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# IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

August 2, 2012 2012 Interim No. 3

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Tuesday, August 14, 2012

### Administrative Rules Review Committee

9:00 a.m., Room 116, Statehouse

*Iowa Legislative Interim Calendar and Briefing* is published by the Legal Services Division of the Legislative Services Agency (LSA). For additional information, contact: LSA at (515) 281-3566.

# AGENDAS

## INFORMATION REGARDING SCHEDULED MEETINGS

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### **Administrative Rules Review Committee**

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

Location: Room 116, Statehouse

Date & Time: Tuesday, August 14, 2012, 9:00 a.m.

Contact Persons: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Agenda: Published in the Iowa Administrative Bulletin:

<http://www.legis.state.ia.us/asp/BulletinSupplement/bulletinListing.aspx>

### ADMINISTRATIVE RULES REVIEW COMMITTEE

July 10, 2012

**Chairperson:** Senator Wally Horn

**Vice Chairperson:** Representative Dawn Pettengill

**ADMINISTRATIVE SERVICES DEPARTMENT (DAS), *Information Technology Enterprise; Human Resources Enterprise, 06/27/12 IAB, ARC 0180C, NOTICE.***

**Background.** This rulemaking is part of the department's ongoing comprehensive review of its existing rules. This portion of the review relates to the Information Technology Enterprise and the Human Resources Enterprise within DAS. Changes made in these amendments include amending certain definitions to reflect existing statutes, eliminating unnecessary terms, and making various technical and grammatical changes; and conforming the Information Technology Enterprise rules with current statutory law by deleting obsolete terminology, replacing the Technology Governance Board with the Technology Advisory Council, and providing for the state Chief Information Officer.

**Commentary.** A representative of the department explained the purpose of the rulemaking. The representative noted that the rulemaking is similar to a prior rulemaking which was not completed, with the exception of one controversial provision which was removed. Committee members asked about the purpose of Item 55, relating to exceptions to the retention point system for certain employees with essential skills, and whether the item could be abused to circumvent the merit system. The representative replied that the purpose of the item is to prioritize essential employees over those who do not meet expectations and that multiple layers of review exist to prevent any abuse. Committee members asked about the language of Item 57, inquiring if "meets expectations" is a sufficiently definite term, and whether it is necessary to specify that a negative rating must occur on the most recent performance review within 12 months if performance reviews are always given at least annually anyway. The representative replied that "meets expectations" refers to meeting job requirements and is standard terminology for performance reviews, which include an appeals process. It was explained that the "12 months" reference is to account for a possible situation where an employee is reviewed less than annually despite the requirement for annual reviews. Committee members also asked the department to gather and provide information regarding employees who receive performance bonuses under Item 35.

**Action.** No action taken.

**MEDICINE BOARD, *Mandatory Reporting—Hospital Action, 06/27/12 IAB, ARC 0176C, NOTICE; Grounds for Discipline—Failure to Report Hospital Action, 06/27/12 IAB, ARC 0177C, NOTICE.***

**Background.** These rulemakings require physician licensees to report to the board any action taken which results in a limitation, restriction, suspension, or revocation of their hospital privileges or any voluntary limitation, restriction, suspension, or revocation of hospital privileges to avoid a hospital investigation or hospital action; and add failure to make such a report to the grounds for which the board may take disciplinary action.

**Commentary.** A representative of the board explained these rulemakings, noting that the intent is for licensees to also report the reasons why hospital privileges are altered. These rulemakings are a response to instances where such occurrences go unreported; the board has found that this happens a few times each year. In response to questions from committee members, the representative explained that the information reported would not become public unless a subsequent investigation turned something up, and that this rulemaking only imposes a reporting requirement on licensees, not hospitals, which are not regulated by the board. A committee member noted that a limitation of hospital privileges might not necessarily involve misconduct by a licensee; it could apply to something simple like a lack of authorization to perform a particular procedure for which a licensee is not qualified.

Public comment was received from a representative of the Iowa Medical Society, who expressed concern about this rulemaking. She questioned whether specific statutory authority exists for this rulemaking, and stated that Iowa Code chapter 147 already covers these matters. She stated that the language of chapter 147 was carefully crafted and provides a multistep process for disciplinary matters, and this rulemaking goes outside of that statutory process. She noted that the statutory process includes immunity for reporting, while this rulemaking does not. She stated that the IMS would continue to work with the board on these issues going forward.

**Action.** No action taken.

**FAIR BOARD, *Lien on Vendor Property, 06/13/12 IAB, ARC 0162C, ADOPTED.***

**Background.** This rulemaking generally updates the fair board rules relating to general practices conducted during the yearly Iowa State Fair and year-round activities at the state fairgrounds. It was initially reviewed by the committee in April. One item was at issue, relating to liens placed on vendor property for rental and other fees.

*(Administrative Rules Review Committee continued from Page 3)*

**Commentary.** An objection was placed by the committee in 1981, relating to the placement of liens. The rule at issue states:

**371—4.8(173) Liens.** The Iowa state fair shall have a lien upon all property being kept, used or situated upon the fairgrounds whether the property be exempt or not, for the rent or privilege money to be paid under a space license agreement and for any damages sustained for any breach thereof. The Iowa state fair board shall have the right to attach the same without process of law, and appropriate such property to the use of the Iowa state fair to satisfy its claims against the licensee as per licensee agreement.

In 1981 the committee objected to this rule, stating:

This provision is unconscionable because it is a completely one-sided remedy which puts the state in a completely superior position to the renter; and the only reason it can be imposed is because the state fair is a unique event, and those who wish to participate must comply with the conditions imposed on a take-it-or-leave-it basis. An agency of the state, itself a creation of law, must not use its superior bargaining position to impose contractual conditions that deliberately avoid process of law for their enforcement.

The objection was renewed in 1996. During the intervening period, the statute itself has been revised. A new statutory provision was enacted in 1987, Iowa Code §173.23 provides: "The board has a prior lien upon the property of any concessionaire, exhibitor, or person, immediately upon the property being brought onto the grounds, to secure existing or future indebtedness." The statute now appears to grant an automatic lien on property brought onto the fair grounds. Board representatives stated that no one could recall that the lien process has ever been used. They noted that during the fair rental receipts are collected every day, and that in many other cases rent is actually collected in advance. Committee members were uncertain whether the old objection should be removed and scheduled additional discussion for August.

**Action.** No action taken, additional review at August meeting.

**Next Meeting.** The next regular committee meeting will be held in Committee Room 116 at the Statehouse, on Tuesday, August 14, 2012, beginning at 9:00 a.m.

*Secretary, ex officio:* Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

*LSA Staff:* Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=53>

### PROPERTY ASSESSMENT APPEAL BOARD REVIEW COMMITTEE

July 18, 2012

**Co-Chairperson:** Senator Joe Bolkcom

**Co-Chairperson:** Representative Tom Sands

**Background.** In 2005, Iowa Acts, Ch. 150, §121 (H.F. 868), established a Statewide Property Assessment Appeal Board (PAAB) and, effective January 1, 2012, a Property Assessment Appeal Board Review Committee (committee). The committee is required to review the activities of PAAB since its inception and issue a report to the general assembly by January 15, 2013, that includes any recommendations for changes in laws relating to PAAB, the reasons for the committee's recommendations, and any other information the committee deems advisable. Staff support for the committee is provided by the Iowa Department of Revenue.

**Department of Revenue's Role on the Committee.** Ms. Courtney Kay-Decker, Director, Iowa Department of Revenue (IDR), summarized IDR's role on the committee and its statutory obligations with regard to PAAB. PAAB is an independent instrumentality of the state but is housed within IDR for administrative and budgetary purposes. IDR gathers and analyzes data relating to PAAB to provide to the committee and the general assembly. Director Kay-Decker stated that IDR would welcome direction from the committee regarding the type of data and analysis the committee desires and how it could best be provided. Director Kay-Decker also provided a brief overview of PAAB's appeal procedure. At the election of a taxpayer or taxing authority, a final decision of a local board of review may be appealed to either the PAAB or district court. PAAB is required to review "de novo" any final decision of a local board of review, meaning that PAAB determines anew all questions that arose before the local board of review. Final actions of PAAB may be appealed to district court.

*(Property Assessment Appeal Board Review Committee continued from Page 4)*

**Presentation of PAAB Case Data.** Dr. Amy Harris, Manager, Tax Research and Program Analysis Section, IDR, presented data on PAAB's caseload since its inception in 2007. Dr. Harris first provided several figures that grouped PAAB's annual caseload by property classification and property classification distribution. Property classifications include agricultural, commercial, industrial, residential, or other. Dr. Harris noted that residential cases normally represent the largest percentage of PAAB's docket, but in both 2010 and 2012 year-to-date, commercial cases dominated. Committee member Mr. Rick Engelken, Dubuque City Assessor, noted that most taxing jurisdictions have a much higher proportion of residential parcels than commercial parcels, so commercial cases appear to be disproportionately represented on PAAB's caseload. Dr. Harris noted that PAAB typically experiences larger caseloads during reassessment years, which occur during oddnumbered years.

Next, Dr. Harris provided several figures that grouped PAAB's annual caseload by outcome and outcome distribution. Outcomes include affirmed, modified, stipulated (cases settled between parties prior to PAAB's ruling), or other (cases dismissed, withdrawn, or pending). Dr. Harris noted that stipulated cases normally represent the largest percentage of outcomes. Several committee members commented on the reasons for the high percentage of stipulated cases. Mr. Engelken stated that litigation costs often factor into the decision to stipulate. Also, in some cases, the assessor's value is incorrect and the error is not discovered until appraisers are hired by the assessor in preparation for a PAAB hearing. Committee member Mr. Bruce Hovden, Floyd County Assessor, stated that stipulations often result from additional information that the taxpayer failed or refused to produce at the local board of review appeal level. Committee members expressed concern that taxpayers may be in effect skipping the local appeal level to go straight to PAAB.

Finally, Dr. Harris provided tables on PAAB's modified decisions according to year, jurisdiction, and property class. The tables presented data on the number of cases, the average assessed value considered by PAAB, and the average modification issued by PAAB. Dr. Harris noted that since its inception in 2007, PAAB has issued a total reduction in assessed value of \$68.6 million.

**Presentation by PAAB.** The committee invited Mr. Richard Stradley, PAAB member, to speak. Mr. Stradley stated that this meeting was his first opportunity to see the data compiled by IDR relating to PAAB and the first time the public has expressed interest in PAAB's work since its creation. He stressed the importance of also reviewing the local board of review appeals process. He believes the local process is too complicated and taxpayers often get a very short amount of time to present their case. Taxpayers want an opportunity to be heard, and more effort should be made to simplify the process on the local level. He also suggested that the committee get input from the attorneys and tax practitioners who frequently practice before PAAB; he believes most are of the opinion that PAAB is more knowledgeable and cost efficient than district court.

**Additional Committee Discussion.** The committee discussed the data presented during the meeting and made several requests for additional information. Committee members stressed the importance of reviewing the work and processes of PAAB to ensure that taxpayers are being provided a fair and honest hearing and that value is being added as a result of PAAB's role in the appeals process. The committee members expressed interest in learning about how the local board of review appeals process could be improved. The committee members briefly discussed the possibility of recommending imposition of a minimal user or filing fee for persons filing an appeal to PAAB, but stressed the need for a thorough evaluation and cost/benefit analysis before such a recommendation would be proposed or considered by the committee.

**Next Meeting.** The committee tentatively agreed to hold another meeting later in the year after more information has been gathered and more stakeholders have had an opportunity to comment. IDR offered to produce and provide a questionnaire to various stakeholders and to invite some stakeholders to testify at the next meeting.

*IDR Contact:* Victoria Daniels, Public Information Officer, (515) 281-8450.

*LSA Contacts:* Michael Mertens, Legal Services, (515) 281-3444; Michael Duster, Legal Services, (515) 281-4800; Susan Crowley, Legal Services, (515) 281-3430.

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=851>

### LEGAL UPDATE

**Purpose.** A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative affairs of recent court decisions, Attorney General opinions, regulatory actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. As with other written work of the nonpartisan Legislative Services Agency, although this briefing may identify issues for consideration by the General Assembly, nothing contained in it should be interpreted as advocating a particular course of action.

### LEGAL UPDATE—INSURANCE PRODUCERS—SCOPE OF DUTY

Filed by the Iowa Court of Appeals

February 29, 2012

*Wuebker and Wuebker v. Heenan Agency, Inc., and Ray Heenan*

No. 10-2036

Unpublished Decision — [http://www.iowacourtsonline.org/court\\_of\\_appeals/Recent\\_Opinions/20120229/1-960.pdf](http://www.iowacourtsonline.org/court_of_appeals/Recent_Opinions/20120229/1-960.pdf)

**Background Facts and Procedure.** The plaintiffs, Jerome and Debra Wuebker (Wuebkers) own and operate an automobile servicing garage, body shop, and automobile detailing businesses in Perry, Iowa. For many years the Wuebkers were advised by and purchased property casualty insurance for their businesses from the defendants, Heenan Agency, Inc. and Ray Heenan (Heenans). In May 2008, a fire caused extensive damage to the Wuebkers' businesses. In the aftermath the Wuebkers discovered that their insurance policy was inadequate to cover their losses.

In May 2009, the Wuebkers filed a negligence claim against Heenans alleging they breached their duty of care by failing to advise the Wuebkers of the amount of coverage needed and to obtain the amount of coverage needed.

In August 2010, the Heenans moved for summary judgment. In December 2010, the district court granted summary judgment in favor of the Heenans, citing *Sandbulte v. Farm Bureau Mut. Ins.*, 343 N.W.2d 457 (Iowa 1984). In that case, the Iowa Supreme Court (Court) held that an expanded agency agreement sufficient to require a greater duty of care from an insurance producer exists only when the insurance producer holds oneself out as an insurance specialist, consultant, or counselor and receives compensation for such consultation and advice apart from premiums paid by the insured. The district court found that the facts did not support an expanded agency agreement between the Wuebkers and the Heenans. The Wuebkers appealed and the case was transferred to the Court of Appeals.

While the appeal was pending, two events relevant to the case occurred. First, in December 2010, the Court issued a decision in *Langwith v. American National General Insurance Company*, 793 N.W.2d 215 (Iowa 2010) that overruled *Sandbulte* to the extent that *Sandbulte* limited the expanded duty of care an insurance producer owes to clients to specific situations. Instead, the Court held that the fact finder could determine, based on the circumstances of each case, what the agreement of the parties was with respect to the service to be performed and whether the service was performed with the skill and knowledge normally possessed by insurance producers under like circumstances.

Second, in April 2011, during the next legislative session after the *Langwith* decision was issued, the Iowa General Assembly enacted Iowa Code §522B.11(7) adopting the holding in *Sandbulte* and explicitly abrogating the *Langwith* decision. This legislation restored the limited scope of an insurance producer's duty to clients except in specific situations.

#### Issues on Appeal.

1. Whether the expanded scope of duty for insurance producers adopted by the Court in the 2010 *Langwith* decision applies retroactively to this case.
2. Whether the limited scope of duty for insurance producers enacted in 2011 in Iowa Code §522B.11(7) has only prospective applicability and does not apply to this case.
3. Whether Iowa Code §522B.11(7) violates equal protection and the separation of powers under the Iowa Constitution.

**Analysis and Holding.** The Court of Appeals found that Iowa Code §522B.11(7)(a) provides that the *Sandbulte* case defines the duties and responsibilities of insurance producers. The Court of Appeals noted that while the statute does not expressly address the subject of retroactivity, subparagraph (b) necessarily implies that subsection (7) is intended to eliminate the application of the principles set forth in the *Langwith* case. The Court of Appeals said that the newly enacted statute, adopted only months after the *Langwith* decision, is "an obvious effort to correct what the legislature determined to be a court decision that did not express what the legislature wanted the public policy to be with respect to duties and responsibilities of an insurance producer." The Court of Appeals further noted that it is just and reasona-

*(Legal Update—Insurance Producers—Scope of Duty continued from Page 6)*

ble to apply the principles of the *Sandbulte* case since that was the law in effect when the alleged breach of duty occurred, when the summary judgment was granted, and when the Wuebkers filed their appeal, and this interpretation gives effect to the entire statute and addresses the public interest as defined by the legislature.

**Constitutional Claims.** The Wuebkers asserted that Iowa Code §522B.11(7) violates equal protection because it provides a different standard of care for insurance producers than for other professions. The Court of Appeals held that the standard enunciated in *Sandbulte* is “reasonable care” which is the normal common law requirement for a negligence claim. The purpose of providing protection to an insurance producer from an expanded agency relationship has a rational basis and is not constitutionally deficient.

The Wuebkers also asserted that the legislature violated the separation of powers principle by adopting Iowa Code §522B.11(7). The Court of Appeals held that the legislature has the power to enact statutes that establish standards and scopes of duty for insurance producers. The Court of Appeals also held that while the legislature may not use retroactive legislation to control cases already finally adjudicated by the courts, the legislature does have the power to enact a law that is clearly retroactive and that law must be applied in reviewing judgments still on appeal that were rendered before the law was enacted. Since this case had not reached a final judgment within the courts, retroactive application of the new statute to this case does not constitute a separation of powers violation.

*LSA Monitor:* Ann Ver Heul, Legal Services, (515) 281-3837.