MINUTES OF THE SPECIAL MEETING
of the
ADMINISTRATIVE RULES REVIEW COMMITTEE

Time of Meeting: Tuesday, February 14, 1978, 7:50 a.m.

Place of Meeting: Senate Committee Room 24, Statehouse, Des Moines, Iowa

Members Present: Senator Berl E. Priebe, Chairman; Representative W.R. Monroe, Jr., Vice Chairman, Representatives Laverne Schroeder and Donald V. Doyle, Senators Minnette Doderer and E. Kevin Kelly.

Also Present: Joseph Royce, Administrative Co-ordinator.

PAROLE BOARD

Janet Johnson, Donald Olson and John Ayers presented the following rules on notice, carried over from the January meeting, to the Committee:

General, Chs 1 to 9, carried over from Jan. mtg. 12/14/77

Johnson, Chairperson of the Parole Board, stated that the board had been expanded to 5 members and that the rules did reflect this change along with the implementation of rule changes brought about by the revision of the Criminal Code. Doyle inquired if all 5 board members had reviewed the rules and Johnson replied that they had not all met together but that the members had had the opportunity to review the rules separately. However, discussion of the rules is to be held at their next meeting.

Doyle suggested that rule 2.1 be changed to require a majority affirmative vote of the board rather than a majority of those voting, to grant a parole.

Schroeder questioned in rule 4.1 the usage of the word "may"; Johnson stated that the statute (Criminal Code 906.4) does state "shall" rather than "may," and that the rule will be changed to bring it in compliance with the statute.

Doyle suggested that the board clarify rule 7.7(2) and rule 7.7(6) by combining the two or otherwise eliminating wording which might cause confusion.

In response to inquiry from Priebe about the board's policy on quorum decisions, Johnson stated that it probably would be acceptable to the board to have a quorum, 3 of the 5 board members, for decisions on substantive matters.

Rev. Ramon A. Runkel and James Cleary, attorney, both represented the Catholic and Luthern churches and presented the attached document* of suggested rule changes to both the board and Committee. Cleary outlined the proposals and discussed them with Johnson,

* p. 508

PAROLE BOARD (continued)

Olson, Ray Cornell, the Ombudsman for the prisoners, and members of the Committee. Johnson pointed out that many of the proposals were already implemented by the board and in some instances the proposals were not required by the Criminal Code; however, there was nothing preventing the rules from, in specific instances, being more liberal. Cleary stated that his organization would like the rules to reflect accurately the actions of the board.

A discussion of rule 3.1 centered around computation of the initial twelve months of incarceration and the interpretation of "admission to the institution of original incarceration." Ayers discussed the Social Services Department's method of computation and there was general discussion as to whether pre-sentencing time served would count in the twelve-month period for computation purposes. Priebe suggested that all concerned parties meet and discuss the rules and proposed changes before these rules are filed.

Olson stated that an open meeting was going to be held this evening, Tuesday, February 14, 1978, for this board.

HEALTH

Peter Fox presented the rules filed emergency on Immunizations to the Committee, and Ron Masters of the Chiropractic Board of Examiners presented the rules on chiropractic to the Committee as follows:

| | |
|---|---|
| Immunizations, 7.4(3), 7.4(4), 7.4(4) "c", "d", filed emergency | 1/11/78 |
| Chiropractic practice, 141.14 N | 2/8/78 |
| Chiropractors, continuing education, 141.25 to 141.34 N | 2/8/78 |

Fox explained that the immunization rules were filed emergency as they merely clarified existing rules and did not change the concept of said rules. There was no further Committee discussion of these rules.

Masters briefly presented the notice rules on chiropractic practice emphasizing that section 147.76 of the Code sets out the provisions for examining boards to promulgate rules to implement and interpret their respective chapters in the Code, i.e. chapter 151 in this case.

Doyle requested that the board desex chapter141 Kelly asked for a definition of "permissible duty" to which Masters replied that it is determined on a case by case basis within the precepts of chiropractic. Kelly suggested that an alternative be found for "duty" perhaps "function" to clarify meaning. Doderer asked how "instruction on diet, food", section 141.14(5) differs from nutrition , as nutrition was specifically excluded from the text of the Practice Acts, chapter 147 of the Code. Masters differentiated between the two stating

HEALTH
(continued)

that the board promulgated rules which set out the duties incident to the practice of chiropractic and in order to allow a basis for future rules defining and, in some instances, limiting such practice.

Robert Throckmorton, counsel for the Iowa Medical Society, presented the attached "resistance" to the Committee and to the board. In summarizing the position of the medical society, Throckmorton stated that the board with its action of promulgating these rules was, in fact, usurping the duties of the General Assembly as they were rewriting the statute not just interpreting the statute. Throckmorton referred to the language of "diagnosis" in 141.14(1), "use, at his discretion, laboratory findings in determining the nature and manner of chiropractic treatment" in 141.14(2), and "give a patient advice and instruction on diet, food and exercise" in 141.14(5), as examples within the proposed rules of the board's attempt to expand the practice of chiropractic when state law defining the practice of chiropractic has been confined to treatment and has not been interpreted by the courts as allowing diagnosis.

Lex Hawkins, counsel for the Iowa Chiropractic Society, stated that the board had the power to promulgate rules implementing the statute and that diagnosis was certainly an intrinsic part of the duties of chiropractic, particularly, as set out in 151.8 of the Code. Hawkins stated that if a chiropractor was prohibited from diagnosis and attempted to treat a patient, that chiropractor would be liable for malpractice. Hawkins stated that the board had held evidentiary hearings and that at that time, evidence had been presented supporting the position of the board. Jerry Estes of the Chriopractic Board of Examiners, in the discussion which followed, brought out that the functions of Osteopaths had changed drastically over the years through implementation of rules and interpretation of the statutes. Larry Lindeman board member and Ames practitioner of chiropractic, objected to the double standard of such organizations as TOPS and Weight Watchers offering instruction in nutrition and yet a chiropractor trained in nutrition is not allowed to give such instruction.

Monroe asked of Throckmorton if the medical society had utilized all the provisions of 17A in resisting the actions of the board, i.e. submitted written comments, requested a hearing, and requested an attorney general's opinion. Throckmorton replied that the medical society was submitting the resistance (attached)* going to request hearing before the Feb. 28 deadline and would ask for attorney general's opinion.

Gene Cretsinger, secretary-treasurer of the Chiropractic

* p. 519

HEALTH (continued)

Society of Iowa submitted a letter to the Committee and the board, see attached*, opposing the rules and urging the Committee to withhold approval of the proposed rules. Cretsinger's group wants to redefine diagnosis as the "chiropractic analysis of spinal related condition or syndrome" which would clarify the position of the chiropractor in the medical community.

Masters pointed out that these rules were promulgated unanimously by the board and the makeup of the board includes all organizations of those trained in the practice of chiropractic, including representatives of Cretsinger's group.

A discussion was held on the continuing education rules, 141.25 through 141.34. Monroe pointed out that there was a conflict between the December 31, 1978 date found in the definition of "hour", 141.25(3), and the date found in 141.26(1), of January 1, 1979, which could cause some confusion as to when accruing of time spent for continuing education should begin. Monroe stated that 141.26(4) concerning continuing education carry-over credit with a limitation of three years was not in compliance with the statute.

Monroe stated that "shall apply for accreditation to the board stating its education history for the preceding two years" was arbitrary, and held a discussion of this wording with Fox. The health department drafted these rules on continuing education as examples for the examining board, and Fox pointed out that this area, as set out in 141.28(1), was applicable only to sponsors. Doyle requested that at the end of this same subrule, the last sentence be deleted in that it gave the impression of ruling out appeals to the board.

A discussion of 141.32 of other instances, besides those stated specifically in the rule, disability or illness, when waiver of minimum educational requirements could be granted was held. Masters stated that the board limited the instances so that they would not be overwhelmed with requests for waivers. However, the Committee urged the liberalization of this rule. Reference to a "physician licensed by the board of medical examiners" was pointed out to Masters by the Committee, and he guaranteed that it would be changed to chiropractic board of examiners.

Monroe questioned the wording of 141.33 stating that it was not in line with legislation in S.F. 312, 67(1) GA, and suggested that the board review Said Act.

ARCHAEOLOGIST
see page 473 of the 12-13-77 minutes

In view of the fact that the archaeologist had complied with the Committee recommendations and overcame objection as moved by Kelly on December 13, 1977 to filed rule 6.3

* 523

ARCHAEOLOGIST (continued) Objection and 70 Day Delay Removed

by deleting the rule in question, Schroeder made a motion that the Committee's objection and 70 day delay be removed. Schroeder's motion carried unanimously with 6 "ayes".

CIVIL RIGHTS COMMISSION

Barbara Snethen, Hearing Officer, appeared before the Committee to present the following notice rules:

| | |
|---|---|
| Rules of practice, 3.1(4), 3.1(5), 3.1(6), 3.3(1), 3.3(4), 3.5(2), 3.5(3), 3.6(9), 3.8, 3.10, 4.11, 4.12 | 1/11/78 |

Snethen explained that these rules represented a revision of the commissions rules of procedure. Note was made that IMA had submitted recommendations to the agency.

PROFESSIONAL TEACHING PRACTICES

Don Bennett presented the Professional Teaching Practices Commission filed rules to the Committee as follows:

| | |
|---|---|
| Unprofessional conduct, 3.2 | 2/8/78 |
| Criteria of competent performance, Ch 4 | 2/8/78 |

OBJECTION

Monroe moved to object and the Committee voted unanimously, 6 "ayes", in favor of the following:

> The Committee objects to subparagraphs 3.2(1)b and c on the grounds that they exceed the statutory authority of Iowa Code Chapter 272A. It is the opinion of the Committee that such terms as 'moral turpitude' and 'sexual conduct with or towards minor students' do not adequately describe the proscribed behavior.

SOCIAL SERVICES

Judith Welp, Methods and Procedures, was present for review of the following rules:

| | |
|---|---|
| Hearings and appeals, 7.1(15) | 2/8/78 |
| Correctional institutions, 17.2(17), 18.2(8), 19.2(16), 20.2(7), 21.2(22) | 2/8/78 |
| Supplementary assistance, application, 50.2(1), 50.2(2), 50.4 | 2/8/78 |
| Supplementary assistance, eligibility, 51.3(2) | 2/8/78 |
| Supplementary assistance, payment, 52.1(1), (3), (5), (6) | 2/8/78 |
| Medical assistance, 78.1(2)"c", 78.2(4), 78.4(1)"i"(5), 78.5(3) | 2/8/78 |
| Foster family homes, license, 106.2(3), 106.9(1) | 2/8/78 |
| Homemaker-home health aide services, 144.5 | 2/8/78 |
| Adult protective services, Ch 156 | 2/8/78 |
| SOCIAL SERVICES[770] F | |
| Riverside release center, 21.2(1,3,4,5), 21.16, 21.20 | 2/8/78 |
| ADC, 41.6(1)"d", 41.6(4), 41.7(4)"j" | 2/8/78 |
| Medical assistance, 78.4(3) | 2/8/78 |
| Medical assistance, provider agreement, 79.5, 79.6 | 2/8/78 |
| Homemaker-home health aide, 144.4 | 2/8/78 |
| Purchase of service, 145.11 | 2/8/78 |

Welp reviewed the notice rules and in response to Monroe as to the advisability of photographing visitors for identification purposes, 17.2(17), 18.2(8), 19.2(16), 20.2(7), and 21.2(22) discussed better security measures and more adequate means than photography.

SOCIAL SERVICES (continued)

Priebe and Welp had a discussion of state supplementary assistance in general. Priebe inquired if the state could suggest changes through the proper channels to the federal regulatory body and Welp said that this could be done but then rule changes could not automatically follow as such changes would require a change in the state statute dealing with such subject and then rules could be promulgated.

Schroeder led a discussion of the amendment to subrule 106.9(1) dealing with corporeal punishment in foster care situations. Schroeder stated that some of his constituents who were foster families were upset that spanking of foster care children would be prohibited under the new rule, as under certain circumstances a well placed swat on the bottom could be extremely effective in disciplining. Welp explained that the department felt that other means of disciplining should be used by foster parents and cited along with Howard Seeley, DSS Licensing, the statistics of child abuse among foster families (20 reported, 9 proven out of over 1,000 foster care families). Mary Lou Secor, foster parent from Badger, Iowa, asked that the department reconsider its decision to implement this rule as she felt that the department would lose many of its foster families simply because of the effect which this rule would have, i.e. chance for distrust to develop between foster parent and foster child because of leverage child could achieve by threatening to report spankings whether or not they occurred, and the inability of parents to deal equally with their own children and foster children. Secor admitted that all other means of discipline should be tried before spanking, however, it often was the means which was the most impressive. The Committee was polled and it was unanimous, 6 votes, that the department should clarify these rules on corporeal punishment, and it was suggested to Welp that the department secure the assistance of Secor in clarifying this wording.

Poll of Committee

Priebe and Welp discussed purchase of services rules, 144.5 and Preibe voiced the concern that these rules were in opposition to the current thrust of the Budget Subcommittee. Schroeder questioned the screening of applicants for homemaker-home health aide, 144.5(5)c and Doderer suggested that generic training, 144.5(6)a be changed to training to clarify the meaning of the sentence.

Doyle pointed out that the department cited the wrong Code authority, 217.6, for the adoption of their rules for Chapter 156. Doyle also suggested that the reference to transportation services in 156.3(1) should be clarified, the reference to the worker seeking to have a guardian appointed in 156.3(2) should be placed into the proper

SOCIAL SERVICES (continued)

terminology so that proper legal channels would be followed in the event this action was deemed necessary. Doyle also pointed out that in 156.4 reference to a "law enforcement officer" should specify that a warrant to gain admittance should be obtained through the office of the county attorney. Monroe asked that the department in rule 156.3(3) update their reference to "commitment of alcoholic" to reflect more recent usage of the term substance abuse so that all forms of chemical abuse could be included.

Welp concluded with a resume of the filed rules and the Committee questioned subrule 21.2(3)b in that it made no provision for minor children visiting alone those incarcerated if there was no parent or guardian to sign permission slip and in addition the Committee questioned the arbitrary designation of age in the subrule and expressed the need for the department to consider liberalization of this rule. No objection was filed, but the Committee requested that Welp report the requests of the Committee to the governing board and report back to the Committee.

Welp to report to governing board and back to Committee

JUDICIAL NOMINATING COMMITTEE

Upon request, as stated at the 1-3-78 meeting, Justice Mason appeared before the Committee along with William J. O'Brien, Court Administrator. The Committee and Justice Mason discussed the notice rules and Justice Mason assurred the Committee that those areas with which the Committee had some problem would be relayed to the nominating commission for their consideration.

BANKING
COMMERCE
NURSING
APPEAL BOARD
ARTS COUNCIL
CONSERVATION
ENVIRONMENTAL QUALITY
INSURANCE
LABOR
PLANNING AND PROGRAMMING
PUBLIC SAFETY

The following rules were acceptable to the Committee as published:

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|---|---|
| BANKING[140] N | |
| Interest and deposits, 8.5(1), 8.6 (last paragraph), see also filed emergency | 1/11/78 |
| COMMERCE[250] N | |
| Rate increases — customer notification, 7.4(1) | 2/8/78 |
| NURSING[590] | |
| Re-examination, 3.1(5)"a"(5) [typo corrected] | 2/8/78 |
| Continuing education, 5.1 N | 2/8/78 |
| APPEAL BOARD[60] N | |
| Tort and general claims, 1.2(3), 1.3(3), 1.5, 1.8, 1.11, 1.12, 3.2(3), 3.3 | 2/8/78 |
| ARTS COUNCIL[100] F | |
| Assistance grants, 2.1(5)"f" | 1/25/78 |
| CONSERVATION[290] N | |
| Fishing regulations, Ch 108, see also filed emergency | 2/8/78 |
| Inland commercial fishing, 110.2, see also filed emergency | 2/8/78 |
| CONSERVATION[290] F | |
| Des Moines River zoning, 30.60 | 1/25/78 |
| ENVIRONMENTAL QUALITY[400] F | |
| Description of organization, 50.4(3) Without Notice | 1/11/78 |
| INSURANCE[510] | |
| Life policies, back dating, 30.5 N | 2/8/78 |

LABOR[530] N
Recordkeeping requirements, 4.2(1), 4.2(2), 4.2(2)"a", "b", 4.3, 4.4(1), 4.5(1), 4.5(2), 4.5(3), 4.5(4), 4.6, 4.12(1), 4.14, 4.16(1), 4.16(2), 4.17 — 2/8/78
Findings of serious and imminent danger hazards, 6.9 — 1/25/78

PLANNING AND PROGRAMMING[630] F
Economic opportunity office, Ch 9 — 1/11/78

PUBLIC SAFETY[680]
Weapons, fingerprinting, 2.303(1)"d", filed emergency — 1/11/78
Criminalistic laboratory, 4.5(5) N — 1/11/78

LABOR
PLANNING AND PROGRAMMING
PUBLIC SAFETY (continued)

EMPLOYMENT SECURITY

Mr. Harold Keenan was present to submit the following rules to the Committee:

Selective review of 4.22(1)"r" — benefit eligibility conditions for on-call worker — IAC
Advisory investment board, quorum, 8.1(2)"f" N — 2/8/78

Selective Review 4.22(1)r

The Committee noted that the subject matter dealt with in the material to be discussed in the selective review has been taken under advisement by the department in light of the petition for rulemaking, a copy of which is attached,* to amend 4.22(1)r.

The Committee discussed the rule on notice with Keenan noting that the authority cited to promulgate this amendment, 96B.3 and 96B.15, is incorrect. The correct Code cite should be 97B.3 and 97B.15. In addition, the Committee requested that for substantive matters, a quorum should consist of 2/3 of the board members holding office and that a quorum should be required for passage of said matters.

CITY DEVELOPMENT BOARD

Larry O'Toole presented the following notice rules to the Committee:

Operations of board and committee proceedings, Chs 1 to 4 — 1/11/78

The Committee discussed the quorum requirements with O'Toole and requested that 3 members, a majority of the board, vote on substantive matters. O'Toole concurred and said that he would present this request to the board.

Schroeder inquired about giving adequate notice to property owners, 2.3(4), and the consequences if notice cannot be served adequately. O'Toole stated that what is really needed is a test case to determine if such notice is adequate, but so far there has been none.

Schroeder of rule 2.3(6) inquired if securing population projections was a problem. O'Toole stated that the board has access to public records, 2.6, and the the department of planning and programming has population projection studies for the counties, particularly cities over 2500.

TRANSPORTATION

The following rules were presented to the Committee for review:

Reciprocity permits, [07,F] 1.3(2) — 1/11/78
Appendix to [01,B] 2.8 amended — 2/8/7(
Junkyard control, [06,F] Ch 7 — 2/8/7(

Federal-aid urban system and project construction, [06,F]2.1, 2.1(1)"c", "d", 2.1(3)"a", "c", "d", 2.1(4) "d"(3), 2.1(4)"e"(2) — 1/11/78



* p. 525

TRANSPORTATION (continued)

Candy Bakke summarized the reciprocity rules [07,F] and emphasized that these rules clarify the requirements for independent operators.

Julie Fitzgerald presented the rules on the appendix, [01,B], stating that this involved a change of office and division names.

Bill Hays presented the rules on junkyard control, [06,F], to the Committee for review. Schroeder and Hays held a discussion of screening and at which point a car is considered junk, see minutes 12-13-77 meeting, page 475.

Harold Scheel presented the notice rules on federal-aid urban system, [06,P]. There was no discussion by the Committee.

REVENUE

Vernon Morgan, attorney for the the Tax Review Committee, presented the revenue rules to the Committee as follows:

Practice and procedure, 7.6, 7.8-.11, 7.16, 7.17, 7.23, 7.24 — 2/8/78

Doyle and Morgan had a discussion of whether a power of attorney was necessary in order that an attorney have access to a client's tax records.

AGING COMMISSION

Dick Woods presented the following filed rules to the Committee:

Organization and responsibilities, 1.2, 5.6 — 2/8/78

OBJECTION

Monroe moved to object as follows:

> The Committee objects to rule 5.6, banning agency employees from holding elective, partisan offices, on the grounds that the rule exceeds the statutory authority of the agency. The Committee specifically refers to Code section 19A.18, which forbids merit employees from engaging in partisan activity only during working hours.

The motion carried unanimously with 4 ayes; Priebe, Schroeder, Doyle and Monroe, Kelly and Doderer not voting.

BEER AND LIQUOR CONTROL

Rolland Gallagher, Director, presented the filed rules to the Committee as follows:

Liquor stores, leasing, Ch 11 — 2/8/78

Schroeder and Gallagher had a discussion of rule 11.2 and the power expressed of the director in the procurement policy.

The Committee requested that Gallagher amend rule 11.12, after a discussion between Gallagher and Schroeder, to

BEER AND LIQUOR CONTROL (continued)

read as follows: "Any person may request to be placed on a liquor store lease bidders list. Such person must notify the department in writing that they wish to be placed on the bidders list." The Committee suggested to Gallagher that he file these changes without notice, as the amendment does not involve substantive changes.

HISTORICAL DEPARTMENT

Doug Lovett, Voter Registration, was present for the presentation of the rules to the Committee as he had drafted these rules, however, no representative of the historical department was present.

Historic preservation districts, Ch 12 2/8/78

Lovett summarized the rules as filed with discussion by the Committee.

OBJECTION

Monroe moved to object as follows:

> The Committee objects to subrules 12.4(1), (7), (8), and (9) on the grounds they exceed the statutory authority of the division. It is the opinion of the Committee that subrule 12.4(1) places greater burdens on the petitioner than contemplated in Code section 303.22. The Committee further notes that Code section 47.3 mandates that the political subdivision for which the election is held shall pay the election costs.

The motion carried unanimously with 4 ayes; Priebe, Schroeder, Doyle and Monroe, Kelly and Doderer were not present.

Jack Porter, Des Moines Planning & Zoning, was also present to hear the presentation of the department and expressed the concern of his agency concerning the creation of historical districts as section 414 of the Zoning Code created neighborhood commissions and Porter felt that the department's rules were in conflict with this concept unless they were applied only to areas in which the commissions had not been established.

MOTION-Notification of House & Senate of Committee Meeting

Doyle made a motion and it was passed unanimously with 4 ayes; Priebe, Schroeder, Doyle and Monroe, Kelly and Doderer were not present, for the Secretary to notify the Secretary of the Senate and the Speaker of the House of the time and place of the Committee meeting and note those members present.

IOWA ADMINISTRATIVE BULLETIN-Printing Difficulties

Vern Lundquist appeared before the Committee to discuss some of the questions which must be resolved before the printing department could proceed with the printing of the Iowa Administrative Bulletin. The Committee voiced no objection to the alternating of the printing of the Bulletin and the Filed Rules in order to utilize

IOWA ADMINISTRATIVE BULLETIN-Printing Difficulties

the same type (otherwise, two sets would have to be set, if simultaneous printing was deemed necessary).

Lundquist, the Secretary, and the Committee discussed the problem presented by the fact that contracts with present subscribers would not terminate until July 1, 1978, and it was unlawful for the printing department to terminate any such contracts at an earlier date. The Committee unanimously agreed that the Secretary should prepare a request so that Senator Doderer could amend H.F. 2099 when it was presented to the Senate for vote, so that the Senate's version of the bill would delay implementation of the Iowa Administration Bulletin until July 1, 1978 and omit reference to "proclamations" in Sec. 3.b. (line 10 of page 4, H.F. 2099).

MINUTES

Doyle moved for the adoption of the minutes of the January 3, 1978 meeting and the motion carried unanimously.

ADJOURNMENT

Chairman Priebe adjourned the meeting at 12:30 p.m. to be reconvened March 14, 1978 at 7:30 a.m.

Respectfully submitted

Phyllis Barry

(Mrs.) Phyllis Barry, Secretary
Assistance of Mary Applegate

APPROVED:

_____
Chairman

DATE_____

PAROLE BOARD
Churchs'
Recommendations

SPECIFIC CHANGES RECOMMENDED
TO THE PROPOSED RULES, WITH COMMENTARY

615-2.1(247) As written, this section would permit the three earlier appointees to the Board of Parole to continue to sit on all cases, without the input of the new members, a violation of the concept and purpose of the expanded Board. Maximum opportunity for maximum participation should be given to all Board members, while not requiring all Board members to sit on every parole-granting or decision-making meeting. That can be accomplished by periodic rotation of Board membership. To assure such rotation, we propose the following change to the proposed section:

"Majority vote. All parole granting decisions shall be made by not less then three members of the board of parole and shall require an affirmative vote by a majority of those voting on each case. At least once each quarter, the board of parole shall reconstitute the membership of the panel which considers paroles to assure maximum variation in its make-up throughout the year."

615-2.3(247) The inmate who is turned down for parole without any opportunity to meet with the Board is not infrequently left without knowledge of the meaning of his or her activities during incarceration. We ask the Board to amend this section as follows:

"Consideration at monthly meetings. Upon reviewing an inmate's progress report, the board shall make a tentative decision as to whether or not the inmate should be granted a parole. ~~If the tentative decision is to grant a parole,~~ Except where waived by the inmate, the inmate normally shall be given a parole interview by at least two members of the board."

615-2.4(247) (NEW) The power of the Board to continue incarceration is virtually untrammeled. The Board's ability to exert that power arbirtarily is always to be recognized and guarded against. The quasi-judicial nature of the Board gives it sufficient control over the paroling process to let it allow maximum opportunity for fair hearing without endangering its role or lessening its control. The expertise and training of institutional and Board staff assure optimum presentation of the State's case in the paroling process. No less does the inmate deserve an opportunity to assure himself or herself a fair hearing, with opportunity for optimum presentation of a case to the Board and, as important, to respond to the State's case. Just as the Board recognizes the need for adequate representation of the parolee at parole revocation hearings, so should it give opportunity for representation by an inmate who feels inadequate or overwhelmed by the parole hearing process. Accordingly, we recommend that the following new section be added after Section 615-2.3(247), which would embody the Iowa Standards and Goals conclusion on the need for such representation at every point in the paroling process:

"Representation. Inmates shall be advised of their right to representation at any hearing or interview held to consider the grant or denial of parole. Such representation may be by legal counsel or by counsel substitute, which shall include law students, correctional staff, inmate paraprofessionals, or other trained paralegal persons."

PAROLE BOARD
Churchs'
Recommendations

615-3.0(247) (NEW) The Parole Board has expressed its intent to meet with inmates shortly after their arrival in the system. The proposed rules do not reflect any such goal. The time most frequently heard mentioned is sixty days after sentencing, a point when tests, evaluations and interviews would be completed, pre-sentence reports available, and orientation completed. Review at that time would likewise give opportunity for consideration of an inmate for shock parole, lesser security, work release, or other programs which might respond to a showing of need for other than institutional incarceration. We would recommend that Chapter 3 of the rules be revised by changing the title to "INMATE PROGRAMS, PROGRESS REPORTS, AND INMATE INTERVIEWS", and that the following new section be added as the first section of that chapter:

"Inmate parole programs. Within sixty days of arrival of the inmate into the corrections system, a member of the parole board shall meet with the inmate to formulate a program of approved activities for the inmate. Such program shall consider information obtained by test and evaluation of the inmate, such information as is available from the sentencing authorities, availability of programs within the correctional institutions, and such other information as can assist in the formulation of such a program."

615-3.1(247) Where an inmate is kept in a jail for any period of time after sentencing, or is for any other reason delayed in arriving at the institution of incarceration, he or she should be given credit for that time in the computation of the time for first progress report. Accordingly, we recommend the following changes:

"Annual progress reports. Except as otherwise provided, progress reports and parole recommendations shall be submitted by the institution or facility staff to the board of parole at least once every twelve months. The initial twelve months shall be computed from the month of the inmate's date of admission to the institution or jail of original incarceration after sentencing, with day-for-day consideration for pre-sentence incarceration."

615-3.4(247) The Board should reconsider its method of dealing with recommendations for commutation of life sentences. There is no valid reason for not publicizing the results of its deliberations and its recommendations. Further, periodic review is well within the Board's capabilities, and the nature of the Board's function in the criminal justice system makes such review practical and advisable. We recommend the following changes to this section, to conjoin with further changes elsewhere, all toward a more fair and open manner of dealing with the commutation question:

"Progress reports for inmates serving life sentences. No A progress report need shall be submitted to the board of parole for any inmate serving a life sentence except in accordance with the requirements of the Code or within five years from date of sentence, every two years thereafter, and when specially requested by the Board of Parole."

PAROLE BOARD
Churchs'
Recommendations

615-3.6(247) The proposed rules permit a "right" to an interview at least once a year; we propose that the rules simply state, the inmate shall be interviewed, thus removing the process from possible inclusion in the list of other failed inmate rights. The right to appeal is no right at all if the appeal is (as the proposed rules state) to a Board employee, a liaison officer; if an appeal is offered, as it should be, it must be a real, effective right. We recommend that the subsections be changed as follows:

"Parole interviews.

"3.6(1) Except where waived by the inmate [illegible], at least once in each twelve-month period an inmate shall ~~have a right to an interview~~ be interviewed before two or more members of the board of parole; except ~~that an inmate who is on work release status shall not be given the right~~ to need not appear for an inmate interview unless requested by that inmate. An inmate on patient status at the Iowa Security Medical Facility shall not be granted an inmate interview unless if requested by the inmate, unless the medical staff of that institution proves to the satisfaction of the board that such would be harmful to the inmate. ~~and approved by the medical staff at that institution.~~ An inmate who is serving time in an institution outside of the State of Iowa shall be entitled to have such interview(s) as may be provided by the state in which that inmate is incarcerated., but no less frequently than these rules shall provide. When an inmate is not available for an interview because of institutional transfer, hospitalization, release on court order, or for any other reason, such interview shall be conducted when ~~annual~~ interviews are next conducted where that inmate is then incarcerated."

"3.6(2) If the board of parole decides to grant a parole to the inmate such fact shall be promptly communicated to the inmate."

"3.6(3) If the board of parole determines that parole should not be granted, as a result of the inmate interview and consideration of such other facts ~~that~~ as have been brought to the attention of the board of parole, the inmate shall be notified in writing, particularized to the individual case, of such fact and the reasons therefor. The inmate shall also be notified of the right to appeal the board's decision to ~~its liaison officer or officers~~ the entire board. Such appeal shall be filed with the board of parole liaison officer."

615-3.7(247) This section as written still leaves in question the opportunity for the inmate to appear before the Board even upon recommendation of the liaison officer or two of its members. It should be changed to allow that as right, as the proposed rules seemed to indicate. We suggest the following changes:

"Other appearances before the board of parole by inmates. Any inmate may request an opportunity to appear before the board of parole, and such request shall be granted upon recommendation of a liaison officer of the board of parole or any two members thereof."

615-3.8(247) The lifer interview is less than adequate at present. Even with the new five-year requirement, there is no further require-

PAROLE BOARD
Churchs'
Recommendations

ment that the Board initiate periodic personal interview, and there is no duty upon the Board to reveal its conclusions or the reasons therefor. We strongly recommend a fair and equitable process, which would inhere to the benefit of the inmate, the system, the institution, and the public. We recommend the following changes:

"Provisions as to annual interviews of inmates shall not apply to those person serving life sentences. Interviews for such inmates shall be conducted as is provided in the Code of Iowa and these rules. Each inmate serving a life sentence shall be interviewed within five years of commitment and at least every two years thereafter. Promptly after each such interview the board shall transmit to the governor its recommendation as to commutation of the sentence of that inmate, and its reasons therefor and shall simultaneously forward to the inmate a copy of such transmission."

615-4.1(247) The language proposed by the Board in this section is rather disturbing. Whereas the legislature dictated a mandatory paroling process to the Board, the Board erased that mandate and substituted a discretionary paroling policy which we hope is not indicative of the real attitude of the Board and its staff. Particularly is this true when, as it now appears, the Board has assumed a role not found in its statutory mandate, that of supporter and enforcer of the disciplinary policies of the institutions. A reading of the proposed change makes very clear the subtle but serious nature of the Board's variance from its appointed role. We recommend a return to the statutory language and dictate:

"Authority to parole. The board of parole may shall release on parole any person whom it has the power to release, when in its opinion there is reasonable probability that such person can be released without detriment to the community or to that person."

615-4.2(247) The Board left a basic consideration, length of time served, out of the factors to be considered in parole decisions. It also neglected one persisting cause of continued incarceration which, as closely analyzed by experts in Iowa and elsewhere, proves a false reason for refusal of parole. We refer to inmate misconduct reports, which are viewed by penologists and sociologists, from substantial empirical studies, as red herring and given far more consideration than they deserve. Instead of an index of instability, they can well be an indicator of normality and, in some instances, a clue to the varying qualities of effectiveness of different corrections officers. The aforementioned studies across the country - and the recent one in Iowa - which make clear that inmate misconduct, per se, is no index of likelihood of success on parole should not be ignored. They point out with clarity that such is no basis for denial of parole, standing by itself. A high parole risk remains such, with or without institutional misconduct; a a person who is a low parole risk likewise remains such, regardless. The Board has no legal right to tie its paroling system into the institution's disciplinary processes; the institutions have the means of punishing inmates for infractions - lock-up, deprivation of good and honor time; filing of criminal charges for serious offenses - and it is illegal and, indeed, unconscionable for the Board to doubly

PAROLE BOARD
Churchs'
Recommendations

punish an inmate for institutional infractions when that inmate could be released without detriment to the community or to that person. That is certainly the law, and it ill behooves the institutions to place pressure on the Board to violate it by engaging in disciplinary processes which are not only illegal but are in fact destructive and expensive, in dollars and lives. It is no indictment of the Board that such a practice was routine in years past; the continuing impact of study upon study on the subject places the Board's future actions in an entirely different light. We recommend the following changes which, while considering misconduct, would do so only in the context of parolability and detriment to the community and the inmate:

"Factors in parole decision. Important factors in the parole decision include, but are not limited to, the following: The nature of the offense, previous offenses, recidivism record, convictions or behavior indicating propensity for violence or failure on parole, participation in programs, including academic and vocational training, psychiatric and/or psychological evaluation, length of time served, freedom from type or types of misconduct, record of court probation, prior parole, or woek release, any history of drug or alcohol abuse, and formulation of realistic the parole plan formulated by the inmate, in conjuction with the parole board and its staff. general attitude, and behavior."

615-4.3(247) This rule contains a hidden policy which should be made clear and apparent to all, in order to assure that the institutions do not accidentally overlook the requirement for evaluation of an inmate and that the evaluation is not so timed that the inmate misses his or her annual hearing before the Board. We recommend the following change:

"Request for psychiatric evaluation. Whenever in the opinion of the board it appears necessary for the safety of the public or for the success of parole, the board may require a complete psychiatric evaluation of the inmate. If the board establishes a policy under which such evaluation is required for a category of categories of inmates before parole shall be considered, such policy shall be publicized and promulgated to assure that the institutions obtain such evaluation in ample time to assure the availability of the inmate for consideration by the board."

615-4.6(247) A category of inmates is left in limbo by this rule as written. We would suggest the following change:

"Parole while on patient status. Normally, an inmate on patient status at Iowa Security Medical Facility will not be granted parole until removed from patient status. Parole may be granted to an inmate on patient status if it is reasonably anticipated that the inmate will be removed from patient status prior to effecting the parole, or if parole is conditioned on prior release of the inmate form a facility. The board shall assure that inmates who are assigned to the facility receive consideration equal to that of other inmates. The board of

PAROLE BOARD
Churchs'
Recommendations

parole may consider parole of a person on patient status to a hospital for the mentally ill or other treatment facility."

615-4.7(247) As above mentioned, the use of a Star-chamber process in the hearing before the Board of Parole is unconscionable and antithetical to the purposes of the parole hearing, not the least purpose of which is the ascertainment of the truth of the matters before the Board. Likewise, it enhances and furthers the most negative aspects of incarceration by solidifying the strength of the inmate government in the yard. The change we propose would assure that no secret-source information from other inmates or from inside the institution would be received by the Board in connection with a parole hearing, while sufficient protection would be given to persons outside the institution who forward such information to the Board. Use of information from the latter sources should be balanced by giving fair opportunity to the inmate to refute it. The Iowa Criminal Justice Standards and Goals Project recognized the need to ban such information from parole hearings and proposed that the Board reject evidence from inmate-informants for the reasons we stated in our preliminary remarks. We urge the Board to accept that philosophy. We recommend the following changes:

"Information considered. The only information that is which will be considered by the board of parole shall be only such information that has been reviewed by the inmate, except where it is not deemed feasible, except as hereinafter set forth. The information shall be considered by the board only if the following safeguards are followed:

"Information will be discussed with the inmate by a member of the staff at the institution and the inmate shall be shown any factual allegations made therein if that can be done in a manner to protect at least three days prior to the parole hearing.
the confidential source, e.g., by excising the signature. Such factual matter shall include but not be limited to:

1. Any statements attributed to the inmate.
2. Any allegations of convicted or unconvicted criminal or anti-social behavior form within or without the institution.
3. Any allegations of drug addiction or alcoholism.
4. Any allegations regarding family history, employment, or education.
5. Disciplinary record at the prison, as it relates to item 3 above and to parolability of the inmate.
6. Alleged threats made by the inmate.
7. Evidence, including sources, to substantiate all of the statements and allegations hereinabove listed.

"If any information from outside the institutions under the supervision of the Department of Social Services is to be considered by the board, and it is necessary to protect the source, the inmate, at least, should shall be informed of at least the following:
The number of such communications; the type of communication(s), i.e., spontaneously or officially initiated; from private or official sources.

The inmate shall be given the opportunity to respond to such information.

"The inmate's ~~institutional~~ reports from institutions under the supervision of the Department of Social Services including admission summary, progress reports, medical reports, and social information or reports shall, to the extent possible, be structured so as to separate opinion from factual information. The factual information ~~should~~ shall be made available for ~~reviewable~~ review by the inmate; ~~and~~ the opinion shall be ~~confidential~~ made available to the inmate except in those exceptional circumstances where it shall be proved to the board's satisfaction that such dissemination would be deleterious to the inmate or dangerous to the institution. No psychiatric or psychological test results or diagnosis shall be deemed factual, but such shall nonetheless be made available to the inmate. Information obtained during medical or psychiatric treatment of the inmate cannot be used for purposes of parole review.

"The board of parole shall likewise assure that the inmate is advised of the factors which the board deems important in determining the parolability of the inmate and the likelihood of his or her success on parole.

"The parole liaison officer may review any file and investigate any facts, allegations, opinions, or comments contained therein. If communications adverse to the inmate or parolee are considered by the board of parole, the inmate or parolee shall be informed of such fact."

615-5.1(247) A matter of common knowledge is the fact that institutions in some states hold far more threat of harm to their inmates than institutions in others. Where an inmate does not wish a parole, a parole should not be granted where its effect would be to cause his transfer to a state which holds a detainer but which likewise holds threat of physical harm. We recommend the following change to this section"

"Paroles to detainers. When a detainer is placed against an inmate by another state, the board of parole may at any time parole the inmate to the detainer with the inmate's consent. ~~Normally, a parole will not be granted to a detainer if the detainer is solely for prosecution and the inmate has not yet been convicted.~~"

615-6.1(247) The practice of holding an inmate beyond a reasonable point until the formal parole contract is prepared and signed by the parolee should be kept to an absolute minimum. We propose a very reasonable time limitation on such, by the following recommended change:

"Parole agreement. Parole shall not commence until the inmate has signed a parole agreement provided by the department of social services and witnessed by a parole agent. If the inmate is on work release at the time parole is granted, the inmate shall remain on work release until the parole agreement is signed but no longer than 48 hours after the grant of parole."

615-7.2(247) The Parole Board has a substantial control over the inmate by its continued retention of the inmate on parole; it likewise has opportunity to deal with the inmate less severely than

PAROLE BOARD
Churchs'
Recommendations

by return to the institution. The Board should search out and use lesser sanctions, particularly in those instances where the violated condition of the parole agreement does not involve community safety. We recommend the following change in this section:

"Revocation of parole. The board of parole for good cause shown may revoke any parole it has previously granted. Good cause for revocation of parole shall not include violation of a minor condition or conditions of the parolee's parole agreement or but can include obtaining parole by giving false or misleading information. Where less severe restrictions than revocation of parole are available and are agreed to by the parolee, the board of parole shall utilize such alternative sanctions."

615-7.4(247) Unwarranted custody of a parolee hazards the single most important factor to the success of parole, his or her employment, without cause. Where public safety is not threatened and where absconsion is unlikely, a parolee should not be placed in custody pending the probable cause hearing. We recommend the addition of the following language to this section:

"Report of and recommendation for revocation. When a parolee has been notified of a probable cause hearing as provided in 7.6(1), the parole agent, without unreasonable delay shall make a written report of any alleged violation(s) and the agent's recommendations to the board of parole regarding revocation of parole. The parolee shall not be detained in custody for possible violation of parole unless the parole officer certifies that the parolee is a threat to public safety or is likely to leave the jurisdiction."

615-7.5(247) This section contains an unnecessarily oppressive process, whereby a parolee waiving a probable cause hearing is forced also to waive a final parole revocation hearing. Given present size and staff, the Parole Board can afford to give the right of final parole revocation hearing to a returned parolee, and the severity of the situation would appear to dictate that it do so in those cases where the parolee wishes it. We recommend the following change:

"Waiver of probable cause hearing and waiver of final parole revocation. When the parole agent makes a recommendation to the board of parole forrevocation of parole, the parole agent shall inform the parolee of the right to a probable cause and final parole revocation hearings. If the parolee is in custody, the probable cause hearing shall be held no later than four days after the parolee is received in custody unless an extension of time is requested by the parolee. and afford the parolee an opportunity The parolee has the right to waive the probable cause and or the final parole revocation hearings or both such hearings. ~~If the parolee waives the probable cause hearing, he or she must also waive the final parole revocation hearing.~~ If the parolee desires to waive either such hearings, such waivers shall be effected by signing the same in the presence of a liaison officer who is hereinafter called the board hearing officer. The board hearing officer shall explain the rights contained in the waiver and the significance thereof and shall be satisfied that

PAROLE BOARD
Churchs'
Recommendations

the parolee understands the same. If this waiver of probable cause hearing is effected, it shall be forwarded to the executive secretary of the board of parole who shall issue a written order for the return of the parolee to the institution from which the parolee was paroled. Upon review of the recommendations for revocation of parole and the a waiver of both probable cause hearing and final parole revocation executed by the parolee, the hearing panel of the board of parole, (hereinafter called the board hearing panel) (see 7.7(2) of these rules) shall enter its order regarding revocation of parole. The board hearing panel on its own motion may interview the parolee prior to entering the final order.

615-7.6(247) Changes to subsections of this section will give the parolee a more clear understanding of his or her rights and will, in addition, effect a more just process. We recommend the following changes to the noted subsections:

"Probable cause hearing.

7.6(7) Parolee's rights. The board hearing officer shall inform the parolee of the following rights and be satisfied that the parolee understands:

a. That the parolee has the right to speak or remain silent in his or her own behalf; that the parolee has the right to be heard and show that the conditions of the parole were not violated, or that the violation or the condition violated was minor, /or that there exist circumstances in mitigation which suggest that the violation does not warrant revocation of parole, or that the conditions of parole were unconscionable or unwarranted;

b. That the parolee has the right to bring letters, documents, or individuals who can give relevant information to the hearing officer on the parolee's behalf;

c. That the parolee, upon reasonable notice, has the right to request that persons who have given adverse information on which a parole revocation might be based be made available for questioning in the parolee's presence and for cross-examination, unless the board hearing officer determines that such person or persons would be subjected to risk of harm if his or her identity were disclosed. In such latter event, the name and the content of information provided by that individual shall be promptly provided to the board for its determination of the propriety of the board hearing officer's decision. In such case, parole may not be revoked unless the decision to revoke is supported by substantial evidence in addition to such restricted information."

"7.6(11) Evidence for parolee. The board hearing officer has the duty to affirmatively elicit evidence that he knows or reasonably should know exists. He shall also provide opportunity for the presentation of evidence and testimony of the parolee and other witnesses on behalf of the parolee to show that the parolee did not violate the conditions of parole or to show that there exists circumstances in mitigation which suggest that the violation does not warrant revocation of parole."

PAROLE BOARD
Churchs'
Recommendations

"7.6(13) Findings of the board hearing officer. If the board hearing officer finds that probable cause does not exist, he or she shall order that the parolee be released from custody and continued on parole. If the board hearing officer finds that probable cause does exist, he or she may order that the parolee be kept in custody at the state correctional institution from which the parolee was released pending the final decision of the board of parole regarding the revocation of parole. If the board hearing officer finds that probable cause does exist, but also finds that there exist circumstances which suggest that the violation does not warrant revocation of parole, he or she may shall order that the parolee be-kept-in-custody-pending-the-final decision-of-the-board-of-parole-or-may-order-that-the-parolee continue on parole pending the final decision of the board of parole."

615-7.7(247) We recommend two simple additions to assure that the rights of the inmate are retained and that hearings be effective and meaningful, as follows:

"Final parole revocation hearing.

"7.7(1) Hearing. A parolee who is sent to a correctional institution by reason of a new sentence and a parolee who has been returned to a correctional institution by order of the board hearing officer after at least three days' notice shall be afforded a final parole revocation hearing before the board hearing panel at the time when the hearing panel next meets at the institution where the person is incarcerated."

"7.7(2) Hearing panel of the board of parole. Prior to the board's monthly meeting, the chairperson shall designate not less than one member two members of the board of parole and-one-liaison-officer to serve as the board hearing panel to conduct final parole revocation hearings. The decision and recommendations of the board hearing panel shall be forwarded to the board of parole for its decision at its next monthly meeting. A written notice of the board of parole's final decision shall be mailed to the parolee."

615-8.4(247) This section is anomalous, in that it provides that the decision of the board can be appealed under the proposed rules to the Board's employees - its executive secretary or a liaison officer - who would act as the hearing officer for the purpose of hearing the appeal. This is effectively no appeal whatsoever, since such a hearing officer would have little reason to go against the Board's expressed conclusions, as the Board is most surely aware. We recommend that, since an appeal is obviously felt by the board to be proper and since the Board is aware of its responsibilities as a quasi-judicial body, the following process be substituted for that heretofore proposed:

"Appeals. Re-hearing. When the board of parole refuses to grant a discharge from parole, an-appeal a request for rehearing may be made to the executive-secretary-of-the board. in-the-manner-provided-for-an appeal-to-a-liaison-officer-in-these-rules.--The-executive-secretary-of

PAROLE BOARD
Churchs'
Recommendations

~~the-board-may-act-as-hearing-officer-or-may-assign-a-board-liaison-officer to-act-as-a-hearing-officer-for-the-purpose-of-hearing-the-appeal.~~ Such rehearing shall be granted no later than one month from date of refusal to grant a discharge, and the parolee shall have a right to present evidence and be heard by a panel of the board upon such rehearing."

615-9.1(247) Minor changes will make the intent of this section more clear and more readily attainable. We recommend the following changes:

"Appeals or requests for appearance. Any inmate who is denied a parole or who is aggrieved by any other decision of the board of parole or the board hearing panel or who wishes to appear before the board of parole may request a review of the same in the following manner: The inmate may make written application to a liaison officer of the board of parole indicating that he or she desires a hearing before the liaiso officer for the purpose of presenting facts to the liaison officer. The liaison officer shall grant such hearing promptly. At that hearing the inmate may present such evidence and make such arguments as the inmate deems appropriate. At the next regularly scheduled meeting of the board of parole, the liaison officer shall make a written report of such hearing to the board of parole. The report shall include a summary of the evidence and arguments presented by the inmate and shall indicate the opinion of the liaison officer as to the following:

1. Whether there appears to be any reasonable basis for reconsidering the previous decision of the board of parole or the hearing panel;

2. Whether, in the opinion of the liaison officer, the statements of the counselor or the preparole committee should be ~~modified;~~ accepted;

3. Whether explanations or communications or both between the inmate and the board of parole would appear to be appropriate.

4. The opinion of the liaison officer on the matter which the inmate wishes to discuss with the board.

The board of parole shall review the liaison officer's report and shall affirm, reverse, or modify its previous decision in writing. The board may also grant the inmate an appearance and hereafter give a written report to the inmate of its decision. No inmate, as a matter of right, shall be entitled to more than one appeal to the liaison officer in any twelve-month period; such limitation shall not apply to simple requests to appear before the board.

BEFORE THE ADMINISTRATIVE RULES REVIEW COMMITTEE

HEALTH
Chiropractic
Examiners Board
(Resistance)

| | | |
|---|---|---|
| IN THE MATTER OF THE PROPOSED RULES AND DECLARATORY RULING FILED BY THE IOWA CHIROPRACTIC SOCIETY | ) ) ) ) | RESISTANCE OF THE IOWA MEDICAL SOCIETY |

This Response and Resistance is filed by the Iowa Medical Society, 1001 Grand Avenue, West Des Moines, Iowa, 50265 (telephone 515-223-1401), by its attorneys, Dickinson, Throckmorton, Parker, Mannheimer & Raife, 1600 Financial Center, Des Moines, Iowa, 50309 (telephone 515-244-2600). The Iowa Medical Society has as its members persons who are duly licensed to practice medicine and surgery in the State of Iowa.

The Iowa Medical Society asks the Administrative Rules Review Committee ("Committee") to object to the proposed rules (Exhibit "A") because (1) they are not "necessary and proper" within the meaning of Code §147.76 (see Exhibit "B"); (2) they are premised on a "Declaratory Ruling" of the Board of Chiropractic Examiners ("Board") which is procedurally defective and which ignores established facts, court decisions and interpretations; (3) they constitute an illegal, unauthorized and unwarranted attempt to usurp the rights and prerogatives of the General Assembly; and (4) they are "unreasonable, arbitrary, capricious or otherwise beyond the authority delegated to the agency" [Board] within the meaning of Code §17A.4(4) (see Exhibit "B").

I.

EXPANDING PRACTICE ACTS IS SOLELY A LEGISLATIVE FUNCTION WHICH HAS NOT BEEN, AND SHOULD NOT BE, DELEGATED TO EXAMINING BOARDS.

Members of this Committee, as experienced legislators, need not be told that the Legislature has always determined the scope of practice of the various professions and occupations; that there is a natural desire on the part of many of these groups to expand their scope of practice; that from time to time bills are presented for this purpose and frequently result in hotly-contested considerations by the General Assembly; that presently H.F. 256, which seeks the enactment of statutory language similar to the rules proposed by the Board, is now pending before the Iowa General Assembly; and that deplorable and unmanageable confusion will surely result if the precedent is established that examining boards may expand the scope of practice by administrative rulings which are not challenged by the Committee.

Code §147.76 provides that "the examining boards for the various professions shall promulgate all necessary and proper rules to implement and interpret the provisions of" Chapter 147 and the enumerated Practice Acts. Without authority derived from this section this Board has no power to implement or interpret statutes. This grant of authority is not without limit. The rules adopted must be "necessary and proper". It is submitted that the proposed rules are neither "necessary" nor "proper".

HEALTH
Chiropractic Examiners Board (Resistance)

No authority is granted to the Board to define the "duties incident to the practice of chiropractic" and in fact, Code §151.1(2) contains a legislative pronouncement on the nature of chiropractic which is binding upon the Board. There is no indication that the Legislature intended to delegate to the Board the right to determine what shall constitute the practice of chiropractic and the proposed rules incorrectly assume that the exercise of such power is proper. The Board should confine its activities to supervision of examination and other matters concerning which it has clear statutory jurisdiction.

II.

THE STATUTORY DEFINITION OF CHIROPRACTIC IS LIMITED TO TREATMENT.

For fifty years, the scope of chiropractic was limited to the following:

> "Persons who treat human ailments by the adjustment by hand of the articulations of the spine or by other incidental adjustments."

The definition as amended in 1974 continues to relate only to "treatment" and authorizes no "diagnosis" of any sort.

In State v. Boston, 226 Iowa 429 (1939), at p. 431, the opinion refers to the above-quoted language and states:

> "In this statute is found the only source of defendant's authority to treat human ailments. Likewise therein is a legislative definition of what such treating of human ailments consists, i.e., adjustment by hand of the articulations of the spine or other incidental adjustments. When defendant professed to use and used modalities other than those defined in §[151.1], as curative means or methods, the conclusion seems unavoidable that he was attempting to function outside the restricted field of endeavor to which the Legislature has limited the practice of chiropractic."

Again at pp. 433-434 it is stated:

> "As already indicated, it appears to us that in §[151.1] the Legislature intended to define and limit the field of chiropractic."

Attached hereto as Exhibit "C" are copies of pp. 437-438 of the opinion, pertinent provisions of which have been highlighted. We urge members of the Committee to read these two pages and preferably the entire opinion.

III.

CHIROPRACTIC TREATMENT HAS "WELL DEFINED" LIMITS.

For the convenience of the Committee, attached hereto as Exhibit "D" is a copy of Chapter 151, the Chiropractic Practice Act. The only relevant sections of the Practice Act which have been altered since 1924 are new §151.8 and the amended paragraph 2 of §151.1, both of which were enacted in 1974. Paragraph 2 of §151.1 actually defines the practice of "chiropractic" as follows:

> "2. Persons who treat human ailments by the adjustment of the musculoskeletal structures, primarily spinal adjustments by hand, or by other procedures incidental to said adjustments limited to heat, cold, exercise and supports, the principles of which chiropractors are subject to examination under the

HEALTH
Chiropractic
Examiners
Board
(Resistance)

provisions of §151.3, but not as independent therapeutic means" (underscoring supplied).

This revised definition of chiropractic is still restricted to "treatment". However, the scope of "treatment" was expanded (1) by authorizing a broader type of "adjustment" than previously authorized; and (2) by authorizing four "other procedures", namely, "heat, cold, exercise and support", which might be utilized "incidental to said adjustments" by certain chiropractors who were found qualified to utilize these limited "procedures".

On May 25, 1977, the Iowa Supreme Court decided Dain v. Pawlewski, 253 N.W.2d 582 (1977), which comments on the 1974 amendments after stating:

> "As the Iowa law stood at the beginning of 1974, the practice of chiropractic was limited to the more restricted view espoused by the former society, Chiropractic Society of Iowa. Code 1973, §151.1(2)."

The opinion, in referring to §151.8, states as follows:

> "We take it that 'the procedures otherwise authorized by law' in this section refer to the incidental use of heat, cold, exercise, and support specified in the newly-enacted definition of chiropractic."

This recent opinion stands as authority for the fact that the definition of chiropractic is limited to "treatment" and that the scope of "treatment" is expressly limited as we have outlined above.

## IV.

## THE CHIROPRACTIC PRACTICE ACT HAS ALWAYS PRECLUDED "DIAGNOSIS".

The Iowa Supreme Court and the Iowa Attorney General have consistently rendered opinions to the effect that the Chiropractic Practice Act merely authorizes "treatment". This has been so generally accepted that the question of "diagnosis" has not been directly raised except as presented in the Boston case. However, the statute itself is crystal clear in referring solely to "treatment" and by implication excluding "diagnosis".

Also, it is well known that, beginning at least as early as 1955 and occurring in several legislative sessions thereafter, attempts have been made to broaden the scope of chiropractic practice in Iowa. Some of these attempts included express authorization for chiropractors to make an "analysis" which in substance presumably would have been a "diagnosis". However, these attempts proved unsuccessful. The 1974 amendments were well understood by the General Assembly and there is no hint of any intention on the part of the General Assembly to authorize "diagnosis" in passing these amendments.

It has previously been noted that pending H.F. 256 would expressly authorize "diagnosis". If this is to be the law it certainly should be enacted by the General Assembly and not created by administrative fiat.

## V.

## THE BOARD'S "DECLARATORY RULING" DEMONSTRATES THAT THE PROPOSED RULES ARE "UNREASONABLE, ARBITRARY, CAPRICIOUS OR OTHERWISE BEYOND THE AUTHORITY DELEGATED TO THE BOARD".

HEALTH
Chiropractic
Examiners
Board
(Resistance)

Presumably the declaratory ruling of the Board issued on January 7, 1978, after a hearing held on November 26, 1977, serves as a basis for the proposed rules. The Board itself, as a party in the Dain case, and comprised of persons who are knowledgeable in chiropractic matters, cannot plead ignorance of the Supreme Court decisions, Attorney General's opinions and legislative confrontations which are the true facts against which the proposed rules must be judged.

The declaratory ruling itself has essentially two aspects. The first is addressed to a dream of what the Board would like the practice of chiropractic to be -- not what in fact the scope of practice as determined by the Legislature actually is. The ultimate conclusion is found at the bottom of page 16 of the Declaratory Ruling as follows:

> "Essentially, the chiropractor utilizes all reasonable health care techniques that do not involve operative surgery or the use of prescription drugs."

Approximately half of the ruling is devoted to a statement of reasons why this dream "should come true" by administrative fiat when, in fact, these arguments should be addressed to the General Assembly and not to an administrative agency which has never been delegated such peremptory authority.

The other half of the Declaratory Ruling contains obvious inaccuracies and distortions of the true facts. Thus at page 12 it is stated "§151.1 does not define chiropractic" and also that "the only restriction on the practice of chiropractic is contained in §151.5". Both of these statements are directly contrary to the Iowa Supreme Court decisions.

At page 13 the Board concludes "that Chapter 151, on its face, is vague" and that §151.1 "gives little guidance in and of itself as to the perimeters of the practice of chiropractic as a healing art". The Legislature and the courts have determined otherwise, as the Board should well know.

At page 14 the ruling lifts up the phrase "duties incident to the practice of chiropractic" as found in §151.1(1) as somehow conferring new powers to define chiropractic. The fact is that the total phrase is as follows:

> "1. Persons publicly professing to be chiropractors or publicly professing to assume the duties incident to the practice of chiropractic."

Similar terminology was incorporated in the 1924 Code and still persists as to physicians and surgeons (Ch. 148), physical therapists (Ch. 148A), podiatrists (Ch. 149), osteopaths (Ch. 150), osteopathic physicians and surgeons (Ch. 150A.1), dentists (Ch. 153), and optometrists (Ch. 154). This language was before the Iowa Supreme Court in its decisions defining chiropractic and was given no weight whatsoever. Obviously the language itself is not intended to grant any power or authority to an examining board or otherwise but is designed to permit appropriate action to be taken against unlicensed persons "who publicly profess to assume the duties incident to the practice of" the specific licensed profession involved.

HEALTH
Chiropractic
Examiners
Board
(Resistance)

In short, the Declaratory Ruling in and of itself demonstrates a degree of partisanship and inaccuracy which demonstrates that no examining board should be permitted to attempt to expand the scope of practice of its profession by administrative rule under any circumstances. Moreover, it should be noted that no attempt is made in the rules to give guidance to the profession by defining the actual scope of present chiropractic as understood by the courts and the General Assembly but the proposed rules themselves contain only vague and generalized statements about "incident to the practice of chiropractic", "nature and manner of chiropractic treatment to be employed" or "whether a chiropractic procedure should be performed". This could easily mislead and deceive practitioners into exceeding the scope of practice as determined by the Legislature and by the courts.

VI.

THE PROPOSED RULES ARE "UNREASONABLE, ARBITRARY, CAPRICIOUS OR OTHERWISE BEYOND THE AUTHORITY DELEGATED TO" THE BOARD OF CHIROPRACTIC EXAMINERS.

We conclude with an analysis of the proposed rules themselves in light of the foregoing discussion. All of the first four rules contemplate "diagnosis" which is beyond the present scope of chiropractic practice. All of the first four rules use the phrase "determining the nature and manner of chiropractic treatment to be employed or whether a chiropractic procedure should be employed" which in substance constitutes "diagnosis". Moreoever, the first rule expressly would authorize a chiropractor "to make a diagnosis of his patient's ailments and physical condition".

It should also be noted that all five of the proposed rules either refer to a "duty" or "a permissible duty incident to the practice of chiropractic". The fact is that under law there is no such "duty". There is not even a right to diagnose. If there is no right under existing law it follows that the Board has no authority to confer such a "right" by declaring it to be a "duty".

In addition, rule 5, which expressly deals with "treatment", contains three serious defects. First, it seeks to include "diet" and "food" which are not authorized by Code §151.1(2) as has been expressly determined by the Iowa Supreme Court and by the Iowa Attorney General.

Second, the fifth rule gives an erroneous and distorted interpretation of "support" which is one of the four modalities authorized by the 1974 amendment ("limited to heat, cold, exercise and supports"). Obviously the term "supports" was intended by the Legislature to pertain to the use of tape, cervical collars, belts, etc., and it is a deliberate distortion to purport that it authorizes "support therapy" or a "support measure".

Third, the fifth rule omits any reference to compliance with the provisions of Code §151.8 that the individual practitioner must be qualified if he is to utilize any of the four new modalities.

2-14-78

HEALTH
Chiropractic
Examiners Board
(Request to
Withhold
Approval)

The Chiropractic Society of Iowa

INCORPORATED

"Chiropractic In Its Purity"



February 13, 1978

Legislative Rules Committee
State House
Des Moines, IA 50309

Re: Chiropractic practice rules proposed by Board of Chiropractic Examiners

Dear Committee Member:

The Chiropractic Society of Iowa urgently requests that you not approve the chiropractic rule changes proposed by the Chiropractic Board of Examiners. The Board of Examiners is asking for approval of rules which have been previously opposed by the Chiropractic Society of Iowa, the International Chiropractic Association and various members of the chiropractic profession; as well as the Iowa General Assembly.

The deep concern and cause for our opposition to the proposed rules is due to the fact that the rules do not establish limits or boundaries to the diagnostic duties or responsibilities of the chiropractor. The rules allow for, by their deliberate vagueness in terminology and definition, the inclusion of all "diagnostic and treatment procedures or instruments" taught by chiropractic colleges approved by the board. Certainly it has not been the intention of the legislature to allow the chiropractic colleges to determine this scope of chiropractic practice and if the rules are adopted the colleges could do so.

Gathering information regarding the patients overall physical condition is not outside the responsibility or duty of the chiropractor. The Chiropractic Society of Iowa and the majority of Iowa chiropractors recognize that as primary health care providers we must be allowed to gather clinical information and physical findings to determine whether a chiropractic procedure should be performed. Our Society recognizes, along with the great majority of Iowa chiropractors, that a diagnosis is necessary when that term is used or defined as the chiropractic analysis of the spinal related syndrome or condition. Diagnosis to a chiropractor is not used to "name" diseases.

The language that encompasses chiropractic diagnosis as opposed to medical diagnosis has not yet been authored and is not provided in the proposed rules. However, I do believe, that we can find the language to define chiropractic diagnosis and avoid unnecessary duplicating responsibilities with medicine while at the same time, purposefully concentrate the responsibility of chiropractic to the specific spinal and neurological services which it provides for the correction of the cause of disease and the restoration of life and health.

The Chiropractic Society of Iowa respectfully and sincerely requests that you withhold approval until the language is clear, detailed and specific to the chiropractic purpose.

Thank you very much for your attention to this matter.

Very Sincerely yours,

W. Gene Cretsinger, D.C.
Secretary-Treasurer
Chiropractic Society of Iowa

WGC/mma

CC: Iowa State Department of Health
Senator Berl E. Priebe
Senator Kevin E. Kelly
Senator Minnette F. Doderer
Representative W. R. "Bill" Monroe
Representative Donald V. Doyle
Representative Laverne W. Schroeder

HEALTH
Chiropractic
Examiners
Board
(Resistance)

WHEREFORE, the Iowa Medical Society requests that the Committee exercise its prerogatives under the Administrative Procedure Act and find objection to the proposed rules issued by the Board.

ROBERT B. THROCKMORTON

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ATTORNEYS FOR IOWA MEDICAL SOCIETY.

BEFORE THE DEPARTMENT OF JOB SERVICE OF IOWA
1000 E. Grand Avenue
Des Moines, Ia., 50319

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| IN RE: THE PETITION OF THE ADMINISTRATIVE RULES REVIEW COMMITTEE FOR THE AMENDMENT OF ADMINISTRATIVE RULE 370-4.22(1)r | PETITION FOR RULEMAKING<br>Docket No._____ |

PETITIONER STATES:

1) That Petitioner is the Administrative Rules Review Committtee, whose address is State Capitol Bldg, Des Moines, Ia., 50319.

2) That rule 370-4.22(1)r be amended to read as follows:

> On call workers. Substitute workers (i.e.,e.g., post office clerks, railroad extra board workers), who hold themselves available for one employer and who will not accept other work, are not available for work within the meaning of the law and are not eligible for benefits. A substitute worker shall be eligible for benefits if for no disqualifiable reason he (she becomes separated from the employer or if he (she) can show by clear and convincing evidence that the employer no longer intends to call the substitute worker.

3) That the proposed amendment is necessary to clarify under what circumstances a substitute worker may qualify for benefits. While the current rule is fairly explicit concerning eligibility, the interpretation of the rule contained in the so-called 'unnumbered letter', dated January 21st, 1977 (see attached copy) indicates that the department does not consider substitute workers unemployed under any circumstance. This interpretation is unenforceable since it is in fact an administrative rule as defined in Code section 17A.2(7) and must be adopted to the IAC pursuant to the provisions of section 17A.4 to be valid. Moreover, the interpretation is contrary to Code section 96.4, which sets out the specific conditions for eligibility.

THEREFORE: Petitioner requests pursuant to the authority of Code section 17A.7 that the department amend rule (370)-4.22(1)r as requested in paragraph two (2) of this petition.

Beri E. Priebe
(Sen. Beri E. Priebe) Chairman

William R. Monroe, Jr.
(Rep. William R. Monroe, Jr)
Vice-Chairman