS:** I. The evidence convincingly establishes Stein violated the disciplinary rules identified by the Commission. II. The most serious violation concerns the persistent course of deceit and misrepresentation. This is not the first time Stein has engaged in such conduct. Yet, the conduct does appear to have been confined to the last few years of practice, Stein has sought psychiatric counseling, and his deceitful conduct was not motivated by personal gain. We indefinitely suspend Stein's license to practice law in Iowa, with no possible reinstatement for two years from the filing of this opinion. Costs are assessed against Stein.

**No. 97-1772. SMITH v. COREY DEV.**

Appeal from the Iowa District Court for Dubuque County, R.J. Curnan, Judge. **AFFIRMED.** Considered by Larson, P.J., and Carter, Ternus, and Cady, JJ., and Harris, S.J. Opinion by Carter, J. (11 pages \$4.40)

Plaintiff landowner entered a contract with Louis and Michael Remakel, whose rights under the contract have been assigned to defendant Corey Development. The agreement in pertinent part contained two provisions: an option to purchase the real estate in question for \$10,000 per acre, which would last for five years from the date of the agreement, and a right of first refusal with respect to any third-party offer of purchase received by the landowner. During the five-year period, the landowner's granddaughter and grandson-in-law, the Bertrams, submitted a formal offer to buy the real estate in question for \$30,000 per acre. The Remakels attempted to exercise the fixed-price option, which the landowner rejected. The landowner commenced this declaratory judgment action to determine the rights of the parties under the contract. The district court found in favor of the landowner. Corey Development appeals. **OPINION HOLDS:** I. We find the district court properly considered extrinsic evidence in determining the parties intended that a third-party offer would extinguish the fixed-option price. We accept the district court's finding concerning the meaning of the agreement. II. We reject Corey Development's argument that the Bertrams' offer was not bona fide. We make an objective determination of the bona fides of the offer based on the viewpoint of a reasonable offeree. Evidence was presented that the Bertrams had a legitimate business interest in acquiring this property. Although they lacked the financial means to personally complete the transaction, they intended to sell off part of the property to obtain a portion of the required payment, and Steven Bertram's father with assets in excess of \$1,300,000 was committed to bankrolling the remainder. We conclude the district court judgment should be affirmed.



**No. 97-2219. EAST OAKS DEV., INC. v. IOWA DEP'T OF TRANSP.**

Appeal from the Iowa District Court for Dickinson County, Joseph J. Straub, Judge. **AFFIRMED.** Considered by McGiverin, C.J., and Larson, Carter, and Cady, JJ., and Andreasen, S.J. Opinion by Carter, J. (5 pages \$2.00)

The DOT began a highway-widening project that interrupted an existing recreational bikeway. The DOT proposed to condemn a portion of East Oaks' property to reconnect the separated segments of the bikeway. East Oaks filed a petition seeking to enjoin the condemnation of the relocated bikeway route. The district court denied the requested relief and upheld the proposed taking on the basis that relocation of the bikeway was an integral part of the highway-widening project. East Oaks appeals. **OPINION HOLDS:** Although we agree the DOT has no general eminent domain authority for establishing recreational trails or bikeways, we conclude the taking was authorized under its power of eminent domain for highway purposes. It was demonstrated that the proposed taking would improve the highway system by allowing bikers to remain on a designated recreational trail without the necessity of crossing or traveling on a highly traveled roadway. We affirm the district court judgment.

**No. 98-1780. STATE v. NEWCOMB.**

Appeal from the Iowa District Court for Jasper County, Thomas D. Mott, Judge. **AFFIRMED.** Considered by McGiverin, C.J., and Carter, Lavorato, Neuman, and Ternus, JJ. Per curiam. (3 pages \$1.20)

Defendant was charged with operating while intoxicated, third offense. He waived his right to a jury trial and stipulated to a trial based on the minutes of evidence. Defendant admitted in open court that he drove while intoxicated on the date in question, and had been convicted of OWI during the preceding six years. He challenged the applicability of a newly enacted statutory scheme extending the period to twelve years. The trial court rejected the statutory argument and found defendant guilty of OWI third. Defendant appeals, contending the trial court failed to engage in the guilty plea colloquy required by Iowa Rule of Criminal Procedure 8(2)(b). **OPINION HOLDS:** We reject defendant's contention that the proceeding was, in effect, a guilty plea, not a bench trial. The record demonstrates strict compliance with Iowa Rule of Criminal Procedure 16(2). This was a bench trial on stipulated evidence, not a guilty plea. Compliance with rule 8(2)(b) was not required. We affirm.

**No. 98-765. BRUNO v. IOWA DEP'T OF TRANSP.**

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge. **REVERSED ON APPEAL; AFFIRMED ON CROSS-APPEAL.** Considered by McGiverin, C.J., and Carter, Lavorato, Neuman, and Ternus, JJ. Opinion by Carter, J. 7 (pages \$2.80)

Eugene Bruno failed a number of field sobriety tests; however, the officer did not note that Bruno had foot and leg problems. Bruno consented to an intoxilyzer test, which produced a reading of .179. But, the officer did not inquire whether Bruno had any foreign substance in his mouth. Bruno was wearing dentures. Bruno's license was revoked for a year. He challenged that action before an administrative law judge and called a forensic expert who opined that the Intoxilyzer 401 IA that was used to test Bruno's breath was not reliable

**No. 98-765. BRUNO v. IOWA DEP'T OF TRANSP. (continued)**

and that false teeth affected the test's accuracy. The administrative law judge upheld the revocation and was affirmed by the agency. The district court reversed, finding model 4011A was antiquated and lacking in reliability. The department of transportation appeals. **OPINION HOLDS:** I. Regarding the reliability of the intoxilyzer and the test's validity, there was a clear conflict in the evidence. Because these issues were inherently factual determinations and the DOT's decision was supported by substantial evidence, the district court erred in disturbing the agency's findings. II. We reject Bruno's contentions that the use of the 4011A Intoxilyzer is not sanctioned by law. The device employed for testing Bruno was approved by the commissioner of public safety, as statutorily required, and was certified to be in working order approximately forty-five days prior to Bruno's test. III. We reject Bruno's argument that the officer did not have reasonable grounds to invoke the implied-consent procedure. The circumstances support the officer's conclusion that Bruno had been operating under the influence. IV. The length of revocation imposed was not longer than permitted by law. Bruno's claim that consideration of an OWI more than six years prior constitutes an unlawful retroactive application of the law has been rejected in *State v. Stoen*, 596 N.W.2d 504, 509 (Iowa 1999).

**No. 97-2266. BARRETT v. LODE.**

Appeal from the Iowa District Court for Cherokee County, Richard D. Vipond and Frank B. Nelson, Judges. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.** Considered by McGiverin, C.J., and Carter, Lavorato, Neuman, and Ternus, JJ. Opinion by Carter, J. (11 pages \$4.40)

Plaintiff, a member of the board of directors of the Aurelia Community School District, brought this action against the other board members and the district superintendent, Martin Lode. She alleged they violated the open meetings act in several particulars, including failure to note in the board's posted agenda policy issues intended to be discussed and arranging for a de facto closed meeting without a prior vote and without tape recording the proceedings. The district court granted Lode's summary judgment motion on the basis that he was not a member of the board conducting the meeting and thus not subject to the requirements of Iowa Code chapter 21 (1993). Later, the court granted the board members' motion for summary judgment finding that, in light of the surrounding events, the agendas for these meetings reasonably apprised the public that the discussion would include topics outside review of administrative performance and evaluation of the superintendent. Plaintiff appeals. **OPINION HOLDS:** I. The statutory language clearly indicates that only members of the governmental body conducting the meeting are subject to the provisions of the open meetings act. Thus, the district court was correct in dismissing the claim against the superintendent. We are not persuaded that limiting the requirements and sanctions of the open meetings act to those persons having policy-making authority is inconsistent with the purposes of this legislation. II. We hold, as a matter of law, that agenda item 8H, which reads as follows: "Discussion—Do mid-semester review of administrative performance (May go into closed session as provided in Chapter 21.5(1)(i) of the Open Meetings Law)," was a violation of section 21.4(1) of the open meetings act. It failed to adequately advise members of the public or press of the topics intended to be discussed at the meeting. The district court should have sustained plaintiffs' motion for summary

**No. 97-2266. BARRETT v. LODE.** (continued)

judgment on this violation rather than defendants' motion and, on remand, shall impose appropriate sanctions pursuant to section 21.6(3)(a). A genuine issue of material fact exists concerning plaintiff's additional claim that the board improperly arranged for a de facto closed meeting by having Lode ask persons present to leave the November 14 meeting. We reverse and remand on this issue. III. With respect to the January 9 meeting of the board, genuine issues of material fact exist with respect to both the allegation of a defective agenda and the allegation of arranging for a de facto closed meeting. We also reverse and remand on this claim.

**No. 98-600. SEYMOUR v. HUNTER.**

Appeal from the Iowa District Court for Poweshiek County, Daniel P. Wilson, Judge. **AFFIRMED ON THE APPEAL; REVERSED AND REMANDED ON THE CROSS-APPEAL.** Considered by Larson, P.J., and Lavorato, Snell, and Cady, JJ., and Harris, S.J. Opinion by Harris, S.J.

(4 pages \$1.60)

Heather and Dwayne, a member of the Meskwaki Indian tribe, are parents of two children. Dwayne earns a salary as an electronic advisor. As a tribal member every year Dwayne was also paid a "per capita" income which the tribal council fixes from earnings of its casino. These payments are not guaranteed, but have been paid regularly in various amounts. Following a hearing to consider Heather's application that Dwayne's child support payments be increased, the court considered the payments income and included them in computing his child support obligation. Dwayne appeals and Heather cross-appeals. **OPINION HOLDS:** I. We hold the per capita payments should be considered income in fixing Dwayne's child support. Income, for purposes of guidelines, need not be guaranteed. In calculating the effect of the per capita payments, the court should consider and average them as earnings over recent years and decide whether their annual receipt should be reasonably expected. II. The district court erred when it rejected Heather's application that Dwayne pay her attorney fees. She is entitled to attorney fees both at trial and on appeal.

**No. 98-1633. STATE v. McCOY.**

Appeal from the Iowa District Court for Boone County, Steven J. Oeth, District Associate Judge. **AFFIRMED.** Considered by Larson, P.J., and Lavorato, Snell, and Cady, JJ., and Harris, S.J. Opinion by Harris, S.J. (4 pages \$1.60)

The defendant was arrested for operating a motor vehicle while intoxicated. The officer explained the implied-consent procedures and specifically requested a breath specimen. Later, at the police department the officer again orally requested a *breath* specimen. But the officer inadvertently checked on the implied-consent advisory form that a *blood* specimen was being sought. McCoy consented to the testing and signed the form but was unaware of the error. The defendant appeals challenging the subsequent ruling admitting the breath test results. **OPINION HOLDS:** The record shows exact compliance with the procedure except for a clerical error. Both the officer and the defendant understood the consent was to the type of test that was actually administered. The trial court correctly held that McCoy could not seize on the error because he was in no way affected by it.

**No. 98-829. BECKER v. BECKER.**

Appeal from the Iowa District Court for Story County, Gary L. McMinimee, Judge. **AFFIRMED.** Considered by Larson, P.J., and Lavorato, Snell, and Cady, JJ., and Harris, S.J. Opinion by Harris, S.J. (3 pages \$1.20)

The Beckers filed a tort action for injuries allegedly sustained at defendant's basketball camp. On defendant's motion, the action was dismissed for abusive delay of process, and the Beckers failed to appeal. However, they subsequently refiled their action. The district court dismissed the action, ruling that because the order dismissing the first action did not state it was without prejudice, and the dismissal was not voluntary, for improper venue, or for want of jurisdiction, it was deemed an adjudication on the merits pursuant to Iowa Rule of Civil Procedure 217. The court dismissed the case with prejudice. The Beckers appeal. **OPINION HOLDS:** We conclude the district court properly dismissed the Beckers' action. The Beckers failed to show they fell within the enumerated exceptions set forth in rule 217.

**No. 98-1852. STATE v. BAEHLER.**

Appeal from the Iowa District Court for Polk County, Robert J. Blink and Glenn E. Pille, Judges. **AFFIRMED.** Considered by McGiverin, C.J., and Carter, Lavorato, Neuman, and Ternus, JJ. Opinion by Ternus, J. (7 pages \$2.80)

The defendant, Robert Baehler, was charged with several criminal offenses, including possession of a controlled substance with intent to deliver. While the criminal charges were pending, he was assessed a tax on the drugs. After this assessment, Baehler filed a motion to dismiss the criminal case on the basis that the tax assessment was, in fact, a criminal penalty and that any additional criminal prosecution would result in a violation of the Double Jeopardy Clause. The trial court overruled this motion. Baehler entered a guilty plea and now appeals, asking this court to reconsider its previous decision in *State v. Lange*, 531 N.W.2d 108 (Iowa 1995), in which we held Iowa's drug tax is not a criminal penalty so as to trigger the protection of the Double Jeopardy Clause. **OPINION HOLDS:** I. This court previously analyzed Iowa's drug tax law in light of *Department of Revenue vs. Kurth Ranch*, 511 U.S. 767, 769 n.1, 114 S. Ct. 1937, 1941 n.1, 128 L. Ed. 2d 767, 773 n.1 (1994), and held that the tax assessment was not a "prosecution" nor a "punishment" for purposes of double jeopardy. II. We disagree with the State's contention that a recent United States Supreme Court decision, *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997), has drawn into question the continued vitality of *Kurth Ranch*. III. Baehler cites cases from other jurisdictions which are distinguishable from *Lange*. In those cases, the record showed that the taxing authority had not undertaken efforts to enforce the law, but rather relied on referrals from law enforcement personnel of persons arrested for drug crimes. In addition, although a taxpayer could theoretically pay the tax prior to arrest, the evidence showed no taxpayer had ever done so, and the tax was, in reality, conditioned on the commission of a crime. The record before us does not reveal the facts and circumstances found persuasive in those cases. We express no opinion on whether a more fully developed factual record would cause us to overrule our decision in *Lange*. The defendant's double jeopardy claim has no merit. We affirm his conviction.

**No. 98-1372. STATE v. PEXA.**

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge. **AFFIRMED.** Considered by McGiverin, C.J., and Carter, Lavorato, Neuman, and Ternus, JJ. Per curiam. (5 pages \$2.00)

The defendant was found in possession of two M-1000 explosive devices, a plastic tube containing ball bearings, and tape. He was convicted of possession of an offensive weapon under Iowa Code section 724.3 (1995). In his first appeal, *State v. Pexa*, 574 N.W.2d 344 (Iowa 1998), this court held there was not substantial evidence to support the trial court's finding that the materials, if assembled, would constitute an offensive weapon under subsection (3) of the statute. The case was remanded for a determination whether the instrumentalities defendant possessed constituted an offensive weapon under subsection (4). On remand, the trial court found that the M-1000's alone and in combination with the ball bearings and masking tape constituted a bomb within the meaning of subsection (4), and the court again found the defendant guilty as charged. In his second appeal, defendant challenges only the finding that the M-1000's by themselves qualify as a bomb under subsection (4). He disputes the State's assertion that his conviction can be sustained under subsection (6) on the court's finding that the materials, when assembled, would constitute a bomb since the trial court focused solely on subsection (4) in its ruling, and did not mention subsection (6). **OPINION HOLDS:** I. The trial court's decision encompassed a finding that the materials possessed by the defendant, "if combined," met the definition of an offensive weapon under subsection (6), despite its failure to specifically mention that subsection. Because the defendant does not challenge the evidentiary basis for the trial court's finding that the items, if assembled, would fall within the subsection (4) definition of an offensive weapon, his conviction must be affirmed on the basis that the items he possessed constituted an offensive weapon under section 724.1(6). III. This ruling makes it unnecessary to consider the defendant's challenge to the court's additional finding that the M-1000's alone constituted a bomb under subsection (4).

**No. 99-467. GORDEN v. CAREY.**

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge. **AFFIRMED.** Considered by McGiverin, C.J., and Larson, Ternus, and Cady, JJ., and Harris, S.J. Per curiam. (3 pages \$1.20)

Jeanie Gordon brought a negligence action based on injuries suffered in an automobile accident. The jury awarded Gordon damages and assessed her a percentage of comparative fault. The district court reduced her damages accordingly. Gordon appeals, claiming generally that the damages were inadequate. **OPINION HOLDS:** I. We find Gordon has failed to preserve error. She did not move for a new trial based on inadequacy of damages or seek additur. II. Even if error had been preserved, there is substantial evidence in the record to support the jury's damage award. We affirm the judgment of the district court.

**No. 98-14. SCHOFF v. COMBINED INS. CO.**

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs, Judge. **AFFIRMED.** Considered by McGiverin, C.J., and Larson, Neuman, Snell, and Ternus, JJ. Opinion by Ternus, J. (16 pages \$6.40)

Ronald Schoff, a sixteen-year employee of MidAmerican Energy Corporation, interviewed with Michael Hageman, a district manager for Combined Insurance. Schoff's later application for employment stated that bonding by Combined's bonding company was a condition of employment. In response to the questions "Have you ever been convicted of a felony?" Schoff answered "No." Schoff had been convicted of two serious misdemeanors and he disclosed that fact to Hageman. Hageman questioned Schoff regarding these convictions. Hageman never asked if Schoff had been charged with a felony. Hageman understood that only felony convictions, not charges, were pertinent to bonding. Hageman assured Schoff that his criminal record would be no problem. After being given this assurance, Schoff terminated his employment with MidAmerican. Schoff signed an employment contract which stated the contract was "terminable at will by either party." Eventually, Schoff was told the bonding company refused to issue a bond for him due to his criminal record and he was subsequently terminated from employment with Combined. Schoff filed suit against Combined basing his claims on a theory of promissory estoppel and negligent training and supervision of its district manager. The district court granted Combined's motion for summary judgment. Schoff appeals. **OPINION HOLDS:** I. We conclude the elements of promissory estoppel include a previously unstated element that the promise be made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promisee could rely and without which he would not act. II. An employment-at-will relationship does not bar recovery under a theory of promissory estoppel. III. Proof of a promise is necessary to establish a theory of promissory estoppel. A promise is not implied from representations by an employer, but requires strict proof that the employer promised to do or not to do a specific act, and did not simply state the employer's view or impression. A plaintiff must also prove that any promise was clear and definite. The statements on which Schoff bases his claim do not satisfy these requirements of a promise. IV. An employer cannot be liable for negligent supervision or training where the conduct that proper supervision and training would have avoided is not actionable against the employee. That is the case here. The court correctly granted summary judgment on both claims.

**No. 98-477. IBP, INC. v. IOWA EMPLOYMENT APPEAL BD.**

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.** Considered by McGiverin, C.J., and Carter, Lavorato, Neuman, and Ternus, JJ. Opinion by McGiverin, C.J. (32 pages \$12.80)

IBP was fined \$125,500 for violations of Iowa Occupational Safety and Health Act (IOSHA) rules and regulations. The violations were charged after an ammonia leak occurred at an IBP plant and a subcontractor's employee died of exposure to ammonia. The leak occurred when the ammonia line was opened by an employee who did not know that a valve in the line had been removed by another employee for repair. IOSHA issued various citations against IBP which alleged serious, willful and repeated violations of IOSHA rules. The Iowa

**No. 98-477. IBP, INC. v. IOWA EMPLOYMENT APPEAL BD. (continued)**

Employment Appeal Board (EAB) upheld the penalty. Alleged violations are grouped into three categories: (1) violation of emergency response/evacuation standards, (2) violation of respiratory/breathing protection standards; and (3) violation of energy control standards/lockout/tagout procedures. The majority of the items charged were for serious violations of workplace safety standards as opposed to willful violations. The district court reversed EAB's decision and dismissed all charged violations against IBP. EAB appeals. **OPINION HOLDS:**

I. The district court wrongfully concluded IBP was exempt from the duty to develop an emergency response plan. In order to satisfy the exemption language found in 29 C.F.R. § 1910.120(q)(1), an employer's disaster readiness plan must specifically call for evacuation only and cannot address both evacuation and rescue operations. IBP's written plan calls for both. Therefore, IBP was not exempt from the duty to have an emergency response plan in effect. IBP's disaster readiness plan did not satisfy the elements of an emergency response plan as required by 29 C.F.R. § 1910.120(q)(2).

II. A scientific reading of ammonia levels in the atmosphere is not required to determine if an IDLH (immediately dangerous to life and health) atmosphere exists as the definition of IDLH in 29 C.F.R. § 1910.120(a)(3) does not mention a measurement of ammonia in parts per million. Substantial evidence supported the finding that an IDLH atmosphere existed at the time IBP employees entered the plant to rescue the missing subcontractor's employee.

III. Evidence shows that IBP complied with regulations by having a lockout/tagout procedure in place concerning the ammonia line valve.

IV. The Iowa labor commissioner has the burden of proving that IBP failed to conduct periodic inspections. It did not meet this burden, thus the burden never shifted to IBP to show that it did conduct them.

V. Not only is an employer required to have lockout/tagout procedures in place, but the employees must follow the procedures outlined. Substantial evidence supports the agency's finding that IBP did not comply with its lockout/tagout procedures as required.

VI. While only one person actually removed the ammonia valve, the removal was done by a "group" for purposes of 29 C.F.R. § 1910.147(f)(3)(I) when the decision to remove the valve had been discussed with the maintenance superintendent and maintenance supervisor before the worker was instructed to remove the ammonia valve. The troubleshooting of the valve and the decision to remove it were made as part of a joint effort.

VII. A. A willful violation of a workplace safety standard exists when the violation is committed with intentional disregard of, or plain indifference to the requirements of the regulation. More than just negligence on the part of the employer is required. B. The term "affected employee" under 29 C.F.R. § 1910.147(b) includes any employee who is working in an area where servicing or maintenance of equipment is being performed. This required IBP to notify both IBP and subcontractor's employees, that work was being performed on equipment in that area. The record supports a willful violation of this requirement.

VIII. The duty of on-site and outside employers to notify each other of their respective lockout/tagout procedures is only triggered when outside servicing personnel (subcontractors) will be utilizing lockout/tagout devices, which did not occur here.

IX. A. The four elements to support a finding of a serious violation of the special duty clause are (1) a relevant safety standard applies, (2) the employer failed to comply with it, (3) employees had access to the violative condition, and (4) the employer had actual knowledge or constructive knowledge of the violative condition. B. With respect to the knowledge requirement, IBP's failure to establish an adequate disaster response plan constitutes constructive knowledge on its part of the violations charged

**No. 98-477. IBP, INC. v. IOWA EMPLOYMENT APPEAL BD. (continued)**

concerning emergency response standards. Also, if a supervisor knows or should have known of a violation, this knowledge can be imputed to the employer. IBP also had constructive knowledge of the violations charged concerning respiratory protection and lockout/tagout procedures. X. To prevail on an isolated incident defense, the employer must demonstrate that it (1) established a work rule to prevent the reckless behavior and/or unsafe condition from occurring, (2) adequately communicated the rule to its employees, (3) took steps to discover incidents of noncompliance, and (4) effectively enforced the rule whenever employees transgressed it. Substantial evidence exists in the record to support the agency's decision that IBP failed to establish the isolated incident defense.

**97-1177. SIMONSON v. IOWA STATE UNIVERSITY.**

Appeal from the Iowa District Court for Story County, Timothy J. Finn, Judge. **REVERSED.** Considered by McGiverin, C.J., and Carter, Lavorato, Neuman and Ternus, JJ. Opinion by McGiverin, C.J. (16 pages \$6.40)

At issue is whether a tenured state university professor, Michael Simonson, has a constitutional right to an evidentiary hearing before the university can place him on paid administrative leave pending an investigation of student sexual harassment complaints against him. Iowa State University appeals a district court decision requiring it to hold such a hearing. **OPINION HOLDS:** I. Apart from any economic benefits, Simonson did not have a protected property interest in continuing to perform his duties as a professor and thus was not deprived of such property interest when he was placed on paid administrative leave pending the investigation of the sexual harassment complaints against him. II. The University's actions did not amount to a suspension as contemplated by the University's rules because Simonson was not deprived of economic benefits while on administrative leave. III. We find no evidence in the record that any of the University officials involved in the investigation of the sexual harassment complaints against Simonson publicly disclosed the reasons why Simonson was placed on administrative leave, and Simonson was not deprived of a liberty interest due to damage to his reputation.

**No. 98-1013. STATE v. CARTER.**

Appeal from the Iowa District Court for Webster County, Frederick E. Breen, Judge. **AFFIRMED.** Considered by McGiverin, C.J., and Lavorato, Neuman, Snell, and Ternus, JJ. Per curiam. (3 pages \$1.20)

Incriminating evidence was discovered during execution of an administrative warrant issued under Iowa Code section 453B.9 (1997) for the purpose of seizing defendant Kenneth Carter's property to satisfy unpaid assessments for drug tax stamps. Carter challenged the warrant on due process grounds, claiming it was facially invalid because it rested on drug possession charges that had been dismissed. Because Carter had not administratively challenged the drug tax stamp assessment, however, the trial court overruled the motion. Carter was convicted of marijuana possession. He appeals. **OPINION HOLDS:** On appeal Carter mounts an entirely different challenge to the administrative warrant, claiming section 453B.9 is unconstitutional because it



**No. 98-1013. STATE v. CARTER.** (continued)

authorizes administrative search warrants “that are not grounded upon reasonable legislative and administrative standards.” Conceding this argument is not preserved for appeal, he attributes this to ineffective assistance of counsel. No record has yet been made on this issue, and we are not inclined to speculate on the outcome based on the record before us. We therefore affirm Carter’s conviction but preserve his ineffective-assistance-of-counsel claim for a possible postconviction relief action.

**No. 98-1226. SEEMAN v. IOWA DEP’T OF HUMAN SERVS.**

Appeal from the Iowa District Court for Linn County, Vern Robinson, Judge. **AFFIRMED.** Considered by McGiverin, C.J., and Carter, Lavorato, Neuman, and Ternus, JJ. Opinion by Neuman, J. (10 pages \$4.00)

Jeffrey and Mischelle Seeman sustained severe injuries following an accident with an uninsured and insolvent motorist. The Seemans had uninsured motorist coverage through American Family Insurance Company, but no direct medical insurance coverage. The Iowa Department of Human Services (DHS) paid medical expenses totaling \$11,688.44 for Jeffrey and \$9116.43 for Mischelle. DHS thereafter filed a lien for these Medicaid payments in accordance with Iowa Code section 249A.6 (1997), which authorizes state plans for medical assistance to seek reimbursement from liable third parties. Seemans eventually settled with American Family for the full value of their uninsured motorist coverage, \$200,000. In a declaratory judgment action the district court ruled that the statutory term “third party” includes the injured party’s own insurance carrier. The court further rejected the equitable apportionment of attorney fees proposed by Seemans in favor of the statutory formula set forth in Iowa Code section 249A.6(4). Finally, the court summarily rejected Seemans’ claims that this statutory scheme, as so construed by the court, violates the equal protection, due process, takings, and contracts clauses of the United States and Iowa constitutions. The Seemans appeal. **OPINION HOLDS:** I. The language establishing the lien of section 249A.6 is broadly applicable to recoveries of medical expenses whether from the tortfeasor or the aid recipient’s own insurance carrier. The district court was correct in so ruling. II. The three-way split of section 249A.6(4) for apportionment of attorney fees demonstrates the legislature’s intent to achieve fairness, rather than wholeness for the injured party, in a situation where medical expenses are, in the first instance, paid not by the injured person but by the State. The Seemans’ claim for equitable apportionment is without merit. III. A. Section 249A.6 did not violate the equal protection guarantees of the Fourteenth Amendment of the United States Constitution and article I, section 6 of the Iowa Constitution. Within the class of persons benefitting from medical assistance under chapter 249A, all are subject to threshold eligibility requirements regarding available assets. B. This section did not violate the Seemans’ right to freely contract with their insurer, under article I, section 10 of the United States Constitution and article 1, section 21 of the Iowa Constitution. C. Given the benefit received by the Seemans under chapter 249A, the record does not sustain a claim for a compensable regulatory taking.

**No. 98-377. GAMERDINGER v. SCHAEFER.**

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge. **APPEAL MOOTED; DISTRICT COURT AFFIRMED.** Considered by McGiverin, C.J., and Lavorato, Neuman, Snell, and Ternus, JJ. Opinion by Snell, J. (8 pages \$3.20)

Plaintiffs Sharri and Thomas Gamerdinger sued defendants Patrick Schaefer and Deere & Company for damages they sustained from a collision at Deere's plant between Sharri's motorized cart and a forklift truck driven by Schaefer. A jury apportioned fault between the parties and awarded Gamerdinger some past and future medical expenses. The Gamerdingers perceived an inconsistency in the verdict and moved for a new trial. After both parties rejected an additur, the court sustained the motion. Defendants appeal and Gamerdingers cross-appeal. **OPINION HOLDS:** Because the evidentiary issues raised on cross-appeal are dispositive, we need not address the defendants' issues. I. The district court erred in excluding evidence establishing Schaefer's past custom and habit in operating the forklift truck. The Gamerdingers' witnesses would have testified Schaefer had a habit of not watching for pedestrians and other vehicles, hit numerous other objects, and did not remedy his driving habits after repeated complaints to supervisors. We find their testimony bears on the question of knowledge on the part of Deere's management and was probative as to the likelihood of Schaefer's being negligent in operating his forklift truck. The evidence should have been admitted under Iowa Rule of Evidence 406. II. The court also erred by failing to include the Gamerdingers' requested instruction on spoliation of evidence based on defendants' failure to produce photographs of the damaged motorized cart. We affirm the grant of a new trial.

**No. 98-1764. STATE v. SCHULTZ.**

Appeal from the Iowa District Court for Polk County, A. Patricia Houlihan, District Associate Judge. **REVERSED AND REMANDED.** Considered by Larson, P.J., and Lavorato, Snell, and Cady, JJ., and Harris, S.J. Opinion by Cady, J. (6 pages \$2.40)

Jon Schultz was charged with operating a motor vehicle while intoxicated, second offense. Approximately six years earlier, Schultz was convicted of vehicular homicide in the operation of a motor vehicle while under the influence. The State used the OWI component of the prior homicide conviction to elevate the current charge from OWI first offense. The district court granted Schultz's motion to dismiss the trial information, holding Iowa Code section 707.6A(6) (1997) prohibited a conviction for vehicular homicide based upon OWI from being used for any sentencing connected with a subsequent OWI. The State appeals. **OPINION HOLDS:** I. Dismissal of a pending OWI charge is not the proper remedy for a pretrial challenge to the prior convictions asserted to enhance punishment. Instead, a challenge to the prior convictions should be treated as a motion for adjudication of law points. The court erred by dismissing the trial information. II. Section 707.6A(6) establishes a general rule which permits a conviction for vehicular homicide based upon an OWI to also be treated as a conviction for OWI. The exception to this rule expressly applies only when "sentencing" occurs under section 321J.2(2). Therefore, the exception only applies when the OWI component of the vehicular homicide conviction is also the current offense. Because the exception is not implicated here, the district court erred in dismissing the trial information. We reverse and remand the case for further proceedings.

**No. 97-2229. CONDON AUTO SALES & SERV., INC. v. CRICK.**

Appeal from the Iowa District Court for Woodbury County, James D. Scott, Judge. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.** Considered by Carter, P.J., and Lavorato, Snell, and Cady, JJ., and Schultz, S.J. Opinion by Cady, J. (23 pages \$9.20)

William Crick was employed as an auto sales manager by two related businesses, Condon Auto and Condon Ford (Condon). After Crick abruptly left to go to work for a competitor, Wisner's Auto World, Condon filed suit and Crick counterclaimed. The jury returned a verdict against Crick on the breach of contract claim in the sum of \$25,000. It also awarded Condon \$9344.64 for overpaid draws, \$700 for conversion, and \$30,000 in punitive damages. The jury also found for Condon on Crick's claim for unpaid wages. The trial judge subsequently granted Crick's motion for judgment notwithstanding the verdict on the breach of contract claim. Crick has appealed and Condon cross-appealed. **OPINION HOLDS:** I. While employed by Condon, Crick retained incentive options which were clearly intended for the dealership, and we affirm the district court's entry of judgment against Crick on the claim of conversion. II. The evidence supports a finding by a preponderance of clear, convincing, and satisfactory proof that Crick retained the incentives with a willful and wanton disregard for his employer's rights. The district court did not abuse its discretion in denying Crick's motion for new trial or in declining to enter a remittitur on the punitive damages award, which was not grossly excessive. III. Although Crick may have been responsible to Condon for the excessive draw, there was no evidence he was contractually bound to pay Condon for the excessive draw from his wages. Condon violated the Wage Payment Collection Act by withholding Crick's wages at Condon Ford and was liable as a matter of law for the unpaid wages, court costs, and attorney fees. Condon's conduct constituted the intentional failure to pay and the trial court erred in failing to enter judgment for Crick for liquidated damages. We reverse that portion of the judgment and remand the case for entry of judgment for Crick on the amount of \$5525, plus reasonable attorney fees attributable to his collection of wages owed, liquidated damages as defined by section 91A.2(6), and court costs. IV. The jury instructions erroneously required Crick to prove Condon intentionally failed to pay a bonus of two percent. Intent is only necessary to support the liquidated damage portion of the wage claim. We reverse that portion of the judgment and remand the claim for a new trial. V. There was substantial evidence in the record to support the verdict based upon the excessive draw. VI. A review of the record reveals substantial evidence for the jury to conclude Crick's actions amounted to competition with Condon while he was still employed by Condon. However, Condon's damages resulted not from Crick's competition with Condon but from the services he performed for Condon. This activity falls outside the scope of any action for breach of loyalty. VII. There was insufficient evidence to support Condon's claim against Wisner's for intentional interference with a contract. VIII. We affirm the district court in part and reverse in part. We remand the case to the district court for further proceedings consistent with this opinion.

**No. 98-804. IN RE MARRIAGE OF ROSEBERRY.**

On review from the Iowa Court of Appeals. Appeal from the Iowa District Court for Linn County, David M. Remley, Judge. **DECISION OF COURT OF APPEALS AFFIRMED IN PART AND VACATED IN PART; DISTRICT COURT JUDGMENT AFFIRMED; REMANDED WITH DIRECTIONS.** Considered by McGiverin, C.J., and Carter, Lavorato, Neuman, and Ternus, JJ. Opinion by Lavorato, J. (11 pages \$4.40)

David filed a petition for dissolution of his marriage to Connie, and during its pendency they attempted a brief reconciliation. At the time of the dissolution, Connie was pregnant. The stipulation and decree stated David was not the father of the unborn child and would have no support obligations. One month later, Alishia was born. Connie later filed a motion for modification, alleging David was Alishia's father and that she became pregnant during the attempted reconciliation. Connie sought genetic testing and payment of child support. The court sustained David's motion for summary judgment, ruling that Iowa Code section 600B.41A (actions to overcome paternity) did not apply, and issue preclusion barred Connie from relitigating paternity. The court ordered the genetic test results sealed. Connie appealed, and we transferred it to the court of appeals, which (1) affirmed on the issue-preclusion issue as to Connie, (2) reversed any determination that Alishia's claim for modification of paternity was barred, (3) remanded for appointment of an attorney for Alishia to reconsider her paternity, and (4) unsealed the genetic test results. Two judges specially concurred, suggesting that Connie could avoid issue preclusion by invoking the court's equity powers to set aside the dissolution decree obtained by extrinsic fraud. David seeks further review. **OPINION HOLDS:** I. Connie did not contend in the district court that Alishia in her own right could litigate paternity, so there was nothing for the court of appeals to review on this issue. We vacate that part of the court of appeals decision that remanded for the appointment of an attorney for Alishia and for the district court to entertain a modification action to reconsider Alishia's paternity. II. Connie did not contend in the district court she could avoid the preclusive effect of the dissolution decree because of extrinsic fraud. There was therefore nothing for the court of appeals to review on this issue either. III. We affirm the district court and court of appeals decisions that Iowa Code sections 598.21(4A) and 600B.41A do not allow Connie to relitigate the issue of paternity. No statutory provision provides for an action to establish paternity by naming as the biological father a person who has previously been found *not* to be the father. IV. The district court acted well within its discretion in denying Connie's request to unseal the genetic test results. We vacate the court of appeals decision and affirm the district court decision on this issue. We remand to allow the district court to rule on any motions that might be filed regarding disposition of the genetic test results.

**No. 98-2181. WHITTERS v. NEAL.**

Appeal from the Iowa District Court for Linn County, August F. Honsell, Senior Judge. **REVERSED AND REMANDED.** Considered by Larson, P.J., and Lavorato, Snell, and Cady, JJ., and Harris, S.J. Opinion by Larson, J. (5 pages \$2.00)

In August 1989 Paul Whitters and Jerri Whitters sued Paul Neal for damages arising out of a motor vehicle accident. In October the Whitters took a default judgment. A general execution on the judgment remains unsatisfied. In October 1998 the Whitters filed a "Motion for Renewal of Judgment." Neal

**No. 98-2181. WHITTERS v. NEAL. (continued)**

resisted on the ground there is no statutory authority to renew a judgment lien. The court overruled the objection and ordered the lien renewed. Neal appeals. **OPINION HOLDS:** While a judgment creditor may (1) obtain a new lien by suing on the judgment, or (2) execute under the original judgment, neither of these procedures was implemented. The Whitters simply attempted to extend the original judgment lien by motion, and our statutes do not permit that. Accordingly, we reverse and remand for an order denying the motion to renew the judgment lien.

**No. 98-934. AUSTIN v. CUNA MUT. LIFE INS. CO.**

Appeal from the Iowa District Court for Cerro Gordo County, Jon S. Scoles, Judge. **AFFIRMED.** Considered by Larson, P.J., and Lavorato, Snell, and Cady, JJ., and Harris, S.J. Opinion by Larson, J. (6 pages \$2.40)

The plaintiff's daughter, Rachel, died during surgery to repair a defective aorta. Prior to surgery, one of the surgeons advised the plaintiff that the surgery had a five percent mortality rate. The plaintiff made a claim for accidental death benefits under its policy with CUNA. CUNA denied it on the basis that Rachel's death was not accidental within the meaning of the policy. The plaintiff filed suit, however, the court granted CUNA's motion for summary judgment. **OPINION HOLDS:** The policy provided that CUNA would pay specified amounts if an insured person sustains a loss within 365 days after the date of an accident. The policy, however, does not define "accident." We believe the better rule, consistent with a "person on the street" view, is that intrasurgical deaths are not accidents for insurance purposes. When the insured undergoes medical treatment for the purpose of curing a disease or other unhealthy or abnormal condition that has not itself been produced by a covered accident, the mere fact that the insured dies or is injured as the result of such treatment does not bring the loss within the coverage. The trial court properly granted summary judgment against the plaintiff on her claim.

**No. 98-427. HUMBOLDT COMMUNITY SCHS. v. FLEMING.**

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge. **AFFIRMED.** Considered by McGiverin, C.J., and Larson, Carter, and Cady, JJ., and Andreasen, S.J. Opinion by Larson, J. (12 pages \$4.80)

David Fleming was the school superintendent for Humboldt Community Schools. In the spring of 1993, Fleming began displaying symptoms of depression, including weight loss, insomnia, indecisiveness, and withdrawal. Fleming began receiving psychiatric treatment. He subsequently committed suicide by carbon monoxide poisoning. After Fleming's death, his widow filed this claim for workers' compensation benefits against the school district. The chief deputy industrial commissioner affirmed the arbitration decision that the widow had established her claim by showing that the job stress experienced by Fleming was greater than the routine job stress faced on a daily basis by similarly situated school superintendents and that this stress caused the depression resulting in Fleming's suicide. Humboldt Schools was ordered to pay weekly benefits and funeral and medical expenses. The district court affirmed on judicial

**No. 98-427. HUMBOLDT COMMUNITY SCHS. v. FLEMING.**  
(continued)

review. Humboldt Schools appeals. **OPINION HOLDS:** I. The commissioner applied the correct test for establishing a mental-injury claim: whether the mental injury was caused by workplace stress of greater magnitude than the day-to-day mental stress of other workers in the same or similar jobs. II. The industrial commissioner and the district court applied the correct legal test for avoiding the self-imposed-injury defense of Iowa Code section 85.16(1) (1993) and properly refused to require a showing of derangement for this claim. III. A. The connection between Fleming's job-related stress and his suicide is well supported in the record for factual causation. B. There is substantial evidence in the record to support the industrial commissioner's finding of legal causation supporting this mental-injury claim. IV. The evidence regarding the settlement of a malpractice claim against the treating psychiatrist was not material because the tort recovery could not be subjected to an employer's lien under section 85.22(1). The district court did not abuse its discretion in denying the request to supplement the record.

**No. 98-04. BRANDENBURG v. FETERL MFG. CO.**

Appeal from the Iowa District Court for Emmet County, Joseph J. Straub, Judge. **REVERSED AND REMANDED WITH DIRECTIONS.** Considered by McGiverin, C.J., and Carter, Lavorato, Neuman, and Ternus, JJ. Opinion by Lavorato, J. (15 pages \$6.00)

In February 1996 Stephen Brandenburg was killed while using a grain auger manufactured by Feterl Manufacturing. Darrell Streff, Feterl's president, was advised of the accident and immediately contacted Feterl's parent corporation, Core Industries. In April 1997 the plaintiffs filed a negligence action against Feterl. Streff was personally served a copy of the original notice. Streff contacted Core's insurance department and requested all primary and excess insurance carriers be notified. Tony Krull, Core's insurance manager informed Streff that Steve Smith, claims manager of Willis Corroon would handle the lawsuit and that Streff should contact Smith if he had not heard from him in several days. Streff contacted Smith several days later and informed him an answer had to be filed in eleven days to avoid a default. No further action was taken, and the district court entered a \$1,130,215 default judgment against Feterl. Streff received a copy of the default judgment and informed Smith, who stated he had forgotten about the lawsuit. Feterl promptly filed a motion to set aside the default judgment pursuant to Iowa Rule of Civil Procedure 236. The district court denied the motion, concluding Feterl had willfully ignored the rules of procedure. Feterl has appealed. **OPINION HOLDS:** I. We conclude the district court erred in focusing on what other people failed to do prior to the entry of default judgment rather than on whether Feterl's actions constituted a willful disregard of the rules of procedure. We believe it is undisputed the default resulted from a mistake. Smith's neglect does not equate to willful disregard by Feterl. The fact Feterl failed to make sure an answer was filed does not rise to the level of willful disregard. The district court abused its discretion in so finding, especially since the court concluded Feterl had intended to defend against the lawsuit. II. We also conclude the plaintiffs would suffer no prejudice if the default were set aside. Nothing has occurred due to passage of time that would prevent the plaintiffs from proving their case. We are also not inclined to

**No. 98-04. BRANDENBURG v. FETERL MFG. CO. (continued)**

recognize any expectancy in the judgment as sufficient to constitute prejudice. We therefore reverse and remand for an order granting the motion to set aside the default and default judgment and for further proceedings consistent with this opinion.

**No. 98-948. FAUSEL v. JRJ ENTERS., INC.**

Appeal from the Iowa District Court for Des Moines County, R. David Fahey, Judge. **REVERSED AND REMANDED WITH DIRECTIONS.** Considered by Larson, P.J., and Lavorato, Snell, and Cady, JJ., and Harris, S.J. Opinion by Lavorato, J. (18 pages \$7.20)

Stephen Fausel sued JRJ Enterprises, Inc. for anticipatory breach of contract. Fausel had agreed in writing to purchase JRJ's membership interest in an entity involved in a Colorado casino operation. JRJ canceled the agreement after Fausel experienced delays in obtaining approval for the purchase from the Colorado Division of Gaming. Following a bench trial, the district court dismissed Fausel's suit. Fausel appealed, contending that the district court (1) misconstrued the agreement as requiring him to perform by July 31, 1995, and (2) erroneously concluded that two provisions of the Restatement (Second) of Contracts barred his claim of anticipatory breach. **OPINION HOLDS:** I. We reject the district court's construction of the Stock Agreement that July 31, 1995, was the deadline for completion of the sale. There is no specific time for, or date of, performance. We reverse and remand to allow the district court to determine, based on the record, what would be a reasonable time for Fausel to obtain approval of the Colorado Division of Gaming. II. A. If, on remand, the district court finds that Fausel had a reasonable period of time beyond June 12, 1995, the date JRJ canceled the agreement, to obtain approval from the Division of Gaming, the district court must then consider Fausel's claim that JRJ's alleged cancellation was an anticipatory breach. A finding that there was an anticipatory breach as of June 12, 1995, would preclude application of the Restatement (Second) of Contracts, section 181 (failure to comply with regulatory licensing requirements). The district court erred in concluding that this provision barred Fausel's claim. B. On remand, if the court determines that JRJ repudiated the contract as of June 12, 1995, and Fausel could have, within a reasonable period of time thereafter, obtained approval from the Division of Gaming, then Restatement (Second) of Contracts, section 254 (effect of subsequent events on duty to pay damages) would not bar Fausel's claim of anticipatory breach. For the reasons stated, we conclude the district court erred in determining that Restatement (Second) of Contracts section 254 barred Fausel's claim of anticipatory breach.

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