MINUTES OF THE SPECIAL MEETING
of the
ADMINISTRATIVE RULES REVIEW COMMITTEE

Time of Meeting: The meeting scheduled for Tuesday, May 15, was recessed at 9:15 a.m. due to lack of a quorum. Senator Dale Tieden was present.

The recessed meeting was reconvened Monday, May 21, 1979, at 8:07 a.m.

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

Members Present: Senator Berl Priebe, Chairman, (arrived 8:25 a.m.), Senators Edgar H. Holden and Dale L. Tieden, Representatives John Patchett (newly appointed member) and Laverne Schroeder.
Not present: Representative Betty J. Clark who had notified the Committee she would be out of the state.
Also present: Joseph Royce, Committee Staff and Brice Oakley, Administrative Rules Co-ordinator

The meeting was called to order by Representative Schroeder.

Minutes: Moved by Tieden to dispense with reading of minutes of the April 24 meeting and that they stand approved. Carried.

SOCIAL SERVICES
Carryover from April 24

The following rules were before the Committee:

Community-based corrections, 25.1(17), 25.2(1), 25.4(6), (8) to (10), 25.5(2), 25.8(4), (7), (16).....4/4/79
Aid to dependent children, duplication of assistance, 41.5(2).....4/4/79
Food stamp program, ch 65, also filed emergency.....4/4/79
Medical assistance, right of subrogation, 75.4.....4/4/79
Intermediate care facilities, limitation of expenses, 81.6(11)"h"(4) to (6).....4/4/79
Family life homes, certification, 111.3(7).....4/4/79
Services, eligibility, 130.3(1)"b".....4/4/79

Petition for adoption of rules, change of address, 4.1, filed without notice.....4/4/79
Declaratory rulings, change of address, 5.1, filed without notice.....4/4/79

Scheduled for Regular meeting

Hearings and appeals, amendments to ch 7, filed emergency.....4/18/79
Newborn child, social security number, 41.2(6)"b".....4/18/79
Medical services, eligibility, income, 75.5.....4/18/79
Medical services, hysterectomy, 78.1(16)"j".....4/18/79
Sheltered work/work activity services, 155.3(2).....4/18/79

Organization and procedures, 1.3, 1.4(3)"k", "p".....F.....4/18/79
Aid to dependent children, granting assistance, 41.6(1)"g", 41.6(2), 41.8(3)"d".....F.....4/18/79
Medical assistance, cosmetics or plastic surgery, clinic services, 78.1(4), 78.22, 78.23.....F.....4/18/79
Medical assistance advisory council, 79.7(5)"b".....F.....4/18/79

Representing the Department of Social Services Department were: Judith Welp, ACT Unit, Jane Jorgenson, Bureau of Food, Penny Bjornstad, Chief of Bureau of Medical Services.

Welp led the discussion. She explained that the proposed amendments to Chapter 25 were in response to recommendations of this Committee as well as the public.

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Proposed amendment to 41.5(2) would prevent two concurrent grants of ADC.

Food stamps

Chapter 65 pertaining to the food stamp program would adopt by reference the mandatory federal regulations. The rules also contain options which are allowed, e.g., the Department elected to define "project area" as statewide rather than countywide. Food stamps would be issued by direct mail. A "hotline" telephone number is included. Further, procedure relative to delays in certification were set out.

Royce raised question, on behalf of Representative Clark, as to the logic in establishing a minimum utility schedule in Rule 65.8. Welp replied that the standard schedule was much easier to administer.

Oakley noted that Chapter 65 had been implemented under the emergency provisions of Chapter 17A. He asked Welp to summarize on comments and suggestions which were made at the public hearing held April 27. Welp recalled that most of the opposition was directed at the mandatory provisions. She added that a major concern was the fact that the Department can no longer allow deduction for medical expenses. Very few comments were voiced on the options which the Department could exercise.

Royce requested explanation as to the variance in 65.6 relating to delays in certification. He noted that if the household were at fault, the local office would be required to grant a 30-day grace period but if the fault were attributed to the office, a 60-day period would be allowed.

Welp answered that 65.6(1) to 65.6(3) were three options the Department had in processing the delayed application. The subrules provided: "(1) When by the 30th day after the date of application the local office cannot take any further action on the application due to the fault of the household, the local office shall give the household an additional 30 days to take the required action. The local office shall send the household a notice of pending status on the 30th day.
(2) When there is a delay beyond 60 days from the date of application and the local office is at fault and the application is complete enough to determine eligibility, the application shall be processed. For subsequent months of certification, the local office may require a new application form to be completed when household circumstances indicate changes have occurred or will occur.
(3) When there is a delay beyond 60 days from the date of application and the local office is at fault and the application is not complete enough to determine eligibility, the application shall be denied. The household shall be notified to file a new application and that it may be entitled to retroactive benefits."

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Food Stamps
Cont'd

Welp explained that they chose the option in (1) to allow the recipient longer time to provide information. The Department could hold for 30 days request for verification which would mean that if they requested the verification within 10 days, the maximum time to hold it would be 40 days instead of 60; or they could deny the case right then and reopen it, if verification was received.
Welp continued that they chose the second option because they considered it preferable to allow discretion to the local office to require a new application to reflect changes which might have occurred. Alternatives were: to always process on the old application which would mean they might not be up to date or to always require a new application which the Department felt would not be appropriate.
Alternatives for the third option they chose were to continue to process--the application would be held anyway until more information was obtained. By denying the application, as the rule provides, the household has the advantage of an up-to-date application without losing benefits.

Oakley had reservations concerning the 60-day requirement. He asked if the applicant's eligibility for food stamps would be retroactive to the date of application. Welp answered in the affirmative. Oakley also questioned Welp as to the length of time it would ordinarily take to process an application and as to an example of fault of a local office.

Jorgenson responded that approximately 90% of the applications are processed within the 30-day time frame. An unusual circumstance such as a strike involving large numbers of applicants could delay the process. An example of fault would be the misplacing of an application.
Jorgenson, in response to question by Oakley, indicated that service of a claim would not necessarily be expedited when delay was attributable to the office.

Senator Priebe arrived.
Holden was concerned as to the need to shorten the time for processing the claims. There was discussion of the procedures followed. Jorgenson pointed out that this may be different in each county because of case load differences. Committee members expressed an interest in possible review of this matter in the future.
In response to question by Holden, Department officials said the processing standard of 30 days was set by the federal government.

SOCIAL SERVICES Cont'd 75.4

Brief discussion of 75.4--right of subrogation. Royce, speaking in behalf of Clark, suggested that the notifications to the department required by law should probably be sent by certified mail. Welp thought this decision could be made by the sender. Also, in answer to Patchett re 75.4(3), Welp replied that the person "acting on the recipient's behalf" could be a lawyer, friend or relative, for example. No formal action by Committee.

81.6(11) h

Welp reviewed the purpose of amendment to 81.6(11) h, sub-paragraphs 4 to 6. It would increase the maximum allowed compensation for administrators of intermediate care facilities when the owners or operators are submitting operational costs to the Department.

Schroeder noted the amounts allowed would exceed the 7 per cent guideline to which the President has urged adherence. Welp recalled there had been no increases for several years and added that the calculations were made prior to the 7 per cent guideline.

Department officials were unable to supply estimates as to average bed size of the facilities. Schroeder thought 40 to 50 would be fairly accurate.

Bjornstad commented that no comments were made at the public hearing.

Oakley defended the proposed amendment declaring that "this weights the compensation for the smaller nursing homes as opposed to the larger homes and sets a maximum but doesn't necessarily mean the maximum would be paid." He continued that the first question ought to be--what does this do to grant reasonable compensation to attract qualified administrators for these facilities.

Bjornstad pointed out that the rule would apply only to the owner administrator. In response to further concerns of the Committee, Bjornstad stated the Department would be evaluating the procedures of transferring of ownership and refinancing of a facility.

111.3(7)

Proposed amendment to 111.3(7) relating to family-life homes was acceptable.

130.3(1)b

Proposed amendment to 130.3(1)b set out guidelines for services under the Title XX plan. Since the notice was published,

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the Department realized they would be able to increase the amount for family planning although other services will be reduced. In view of the fact that Title XX funds were cut, Priebe wondered how there would be sufficient amount for the services. Welp stated that the Department had committed $400,000 for family planning services to the delegate agencies under the Health Department. In the event those funds would be depleted, it was her understanding the Health Department would continue to serve eligible clients. She was not sure of the method of funding by the Health Department.

4.1, 5.1

Amendments to 4.1 and 5.1 were merely address changes for the Act Unit--from Lucas to Hoover building.

Ch 7, 41.2(6)

Amendments to Chapter 7 and 41.2(6)b were acceptable as published

Discussion of proposed 75.5 pertaining to computation of countable income and resources for persons in a medical institution. This would include nursing homes, hospitals and skilled care facilities.
Question was raised as to whether the Department had given "fair notice" when the rules were originally adopted and Welp stated that the subject was being "renoticed" to provide for public comment.

Bob Bray and Dennis Groenbaum, representing Legal Services, addressed the Committee as to the impact of the proposed rule and how it was, in fact, different from the Herweg v. Ray case which the Department has cited .

Bjornstad responded to question by Patchett by explaining that the court decision, in the Herweg case, said that if the person in an institution has a spouse living at home, the spouse at home could only be required to help pay for the nursing home care if they had money left after paying normal living expenses. The Department then filed a rule (Apr. to provide that both incomes be combined. The living expenses for the spouse at home was to be subtracted and the remaining amount would go to the care facility. In July 1978, when the judge's decision was received, the Department learned that their procedure for determining income were acceptable. However, the judge agreed with the plaintiff's argument that social security benefits, retirement annuities and civil service comm. annuities ought to be considered exempt from the "deeming process." In the Herweg case, this applied only to the income of the spouse at home. After consultation with the Attorney General, the Department felt that the principle was that the income was meant for the person entitled to it even though that was not the specific situation addressed in the Herweg case. Bjornstad continued that in June 1978, they filed emergency rules and also submitted them under Notice. Rules under the normal procedure became effective in October of 1978.

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Priebe pointed out this area was of concern to the Appropriations subcommittee on which he served. He noted that the federal government prohibits any attempt to block the transfer of property by a prospective recipient. Bjornstad added that once a couple has been separated one month, federal regulations prohibit counting that spouse's income at all. The Appropriation Act for 1978 contained an intent clause which directed the Department to resist the regulation. The department complied and the lawsuit resulted.

Groenbaum cited the problem of the situation when the husband is confined to the institution and the wife at home is under age 62 and deprived of his social security benefits. He noted that the filed emergency exempt income rules have been appealed before the Department and hearing officers have reversed in every case, saying the rule was not proper. The Commission has then maintained the rule was proper but was willing to grant an exception to the policy to every person who applied. As a result, all of his clients have been able to have sufficient income to maintain themselves in the home. He added that individuals who have not appealed, for whatever reason, are living under the exempt income rule.

Bray reminded the Committee that the Herweg case is on appeal in the 8th Circuit. He was "astounded the Department would imply what the Herweg facts apply." It was his opinion, in the Herweg case, the income was with the ineligible spouse and they tried to deem it available with the eligible one, who, in the case he dealt with, was in a coma confined to a nursing home. Whereas, in this case, there are exact opposite facts where the income, which is only social security, is the income of the eligible spouse who is confined to an institution and the Department is saying none of that income is available to the spouse at home who has no income whatsoever. He concluded that rules that broad were unworkable.

Patchett inquired as to reasons the Department continues to apply the rule generally if they have reversed on every appeal. Bjornstad said the proposed decision was to reverse the final decision was not a reversal. It upheld Department action but granted an exception to policy.

Responding to question by Priebe, Groenbaum reiterated that a spouse in a nursing home receiving social security benefits should be able to support his spouse at home so she would have more than the 37% allotment. When there is no other income, you would be dealing only with social security, civil service and railroad retirement benefits.

Bray pointed out that Judge Stuart ruled it was necessary to review each case and determine what money is actually avail-

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able to the spouse and when doing this exclude the three types of income--social security, etc.

Schroeder voiced concern as to discrimination of persons who had not appealed. Further, he contended that this type of situation would tend to induce appeals of every departmental decision.

Oakley was doubtful the affect of the court decision would trigger a flood of appeals. However, he inquired of Department officials what instructions are provided to field personnel concerning this rule and whether the Commissioner had granted a general exception to his own regulation or only for those persons who appeal. Exception was made only to those appealing, according to Bjornstad.
It was noted the Departmental Manual instructs workers in the field to compute on the basis of exempt income.
Patchett had reservations about "forcing people to appeal or live with the rule."

Oakley asked for clarification--after the decision was handed down, the hearing officers have reversed the determinations made under the emergency rules based on the finding the rules should not have been emergency and not whether they comply with Herweg. Welp responded that reversals were made on the basis the rules should not have been filed on emergency basis.
Oakley observed it could be argued the Commissioner's exception is not to his own substantive rule but to recognition of the fact it should have been placed under Notice before implementation. He concluded the inconsistency is not as great as it appears to be. The question is--how will this Committee and his office deal with the matter?

Priebe reiterated the subcommittee wanted to provide for responsibility of the spouse when funds were available. He recalled examples of how costs can be mushroomed.

Bray reasoned the rule is not good for Iowa.
Bjornstad stated the intent of the Department in the beginning (April 1978) was to combine income of both spouses and allow the one at home the amount necessary to live and send the remainder to the care facility but the court decision complicated the matter.

Patchett thought an alternative would be not to exempt the social security check altogether but apply it to needs of the spouse at home and send any balance to the care facility.

Bray was convinced the confusion existed because the Department was attempting to apply Herweg to this set of acts and it isn't possible.
Holden reflected on the problem of the Department's interpretation when one spouse goes to a care facility, they have two families which is not true. He favored having the Department

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proceed as they had originally intended. His position was the Department should not have reversed their plan after the court case. He agreed, however, that if it is the head of the house who is confined to the institution, the Department may be "locked in by the court decision."

Priebe suggested that Oakley, Royce, Bjornstad and Bragg form a Committee for the purpose of studying the rule before it is adopted for filing.

Oakley thought two questions should be considered: the policy question and what can be done from the legal standpoint.

Patchett inquired as to the availability of an economic impact statement. Bjornstad said there was none but after the Herweg decision was implemented, they estimated a net loss of $10,000 per month and if they changed the rule, there would be approximately $30,000 lost each month. Patchett was interested in learing the impact of the rule on individuals and its affect on local taxing bodies.
Oakley asked to comment prior to a motion to request an impact statement. He pointed out that the cost of preparing the statement could be quite substantial. He urged that the information be gathered without a formal request. It was noted the request could be made at any time by two members of this Committee.

Schroeder thought the first question should be: How many cases have been filed? Bjornstad indicated there are figures on the number of clients participating between September and November. Since they had no computerized system for separating Herweg clients from others, they requested the counties to record every change made in client participation for 3 months. She was willing to supply this information. She added that the ruling by Judge Stuart on July 10 gave the Department instructions which have been applied in these cases.

It was agreed to withhold request for impact statement now.

Holden personally disagreed with the judge's decision but admitted, "We have to live with it."

Motion

He moved that a letter be sent to the Department conveying to them the Committee's position that the Case should not be used to deny any person's needs. Discussion followed.
Patchett was upset that, for whatever reason, persons were treated differently.

Bjornstad referred to an alternative in federal regulations which provides that if a spouse at home has no money and the institutionalized spouse does have, an amount up to that which would be allowed under public assistance can be diverted.

The Holden motion carried viva voce.

SOCIAL SERVICES Cont'd 78.1(16) j

Amendment to 78.1(16)j was intended to clarify that the Department can pay only for medically necessary hysterectomies. No oppostion voiced.

155.3, .7

It was noted that amendment to 155.3(2) and 155.7(2) had been formally withdrawn by the Department.

Amendments to 1.3 and 41.6 were acceptable as published.

Welp explained that amendments to Chapter 78 basically set out exclusions to care for which the Department would pay for medical assistance. She said the rules would probably be revised because of the court decision on sex change. In answer to Patchett as to the status of the rules in the event of an appeal, Welp commented the normal procedure would be to leave them intact through the appeal process.

CONSERVATION 33.3(3)

Roy Downing, Waters Section, Conservation Commission, explained proposed amendment to 33.3(3), published IAB 5/2/79. As requested by this Committee previously, Downing said the rule allows persons with docks within 50 feet but more than 30 feet from another dock to have an "L" or "T" not to exceed 8 feet.

Schroeder raised question in 33.3(3)a (existing language not officially before the Committee) re "fee title". He was concerned as to persons who had leased land. Downing agreed to research the matter and report to Schroeder.

PUBLIC SAFETY

Theodore Becker, Assistant AG, and Connie White, Program Planner, represented the Department of Public Safety for review of amendments proposed to their chapter 1 to 4 and 6 to 15 published in IAB 5/2/79.

Becker reported that there were only two major changes: Authorization to reimburse departmental employees for small claims; procedure for filing of a complaint against an officer or the department.
Other changes dealt with updating to conform to changes in the criminal code and clarification of the various functions of the Department.
Schroeder questioned the restriction to Polk county in Item 33 amending 11.6. He thought action should be initiated at the local level.
Clark had noted that "said" was superfluous in line 13 of 11.6.
Also, Clark had recommended that Item 13 amending 2.2(3) be reworded as follows: "Suspension or revocation shall include the withdrawal or cancellation of a license."

PUBLIC SAFETY Cont'd

Patchett responded to Schroeder recommendation that "Polk" be deleted from 11.6 by pointing out that 17A.19(2) of the Code provides: "proceedings for judicial review shall be instituted by filing a petition either in Polk county district court or in the district court for the county in which the petitioner resides ..."

Holden questioned Becker as to rights of owner who finds an abandoned vehicle on his property. Chapter 6 of the rules would deal only with public property, basically along the highways. Department officials referred Holden to Code §321.89.

Schroeder thought the 10,000 population limitation might be too restrictive in Item 35 amending 11.8.

Royce submitted to the Department for their perusal some technical changes suggested by Representative Clark.

TRANSPORTATION

Rex Lyon, representing the Department of Transportation, proposed the following amendments which were acceptable as published:

Organization and responsibilities, [01,A]1.6(3)"d", "f" ..... N 5/2/79
Highway project planning, rescinds [06,B] ch 1 ..... N 5/2/79
Highway project planning, [08,G] ch 1 ..... N 5/2/79

VOTER REGISTRATION 7.1(4)

Douglas Lovitt appeared in behalf of Voter Registration Commission for adopted amendment to 7.1(4) which was published in IAB 5/2/79. Telephone numbers would no longer be required in certain data submitted by counties to the state. This would relieve undue burden placed on the auditors.
No objections were voiced.

ENGINEERING EXAMINERS

Arnold Chatland, Chairman of the Board of Engineering Examiners, explained proposed change to 4.2(6) -- disciplinary procedure. The board would not consider as grounds for discipline acts which terminate more than five years before the date of the complaint or more than five years after the date when the grounds should have been discovered. The rule now provides three years but the Department had included the change to five years along with other amendments several months ago. In final drafting, the five-year change was inadvertently overlooked.
Priebe questioned the need for five years. Holden wondered if a particular problem had prompted the Board to seek the change. Chatland said there were none.

Chairman Priebe recognized Norm Van Sickle, a licensed engineer in Iowa and a former land surveyor who also wondered when the three-year requirement was inititated. Oakley mentioned the

ENGINEERING Cont'd

fact that minutes of the Board showed they had adopted the five-year requirement but through scrivener's error it remained three.

Patchett was inclined to agree with Royce who, in a memo to the Committee, had pointed out that, in his opinion, the Board lacked authority to set out a statute of limitation by rule. Chatland stated that they were advised by counsel this could be done.

Van Sickle indicated he had petitioned the Board for an appearance before them in an attempt to learn why they have effectively limited methods of surveying, e.g. EDM are ruled out. Chatland responded that the Board does not set methods and never has--only what they expect in terms of end results for protection of the public and property. He continued that the Board has not specifically reviewed Van Sickle's methods but they are similar to those used throughout Iowa. He added EDM's are common in Iowa. Van Sickle then asked why the Board adopts rules requiring certain technology. Chatland was willing to review the rules if there were inconsistencies.

Holden asked Van Sickle if he could meet the "end result" and Van Sickle didn't think that could be determined.

After some discussion, the Committee requested the Board to work with Royce and Oakley to research the matter and explain reasons for setting a statute of limitation.

HEALTH

The following rules of the Health Department were explained by Peter Fox, Hearing Officer:

Speech pathology and audiology, continuing education, 156.2(1)"b"....N.....4/18/79

Funeral directors, disciplinary procedures, 147.200-147.213.....F.....5/2/79
Board of mortuary science examiners, cameras and recording devices at meetings, 147.300 .F.....5/2/79
Speech pathology and audiology, disciplinary procedures, 156.100-156.113....F..... 4/18/79

Amendment to 156.2 was merely clarifying continuing education requirements. Funeral director disciplinary procedures were the same as those of other licensing boards. Amendment to 147.300 was also identical to that of other boards on the subject of cameras and recorders at meetings.

Fox said that filed rules were basically the same as those published under Notice with exception of changes in 156.112(8), 156.112(9) and 15.112(14).

Oakley indicated the Governor plans to object to 156.110 which provides: "The party who appeals a decision of the board to the district court shall pay the cost of the preparation of a transcript of the administrative hearing for the district court." He quoted from §17A.19(6) as the basis for the objection.

Fox gave some background on the provision. For administrative

HEALTH Cont'd

hearings, the Boards pay for the appearance fee for the court reporter. Also, some appeals to district court which transcript was made and then appeal was dropped creates financial loss to the state. Oakley suggested there are avenues which the counsel can pursue to reduce the costs.

REORGANIZATION

Chairman Priebe announced that since all appointments had been made to this Committee, it was time to reorganize as provided by statute. He called for nominations for Chairman.

Motion Chairman

Tieden moved to select Representative Schroeder as Chairman. Priebe called for discussion of the motion. There was none. Motion carried.

Motion Vice Chairman

Priebe called for nominations for Vice Chairman.
Holden moved that Senator Priebe be selected as Vice Chairman. There was no discussion. Motion was carried.

Senator Priebe commended the Committee for its service and expressed his pleasure at having served in the capacity of Chairman. He acknowleged Brice Oakley as being a welcome addition to the group.
Oakley responded by expressing his appreciation for the co-operation of Committee members and those associated with it.

A sample copy of proposed letterhead for Committee stationery was distributed to members for their approval. It was acceptable.

Senator Priebe continued in the Chair.

DENTISTRY

Marcia Hellum, Attorney, appeared before the Committee as a representative for Chairman of the Board of Dental Examiners. Also present was Helen Price, a citizen member of the Board. Hellum explained that dentist members of the Board were administering examinations today.

Hellum reviewed changes which had been made following the public hearing. Two basic areas with change dealt with auxiliary personnel and advertising. Auxiliary personnel--Chapter 20--pertaining to the relationship between the dentist and the assistant was revised significantly. Rather than list the specific acts which the dental assistants could perform, they listed the criteria under which duties could be delegated to them and then listed the parameters of what could be delegated. Hellum continued that some changes were made in Advertising--chapter 26--as a result of the hearing. Through Oakley's office, the Governor had advised that some areas of the rules were too restrictive re advertising. The Board held a telephone conference on Saturday and agreed to amend the rules later, according to Hellum.

DENTISTRY
Cont'd

In answer to Schroeder's question, Hellum said that extensive comments were made at the hearing concerning auxiliary personnel. The range went from those who advocated no limit on dental assistant's duties (an extreme position) and the other extreme position was to limit the duties to very menial tasks. Key criticism was to provision allowing coronal polishing of teeth by a dental assistant.

Schroeder raised question as to use of the word "elsewhere" in 27.4(1) relating to display of signs. It was the consensus of the Committee that the word should be deleted.

Oakley indicated he had taken a comprehensive look at the advertising provisions and he wanted to explain why they as well as the auxiliary personnel rules were issues. He recalled that over the last several years there have been a number of court cases that discussed the question of "commercial free speech" that is advertising by professionals which has been traditionally denied. Last year, the legislature removed the very restrictive language dealing with advertising by dentists, choosing to have that covered by administrative rule. Oakley referred to §147.55, a general provision covering health-related occupations as to areas where they can advertise. He explained that the position of the governor's office has been that the rules were too restrictive--that there were additional areas of advertising that would be appropriate, particularly in advertising specific services. There is the question of the media to be used, the form and content of advertising which he considered to be key areas. Oakley added that he is especially interested in the rules, since they are the first substantial rewrite of advertising rules and they will set a precedent for other licensed occupations. He deferred comments on the auxiliary rules.

Holden declared that he takes " dim view of any rules that tend to limit competition." All examining boards exist solely to protect the citizens. It was his opinion the rules before the Committee were irrelevant --they should cover only areas to protect the citizens.

Patchett was interested in knowing what changes were planned. Hellum offered background before answering the question. She referred to U.S. Supreme Court case Bates v. Arizona which basically dealt with lawyers but also gave parameters and guidelines for what protection there is for freedom of speech in the commercial area. All advertising in newspapers could not be prohibited. The nature of the regulation could be to ensure that ads were not fraudulent, misleading or deceptive.

DENTISTRY Cont'd

Hellum reported on the telephone conference proposals.
Re 26.2--media, they do not wish to expand this area into other than print media for several reasons, e.g., any kind of broadcast is subject to problems which would not be encountered in the print media. According to Hellum, the Supreme Court is not expected to rule on broadcast media because of problems in that area.
Rule 26.2(1) would be amended to eliminate the exclusion of a shoppers guide.
Rule 26.3 re form would be amended to eliminate requirements for colors, size, background, etc. Basically, they want to avoid ads that are primarily "attention getters" by nature. The rule would be rewritten to provide that ads not be sensational or flamboyant. Other states have used similar language geared toward providing information for the consumer to be able to evaluate services.
Hellum added that No. 5 of 26.3 would also be deleted since many newspapers do not have a portion designated for professional announcements.
The Board plans to revise 26.4(1)f patterned from Oregon rules on the subject of fixed fees. The dentist would be permitted to advertise a fixed fee for any service as long as that fee is available. They would also be allowed a range of fees for services as long as conditions were stipulated.
Committee members were concerned that it would be difficult to cover all the possible charges due to unanticipated work found during the service. This would defeat the purpose of ads.
Hellum quoted from language in Oregon rules which the Board intends to adopt.
After some discussion, the Committee requested that the rules be revised so that all advertising quoting a fixed price for a service include a disclaimer. Hellum agreed to notify the Board,

Oakley commented that the Governor has reviewed the Board's planned revisions and his opposition has eased somewhat. They recognize the fact that some reasonable restrictions are needed and basically concur with the position taken by this Committee.
It was noted that the rules will become effective June 6.

Patchett questioned the prohibition of advertising in the yellow pages--27.3(2), He wondered if that would be less professional than advertising in the shoppers guide.
Hellum said this section is primarily to locate a service and also they would want to avoid large ads which would possibly mislead the consumer.

Discussion of Committee options regarding the rules.

DENTISTRY Cont'd

Patchett thought it advisable to delay the rules until the Committee has an opportunity to review the changes which the Board intends to make.

Priebe called for comments from persons in the room who might be interested in the rules.

Sharon Moore, representing the Iowa Dental Assistants Association, addressed the issue of unauthorized practice of dentistry. She related some of the questions which her group had posed to the Board during the Dental convention:

Re 20.2(1)a--what is meant by "limited judgment?"

Would removing of cement below the gum line be a violation of the rules? She pointed out that removal of subringival and supragingival calculus deposits would be an unauthorized practice when performed by unlicensed personnel.

20.2(2)g was of some concern to her--when does the patient have trouble, at the beginning or at the end?.

Moore noted that the assistant can fabricate a crown but would not be allowed to place or remove temporary crowns and restorations--20.2(2)d

Moore summarized her concern that persons are allowed to perform dental functions without proper training.

Royce thought 20.2(2)g should be clarified to remove any doubt as to who would be monitoring the induction of inhalation agents.

Oakley was of the opinion that the whole area of control by licensing boards of paraprofessionals will increase. He was involved in rather extensive investigation as to the legal authority for licensing boards to regulate this area. Oakley stated that his position concerning Chapter 20 was that preferably the matter should be left to the legislature or the courts and although he had reservations about the Board's authority to go this far, he did not plan to object to the rules.

Holden brought up 20.2(2)g again and asked the dental assistant representatives present if, in actual practice, the dentist does leave the room when inhalation agents are being administered and was told that they do.

Schroeder recommended that 26.3(2) be modified to allow for variance in color of ink used on occasions such as St. Patrick's Day when green would be appropriate.

Discussion of disposition of the rules. Patchett thought Chapters 26 and 27 should be delayed and objections placed on others as being beyond the authority, in particular Chapter 20.

DENTISTRY Cont'd

Hellum assured him there is authority for Chapter 20.

Holden observed that since the dentist is responsible for his personnel, perhaps the rules are unnecessary.

Motion

Patchett moved to delay for 70 days chapters 26 and 27.
Discussion followed.
Patchett considered placing a 45-delay into the next GA on the remaining rules.
Royce pointed out that a 70-day delay could be placed on all the rules at this time and the 45-day one could be imposed at the time the 70 days is up.
Patchett then asked unanimous to include all rules in his motion to delay.
Further discussion. It was decided to omit 6.4 and Chapters 30 and 31 from the motion.

Motion

Patchett withdrew his motion and moved to delay for 70days Chapters 20, 21, 26, 27 and 28 of the Dental Examiners rules.
Motion carried unanimously.

MERIT EMPLOYMENT

Wallace Keating, Merit Employment Director, was present to answer questions concerning filed amendments to Chapter 5 of their rules governing recruitment and examination.

Clark left a request for Item 11 to be revised to avoid a split infinitive -- transpose the words "successfully perform" to "perform successfully".

Recess

The meeting was recessed at 11:50 a.m. for lunch.

Reconvened

Meeting was reconvened at 1:20 with Priebe in the Chair.

ENVIRONMENTAL QUALITY

David Bach, Hearing Officer, represented DEQ for review of the following:

Air quality, feedlot operations, anaerobic lagoons, 4.5(3)"b", "c" ..... N 5/2/79
Water quality standards, effluent limitations, 17.8(2) ..... N 5/2/79
Water quality, sewer construction permits, 19.2(10) ..... N 5/2/79

Air quality, phosphate processing plants, 4.4(10) ..... F 5/2/79
Water quality, waste water construction and operation permits, 19.2(3)"a", 19.2(9) .. F 4/13/79
Water quality, water supply system construction, 22.12(2)"a", "c", 22.12(13) ... F 4/13/79

There was discussion of distance requirements in the rules pertaining to anaerobic lagoons. It was noted that S.F. 277 on the subject had passed both houses and was awaiting signature of the Governor. Bach indicated that if the bill becomes law, the Department will probably withdraw the proposed rules as published IAB 5/2/79.

Amendment to 17.8(2) was basically a revision of references. Committee members raised question as to adoption of Quality management Plans as of June 27, 1979. They would prefer the latest date of the publication prior to the IAB date where the rule is published. Bach explained that the June 27 date was when the Commission would meet and adopt the rule.

DEQ Cont'd

Discussion of amendments concerning sewer construction permits. Bach indicated the rules are responsive to concerns of cities. Tieden questioned whether the revised rules were more stringent and Bach replied that the effluent standards would remain the same.

Patchett cited a problem in the City of Solon where they have been unable to complete construction before the rules change. He wondered if there were a cutoff point. Bach indicated there is a bill on the subject. However, he questioned whether rule changes had created the problem.

Schroeder and Patchett recommended that 19.2 include language to eliminate uncertainties, e.g.,"Rules in effect at the date of application shall with respect to ...."

Schroeder noted that 4.4(10)f should show a date certain. Bach was willing to add the information.

AGRICULTURE
Commercial Feed
Bee Caution

The Agriculture Department was represented by Bette Duncan, Counsel, for review of filed amendments relating to animal feed, being 6.9(3), 6.10, 6.11 and proposed 10.31 pertaining to pesticide application.

Schroeder requested Duncan to make sure that provision is made for experimental use of commercial feed.

In re the pesticide rules, Oakley conveyed his misgivings as to the contemplation by the Department to require registration of bee hives with the state. The County Extension offices seemed to him to be the logical place.
Committee members concurred.
Duncan said the aparist did not forsee any problems with recordkeeping and a central system for applicators seemed advantageous to the Department. Public hearing on the matter was scheduled for May 29.

CIVIL RIGHTS

Bill Stansberry, Hearing Officer, appeared for review of the following rules of the Civil Rights Commission:

Records preservation and employment practices, 1.3(5), 2.15 ..F..... 4/18/79
Rules of practice, discrimination of sex and disability in employment, public accommodations, 1.1(7-9), 1.3(2), 1.16, 1.17, 3.9, 6.1, 6.2(6), ch 7...Je.3(J).....F..... 4/18/79

Stansberry reviewed the amendments briefly. It was noted Items 7 and 8 amending 6.1, 6.2 were new wording and were intended to clarify what is expected of employers with respect to the handicapped. The Iowa Civil Rights Act will apply to more employers than the federal Act. The language of the new rule parallels the federal law, according to Stansberry.

Stansberry pointed out that 2.15--employment practices in state government -- was new under the authority of Executive Order 15 and partially on substantive provisions of the Iowa Civil Rights Act.

CIVIL RIGHTS Cont'd

Patchett observed that 2.15 was basically a restatement of Executive Order 15 and he questioned the purpose. Stansberry said the purpose is to give guidance but he was unsure if there were differences between EO 15 and the rule. Patchett was curious to know if the rule would "put teeth in the executive order."

Schroeder and Patchett took the position that 7.3 d seemed to be in conflict with the affirmative action program. The paragraph would prohibit "treating an individual differently from others in determining whether he/she satisfies any admission enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function, or benefit available to other members of the general public."
Schroeder and Patchett could forsee possible problem in areas such as awarding of scholarships, limited to one sex, or restrictive dormitory living and separation of the sexes in YMCA and YWCA. To his knowledge, no comment had been received from the Board of Regents concerning the provision, Stansberry said.
Patchett asked if d was consistent with Bakke but Stansberry was unsure.

Oakley commented that the question is, do we disagree with the definitions as going beyond those set out 601A of the Code. A second area would be to decide whether the discrimination prohibited within the legislative mandate or whether it is ultra vires, you would want to read 601A.7 and 601A.9. He raised question as to whether or not the matters they included in discrimination prohibited under 7.3 uses as part of its mandate 601A.9. The question should be: "Are the rules beyond the statutory authority." Oakley pointed out that a broad statute demands broad rules and this is what we have.

The Chair recognized the following persons: James West, Attorney, representing Iowa Life Association, and Paul Brown, their president. Brown called on Curt Cunningham, Assistant Counsel, Bankers Life, to comment on the rules.
Cunningham said that in reviewing the rules, he had difficulty with 2.15(7) re state licensing and regulatory agencies, in particular the last two sentences which provide: "Any such licensee, or any applicant for a license issued by a state agency, who operates in an unlawful discriminatory manner, shall, when consistent with the legal authority and rules of the appropriate licensing or regulatory agency, be subject to disciplinary action by such agencies as provided by law, including the denial, revocation, or suspension of the license. In determining whether to apply sanctions or not, a final decision of discrimination certified to the licensing agency by the Iowa Civil Rights Commission shall be binding upon the licensing agency."

CIVIL RIGHTS Cont'd

Cunningham quoted from §601A.15(8)b(1) which provides "...the licensing agency may initiate licensee disciplinary procedures." He interpreted this as having the Civil Rights Commission mandating a sister agency to include those types of sanctions. It was his opinion the rule exceeded the statutory authority.

Donald Hauser, Vice President, Iowa Manufacturers Association, concurred with Cunningham. He referred to the following prepared statement:

The Iowa Manufacturers Association has a concern about rules proposed by the Iowa Civil Rights Commission which are identified in the Iowa Administrative Bulletin of April 18, 1979 as ARC 0193. We are specifically concerned about Item 2, Section 2.15(7) on page 1300 which creates a standard for application of Section 15(8)(b)(1) of the Iowa Civil Rights Act as amended. Through oversight this rule did not come to our attention until after the time for public comment to the Commission had expired, so we have not commented on it previously to the Commission.

Section 15(8)(b) of the Iowa Civil Rights Act provides possible sanctions for violations in addition to the affirmative remedies authorized by the Act. While both subsections (1) and (2) of Section 15(8)(b) provide for a certification of the findings of the Iowa Civil Rights Commission to a licensing or contracting agency, which are not reviewable by such agency, the statute does not mandate that all state licensing or contracting agencies take disciplinary action against the licensee or contractor. The law states that "the licensing agency may initiate licensee disciplinary procedures."

In its rules the Commission proposes a system of certification of their findings on a civil rights complaint to a licensing agency and then requires by rule that that agency take disciplinary action against the licensee. It is apparent from the statutory scheme of affirmative remedies available to the Commission, and the discretionary penalties left to the licensing agency, that the legislature did not intend that the Commission have the authority to impose a rule mandating the licensing agency to take disciplinary action.

In our opinion, the Commission has exceeded this discretionary procedure and mandated specific discipline in the form of denial, revocation or suspension of the license. The disciplinary procedures contemplated by the law could take the form of posting notices, monetary penalties, etc.

IMA is opposed to Rule 2.15(7) because we believe the Commission is exceeding its authority in issuing it as currently written. Concern about this rule would be eliminated if the sentence beginning in line 8 with the words "Any such" and ending in line 15 with the work "license" were deleted. We also believe that the phrase "In determining whether to apply sanctions or not" in the final sentence should be deleted.

CIVIL RIGHTS Cont'd

Discussion continued on 2.15(7). Oakley said that the Civil Rights Commission position regarding the statute is that the word "may" used in that context means "shall". He agreed that it is not the "most supportable position." He thought the legislature, in that language, has left the discretion to the licensing agency whether they want to initiate disciplinary procedures. Further, in regard to the rule, Oakley did not agree that "shall be subject" is the same as "shall initiate". The word "initiate" connotates doing something in an affirmative way and "shall be subject" just means "it is subject if the agency so choses to bring those proceedings."

Oakley referred to the Governor's Executive Order issued in 1973 which was a continuation of one issued by Governor Hughes which said that any licensing authority responsible to the Governor "shall initiate such disciplinary action." The legislature, last year, changed the "shall" of the Exec. Order to "may" which, in his opinion, reaffirms that they intended for discretion to be left to the licensing agency. Oakley questioned Stansberry as to what was their intent. Stansberry thought that "shall be subject" meant there would be discretion by the agency. Further, the rule did not intend to add any ground for disciplinary action not found elsewhere. It was his opinion that the statute gives the agency authority to take disciplinary action.

Tieden recommended that specific intent be included to eliminate the problem.

Patchett sees only that the agency is subject to disciplinary action. He saw no mandate.

West commented that the thrust of it is to imply that some action be taken. The last sentence of 2.15(7) exceeds the law, in his opinion.

In response to Oakley, Stansberry did not think the Commission would interpret "may" in the law as imposing a duty on the licensing agency to initiate proceedings.

Motion 2.15(7) Delayed

Holden moved to delay for 70 days the effective date of 2.15(7). Motion carried.

Oakley reiterated it was his concern as to the Commission's interpretation of the law.

Brown spoke in opposition to 1.1(8) defining "retirement plan and benefit system. He quoted from the statute and argued this rule invades the clear intent of §601A.13.

1. It limits retirement plan and benefit system as relating only to discontinuance of employment pursuant to the provision of such plan.

CIVIL RIGHTS Cont'd

2. the section of the law would be limited to retirement plan of benefit system where contributions are based upon the anticipated costs of the needs of the retirees.

He continued the two additional limitations not only are not authorized by law, they are not meaningful as applied to retirement plans. Brown referred to the Franklin Mfg. case and the Iowa Supreme Court which say that the purpose of §601A.13 was to exempt those plans and benefit systems relating to retirement. He urged that the subrule be deleted as being strictly beyond the statutory authority.

Donald Hauser and the following members of the Human Rights Committee made additional comments: Kathleen Reimers, Denny Drake, Maytag and Jerry Nelson, E.E.O Co-ordinator for Deer and Co.

Hauser referred to correspondence furnished the Committee and summarized their position concerning the rules.
The Association found objection to 1.1(9) which defined "injury" to mean a loss of pecuniary benefit, rights, or an offense against a person's dignity.
Amendment to 1.3(1) would allow liberal amendment of ICR complaints at any time in the Commission's processes.
The Association also found objection to amendments to 1.17 and 6.1 and 6.2(6). (See attached statement)

Reimers indicated they supported the position taken by the insurance group regarding retirement plans. In re the rule on damages for injury to personal dignity, it was their contention the rule was not supported by the ICR Act. She recalled that an amendment to include damages provisions in the statute was rejected by the legislature last year. Further, she opposed the absolute right of ICR Commission to amend the complaint at any time and she cited an example of a 4-year hearing during which time all records had to be preserved. The liberal rule should be restricted.

Nelson concurred with Reimers opposition to 1.3(1)--to reopen a case at the whim of the Commission.

Drake noted that the revised definition of "handicapped" is vague and hard to understand. Rules concerning reasonable accommodations for the handicapped would create a "tremendous burden on all Iowa employees with three or more employees. This would place all Iowa companies with three or more employees in the same category as a few companies that hold large federal contracts and create great expense.
He was concerned as to reverse discrimination when an employer

CIVIL RIGHTS Cont'd

would be required to restructure the job, hire readers or interpreters and similar actions. Therefore, they opposed 6.1 and 6.2.

Nelson interpreted 6.1 to cover temporary disability. Reiners pointed out that up to 1975, the Commission has included in their rules "permanent disability" within the definition of the protected class. They believe that with the redefinition and elimination of the specific term opens that portion of the Act up to anybody who might fall within the very broad terms.
Schroeder wondered about the procedure for a highly skilled person who must be absent for medical treatment regularly. Stansberry did not think the employer would be required to accommodate the employee in this situation.

Holden asked what prompted the rule changes.
Stansberry answered that the law was changed re accommodations and the impetus was to have the state and federal conform with basically the same application. He doubted that the old rules were any less vague.

Patchett questioned Stansberry as to the similarity of federal law to Iowa law with respect to discrimination against the handicapped. Iowa statute seems to limit the discrimination to individuals whose handicap does not relate to that person's ability to perform a job as Patchett interpreted it. He asked if the federal were more restrictive. Stansberry was not that familiar with the federal rule. Patchett thought it arguable that 6.2(6)b may go beyond the law. In this area, according to Stansberry, you must look at each case. Patchett had reservations as to requiring "job restructuring." He quoted from §601A.2(11).

Discussion as to reaction by the Commission if an objection is placed.

4:00 p.m. Priebe excused. Schroeder in the Chair.
Reimers responded to Patchett question concerning the federal law. She quoted from federal rule implementing the handicapped law: "Under the affirmative action obligation imposed by §503 of the Rehabilitation Act of 1973 contractors are required to take affirmative action to advance employment of qualified handicapped individuals at all levels of employment, including the executive level. Such action shall apply to all employment practices, including but not limiting to hiring, upgrading, demoting, transfer, recruitement, layoff, termination, rates of pay, etc."

CIVIL RIGHTS Cont'd

Holden asked if adoption of the rules would help the backlog of cases. Stansberry answered in the negative so far as the handicapped rules were concerned.

It was pointed out that job restructuring interfers with bargaining.

AGRICULTURE

Betty Duncan, Director of the Regulatory Division of the Agriculture Department addressed the Committee concerning 2.15(7) which related to revocation of a license on the basis of discrimination. She pointed out the Department has an affirmative Action Program and regardless of the rules, they plan to continue to implement it.
Duncan pointed out the Department's authority for revocation of licenses is found in Titles 9 and 10 where there is no authority for revocation on the basis of discrimination.
She added that if the Commission construes the rule as being a mandate to the Agriculture Department to initiate a revocation they oppose it as being ultra vires.

In addition, Duncan challenged the authority of the Commission to require an affirmative action program and she urged the Committee to "look strongly at the rules for proper authority."

Ed Hanson, Iowa Bankers Association, and Charles Wasker, Iowa Retail Federation, appeared in complete support of opponents of the rules.

Recess

Schroeder called a five minute recess.
Reconvened at 4:20 p.m.

CIVIL RIGHTS

Oakley thought, in all fairness, it should be noted that, contrary to Hauser's statement that IMA had been basically ignored by the Civil Rights Commission, the Commission did respond to IMA by a 6-page letter.

Motion

Moved by Tieden to delay the effective date of rules published as: ARC 0192 (amendments to 1.1, 1.3, 1.8(2), 1.16, 1.17, 3.9, 6.1, 6.2(6) and Chapter 7) for seventy days.
Motion carried with 4 ayes.

REVENUE

Elliott Hibbs, Deputy Director, and Michael Cox, appeared in behalf of the Revenue Department for review of the following:

Tax review board, location change, 1.1, 2.3, 2.14, filed emergency	F.E	5/2/79
Briefs and pleadings, 7.5(4), 7.5(5), 7.8, 7.12, 7.17(4)	N	4/18/79
Property tax exemptions, ch 78	N	5/2/79
Assessor education commission, chs 122-125	N	4/18/79

Amendments to Chapters 1, 2 and 7 were acceptable.

REVENUE Cont'd

Discussion of Chapter 78--property tax exemptions. Hibbs pointed out that although the rules are new, the policy has been in effect for many years.

Schroeder raised question as to local auditor releasing clear title to property without back taxes being paid.
Hibbs said that when it involves government entity that purchases the property, this will occur.
Cox noted that the Attorney General had held in four different opinions since 1938 that the tax liability merge with the title of the property when it is subdivision of the state.
Hibbs added there are other instances which taxes are affected by changes in the ownership of property during the year.
It is very possible for counties to realize a windfall as well as a loss at any given time.

Dave Elias, Deputy Auditor of Johnson County, submitted a prepared statement wherein he objected to proposed rule 78.6(3) contending it would make budgeting impossible for all local governmental bodies which rely upon property taxes for revenue..

Oakley observed that perhaps distinctions should be made for different types of situations.
Tieden was sympathetic to the problem in Johnson County since there is an impact on their budgets.
Patchett wondered what justification there was to "let the property owners off the hook."
Hibbs referred to the 4 AG opinions which they have followed.
Incidentally, the Assistant AG did not agree with the objection of Elias.
Discussion as to possible delay into the next GA after the rules have been filed. The matter is one that should be handled legislatively, according to Hibbs. He added that the matter of annexation is another area which should be reviewed by the GA.

No recommendations were made concerning Chapters 122 to 125 re asessor education commission.

There was unanimous consent to carry over rules of Commerce to the next meeting--both groups which were on the May agenda.

The following rules were acceptable as published.

Credit Union, 4/18/79
Insurance Department, 5/2/79
Nursing Home Administrators, 4/18/79
Planning and Programming, 5/2/79
Board of Regents, 5/2/79

June Meeting — There was unanimous consent to hold a special meeting of this Committee on June 5 and 6 in lieu of the statutory date of June 12. (The date was later changed to June 5 only)

ADJOURNMENT — The meeting was adjourned at 5:10 p.m.
Next meeting will be Tuesday, June 5, 1979, at 9:00 a.m., Senate Committee Room 24.

Respectfully submitted,

Phyllis Barry

(Mrs.) Phyllis Barry, Secretary

APPROVED

_____
Chairman

DATE _____

THE VOICE OF IOWA INDUSTRY

IOWA MANUFACTURERS ASSOCIATION

706 Employers Mutual Building
717 Mulberry St., Des Moines, Iowa 50309
515/244-6149

January 5, 1979

Iowa Civil Rights Commission
Suite 540, Liberty Building
418 Sixth Avenue
Des Moines, Iowa 50319

Dear Commissioners:

The proposals contained in your notice of intended action which appear in the December 13, 1978 issue of the Iowa Administrative Bulletin contain many provisions that are of great concern to Iowa manufacturers and Iowa employers generally. It is our belief that there are proposals included which are not within your statutory authorization to promulgate rules "consistent with and necessary for enforcement of the Iowa Civil Rights Act."

Item 1, Subrule 1.1(8) - The Commission proposes to limit the Section 601A.12 exemption for retirement plans and benefit systems to "discontinuation of employment." First of all, it is not clear what this attempt to limit the Section 601A.12 exemption means. The Iowa Supreme Court in Franklin Manufacturing Company v. Iowa Civil Rights Commission, 270 N.W.2d 829 (Iowa 1978), examined Section 601A.12 and decided to limit the application of Section 601A.12 to retirement plans and "retirement" benefit systems. The Court did not further limit this section to the "discontinuation of employment" provisions of a retirement plan, nor did the Court limit the application of Section 601A.12 to plans "where contributions are based upon the anticipated financial costs of the needs of the retiree."

The Commission's attempt to redraft the language of Section 601A.12 could mean that an employer may not deny an elderly newly hired employee entry into a retirement plan, even though the retiree is above normal retirement date of the plan. Mandatory coverage of all employees regardless of age, with a pension payout that meets the financial needs of all retirees, could lead to the destruction of a viable pension plan for other long-term employees. Even the 1978 amendments to the Federal Age Discrimination in Employment Act, Section 4(f)(2), grants employers an exemption to facilitate the hiring of older employees by permitting their employment without necessarily providing equal benefits under employee benefit plans. House Labor Committee Report on H.R. 5383, Rept. 95-527, Part 1 and Senate Human Resources Committee Report on H.R. 5383, Rept. No. 95-493.

Neither the language of Section 601A.12, nor the legislative history of the section discussed by the Iowa Supreme Court in the Franklin case, supports the Commission's attempted limitation of Section 601A.12. Further, the Commission's intention to consider a retirement plan a subterfuge unless the contributions to such a plan are based upon anticipated financial needs of the retiree, makes the standard for a retirement plan an ambiguous and unattainable goal since it is impossible in this day of inflation to anticipate financial needs of each retiree.

Subrule 1.1(9) - The Commission's proposed rules would expand an individual complainant's right of recovery for civil rights violations to injuries to "personal dignity." Recovery for injury to personal dignity can be likened to damages for mental anguish. Both forms of damages are broad and indefinable requests for relief calling for speculation and generalizations. The Iowa Legislature rejected such forms of relief in the new amendments to the Iowa Civil Rights Act by rejecting a proposed legislative amendment which would allow recovery for pain and suffering as a remedy under the Iowa Civil Rights Act. Similarly, the federal courts have found that to allow compensatory and punitive damages for humiliation and harm or injury to character in a Title VII action would unduly strain the language of the Act and is not supported by the legislative history. Pearson v. Western Electric Co., 542 F.2d 1150, 13 FEP Cases 1202 (10th Cir., 1976).

Item 2 - Would allow liberal amendment of a civil rights complaint at any time. The proposed regulation does not limit the amendment provision to preconciliation or prehearing amendments, but allows amendment by the Commission at any time, with the possibility that a respondent may get a discretionary extension of time granted by the Commission hearing officer, if the officer deems it appropriate. The problems with this liberal provision for amendment are twofold. First, as the federal courts have held under Title VII, a respondent should be able to reasonably estimate what records and information are necessary to defending a particular charge. With the long delays in processing the ICRC complaints, as much as three to four years, the respondent, "like any other person against whom a claim is asserted, is entitled to know it is exposed to a risk. It is entitled to have an opportunity to investigate the facts itself. It should know what records and papers may become important so that they can be preserved and that certain employees are potential witnesses to facts which may later determine its liability." Wilson & Co., Inc. v. Oxberger, 252 N.W.2d 687 (Iowa, 1977). Under this rationale, the federal courts have limited a complaint to the scope of an investigation which could reasonably be expected to grow out of a charge. Macon v. Bailar, 17 EPD paragraph 8376 (D.C. Va. 1978); Johnson v. Nekoosa-Edwards Paper Company, 558 F.2d 841 (8th Cir., 1977); EEOC v. Bailey Co., Inc., 563 F.2d 439 (6th Cir., 1977); Harris v. Caterpillar Tractor Co., 18 FEP Cases 765 (D.C. S. Ill., 1978).

The second problem created by the ICRC proposal to allow amendments to the complaint at any time is the potential failure of the ICRC to make a reasonable attempt to conciliate all claims made prior to a hearing on the matter, as required by Section 601A.14(3). The federal court reviewed this precise issue in EEOC v. Sherwood Medical Industries, 17 FEP Cases 441 (D.C. Fla., 1978). In that case the EEOC had received a charge alleging only racial discrimination and had compiled data on both racial and sexual composition of the employer's workforce. The Commission failed to make a reasonable cause determination and to attempt conciliation efforts on the issue of sex discrimination. The Court held that EEOC was precluded from suing the employer under Title VII for sex discrimination. The Court rejected EEOC's contention that conciliation efforts are required only on the subject of the original charge. Similarly, liberal amendment of ICRC complaints to include "facts as uncovered in the investigation" may very well lead to the Commission's failure to attempt conciliation on all allegations of the complaint.

Item 3 - Would allow the hearing officer, who has made an affirmative decision on the merits of a complaint, to also rule on merits of any "motion for procedural ruling or relief." At least one Iowa District Court in Loras College v. ICRC, Dubuque Co. Law No. 41499, expressed concern with the impartiality of the decision-making procedure of the Commission under its present procedure. Pre-

hearing motions to quash or limit subpoenas, to dismiss portions of the complaint, etc., may be just as important as any other portion of the hearing. A respondent is entitled to a neutral, unbiased hearing body in each facet of the hearing of a contested case. Keith v. Community School District of Wilton, 262 N.W.2d 249 (Iowa 1978). A hearing officer who has determined probable cause in a case after reviewing the investigative file is not such a neutral.

Item 5 - Appears to implement Section 17A.16(2) of the Iowa Administrative Procedure Act (IAPA) regarding applications for rehearing of the final decision of an agency in a contested case. This provision of the IAPA does not provide for the agency's sua sponte (on one's own motion) reconsideration of a final agency action. The ICRC proposed regulation provides that the agency may reconsider a decision on its own initiative. Moreover, the proposed regulation does not provide any time limit or method by which the Commission may reopen a matter previously closed. A procedure, such as the one proposed, for open-ended reconsideration of a final Commission decision by the Commission could totally disarrange the orderly statutory procedure for appeal of a final agency action pursuant to the IAPA.

Item 7 - Defining handicap purports to implement the Chapter 601A prohibition against discrimination in employment on account of the "disability of (an) applicant or employee, unless based upon the nature of the occupation." Section 601A.6(1)(a). On the federal level, discrimination against handicapped persons is prohibited by the Rehabilitation Act of 1973, 20 USC subsection 793, as amended, and under Executive Orders 11758 and 11914. The Rehabilitation Act is not of general application to employers engaged in commerce, as is Title VII, but is directed to a narrower group of employers who have federal government contracts in excess of $2,500. Under Federal Executive Order 11914, the Department of Health, Education and Welfare is given authority to issue nondiscrimination standards for recipients of federal assistance from H.E.W. The federal regulations promulgated pursuant to these sources are not of general application to employers covered by Title VII. Rather, the application of these regulations parallels the application of Iowa's Executive Order 15 governing state contractors and licensees. The state government, like the federal government, may impose affirmative obligations on employers who have a special tie with the government, but the ICRC by parroting the H.E.W.'s handicap regulations at 45 CFR 84, et seq. attempts to apply these same standards to any Iowa employer with more than three employees. The results are a set of regulations that have no basis in the law, and unduly restrictive standards that small Iowa employers are forced to attempt to meet.

The ICRC's basis for interpretation and implementation of the ICRA must have its origin in the authority conferred by the express provisions of the law. Quaker Oats Co. v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 868 (Iowa, 1978). There is no legal basis for the ICRC's extension of stringent standards for federal contractors and recipients of federal monies to affirmatively make accommodations for handicapped persons unless "undue hardship" to the employer's operation can be shown. The Iowa law specifically permits the consideration of the nature of the occupation in employment of disabled persons and does not require promotion or transfer of a handicapped person unless such person is already qualified for the position. Sections 601A.6(1)(a) and 601A.13. Certainly the clear language of the Iowa law does not lend itself to the expansive interpretation proposed in these rules.

Additionally, in 6.1(2) we believe it is a strained construction to include "cosmetic disfigurement" in the term "physical or mental impairment" which is con-

tained in the statute at 601A.5(10). Even the term "anatomical loss" is questionable when it applies to some "sense organs" and "reproductive systems." Under this definition, individuals who have had vasectomies, tubal ligations, hysterectomies, deviated septums, breast enlargements, etc. could be considered handicapped as all of these are "cosmetic disfigurements" created by surgery. Many of these kinds of operations are requested by the individual involved and are not uncommon. This language could result in unnecessary and costly litigation.

Under 6.1(2)b, an employee who is terminated due to inability to perform or learn a job could file a charge based on being "regarded as having" a "specific learning disability."

Item 8, 6.2(6) - "Reasonable accommodations" include: "job restructuring"; "modified work schedules"; "readers or interpreters and other similar actions." For an organization of four or five employees, it is a simple matter to show when these "reasonable accommodations" create undue hardships. But in large organizations with hundreds of employees, it is most difficult to show "undue hardship." However, these reasonable accommodations are no less expensive or counterproductive in large organizations than they are in smaller ones. The larger organizations supposedly are more capable of absorbing the added costs of these accommodations.

By restructuring jobs, hiring two people for one job (the handicapped and the tutor), etc., many problems are created. Those employees who are "normal" are being paid a wage to perform a range of functions within an occupational classification. When a job is restructured, breaking it down into the "simplest common components," and a handicapped individual is hired to perform only a limited number of tasks in an occupational classification, reverse discrimination results. The "normal" employee receives the same wage for being qualified and able to perform all the functions in that classification while the handicapped individual performs only a few. To totally re-evaluate all work stations in an operation and reassign new wage levels to them is unrealistic and, no doubt, would create an "undue hardship." But, in essence, employers are being ordered to fit specific jobs to the qualifications of the individual applicant or employee rather than hiring and employing qualified people in occupational groups. That concept presents all kinds of interesting ramifications and, if it persists, could lead to horrendous costs and counterproductive efforts.

For the reasons stated above, IMA objects to these proposed rules and urges you to withdraw them from further consideration.

Sincerely,

D. G. Hauser
Vice President

cc: Governor Robert D. Ray
Brice Oakley
Executive Director - ICRC
Members of the Administrative Rules Review Committee
Code Editor

THE VOICE OF IOWA INDUSTRY

IOWA MANUFACTURERS ASSOCIATION

706 Employers Mutual Building
717 Mulberry St., Des Moines, Iowa 50309
515/244-6149

May 21, 1979

TO: Members of the Iowa Administrative Rules Review Committee

In January and again in March 1979, the Iowa Manufacturers Association (IMA) offered comments and testimony regarding rules proposed by the Iowa Civil Rights Commission. These rules are currently listed for your consideration in the Iowa Administrative Bulletin as ARC 0192 beginning on page 1300. We previously sent a copy of our January 5 letter, addressed to the Commission, to you for your consideration.

Since January 5, IMA has provided further testimony in a March 13 letter to the Commission, a copy of which is attached. IMA representatives also appeared at the Commission hearing on these rules. The involvement by IMA and other employers in these rules is evidence of the concern Iowa employers have over the passage of an agency's rules having the force of law, which we believe may confuse and inhibit the enforcement of the state and federal laws they are intended to advance.

We ask you to please review our January 5 and March 13 letters for greater details. Following is a summary of some of our areas of concern:

1. Item 1 adds new limitations on the provision of employee retirement plans. These limitations mandate that an employer may only offer retirement plans if they (1) are "based upon the anticipated financial costs of the needs of the retiree" and (2) do not consider the age or sex of any participant in the plan for any reason, except the discontinuation of the employment of that participant. These two requirements are not only difficult to understand, but are impossible to interpret in light of known terminology and practice in providing employee retirement plans. Further, if these requirements are given their literal meanings, their actual application may be inconsistent with the federal requirements for employee retirement programs as provided by the Employee Retirement Income Security Act of 1974 (ERISA).

2. Item 1 also limits the application of Section 601A.12, Code of Iowa (1979), which provides that employee benefit and retirement plans shall be exempt from the Iowa Civil Rights Act's prohibition of consideration of the age and sex of employees. While Franklin Manufacturing Company vs. Iowa Civil Rights Commission, 270 N.W.2d 829 (Iowa 1978) made it clear that the Iowa Supreme Court intended that disabilities due to pregnancy or complications arising therefrom, be treated by the employer the same as other employee disabilities, the Iowa court did not address the possible elimination of all legitimate considerations of the age and sex of employees in extending other benefit plans or systems.

3. Item 1 - subrule 1.1(9) - the proposed rule that injury shall include an offense against a person's dignity conflicts with the court decisions in this area. The court's disallowance of such a separate category of

recovery on a statutory claim is because it would encourage harassment suits but add nothing by way of condemnation of invidious discrimination. Private actions for pain and suffering can be brought in tort if a person has such a claim, and the Iowa Civil Rights Act is not intended as a vehicle for the expansion of tort law.

4. Item 2 of the rules would allow liberal amendment of Iowa Civil Rights Commission complaints at any time in the Commission's processes. This regulation would permit the filing of a generalized claim of discrimination within the statutory period of 180 days, and would then allow the addition of "any" amendments accusing the Respondent of new and different allegations. Noting the Commission's backlog in processing complaints, these possible amendments may come one, two or even three years after the date of the initial complaint. Moreover, according to the proposed rule, the amendments may be accepted regardless of whether the Respondent had any opportunity to answer those charges in the Commission's investigation of the original complaint.

5. Item 5 similarly allows the Commission to reopen a case previously closed upon its own motion. This procedure of an agency-initiated reconsideration of cases is not authorized by the Iowa Civil Rights Act or the Iowa Administrative Procedure Act (IAPA). Further, Section 17A.15(1), Code of Iowa (1979), defines "a final decision" as one made when the agency presides at the reception of evidence in a contested case. If a complaint is closed because of a Complainant's failure to proceed, or because an investigator finds no probable cause to credit the allegations contained in the complaint, no "final decision" within the meaning of Section 17A.15 is ever reached. When will the Respondent be sure the matter is closed? When will the Commission's right to reopen a complaint ever be ended if no "final decision" is made?

6. Items 7 and 8 create an expansive interpretation of the term "handicapped" person and of an employer's obligation to accommodate such handicaps. The Iowa Civil Rights Commission's proposed rules describing a handicapped person are so vague and generalized that many employees' temporary disabilities may fit into these broad definitions. This generalized treatment of employee handicaps diminishes the effective thrust of Iowa's law to provide equal employment opportunities for permanently disabled persons. Moreover, while the federal law only seeks to impose mandatory accommodation to the point of undue hardship upon employers having a contractual relationship with the federal government, the Iowa Civil Rights Commission seeks to impose this standard on all Iowa employers with over three employees. Further, the Commission's proposed rules on the definition of physical impairments covered by the law depart from present rules with established standards containing definite guidelines, and move towards a vague and ambiguous standard of "perceived" and actual disabilities limiting major life activities.

IMA is opposed to these rules as they are currently written. As indicated earlier, we have presented testimony on a timely basis to the Iowa Civil Rights Commission, and feel our comments and concerns have been largely ignored.

We ask that the Administrative Rules Review Committee use the powers delegated to it by the legislature to bring about revision of these rules. At the least, we ask the committee to place a letter of objection on the rules in the event they are not withdrawn or amended before going into effect.

Thank you for your consideration of our remarks and our concerns.

Sincerely,

D. G. Hauser
Vice President

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Attachment

THE VOICE OF IOWA INDUSTRY

IOWA MANUFACTURERS ASSOCIATION

706 Employers Mutual Building
717 Mulberry St., Des Moines, Iowa 50309
515/244-6149

March 13, 1979

Iowa Civil Rights Commission
Suite 540, Liberty Building
418 Sixth Avenue
Des Moines, Iowa 50319

Dear Commissioners:

The opportunity to provide testimony at this public hearing is appreciated.

On January 5, 1979, IMA provided fuller comments on proposed amendments to Chapters 1, 3, 6 and 7 of your rules which were announced in the December 13 Iowa Administrative Bulletin.

Today's statement is presented as a summary of our position but we urge that our earlier detailed comments also be considered.

We also acknowledge receipt of a January 23 detailed letter from Chairperson Bataille. Rather than attempt a lengthy, oral response, we have attached an explanatory memorandum prepared after consultation with members of the IMA Human Rights Committee and our general counsel. We will read this into the record also if you wish, but in any event we would like for it to be considered a part of the record on this matter.

Item #1, Subrule 1.1(8) -- Insofar as the rule attempts to state the Iowa Supreme Court's interpretation of the Section 601A.12 exemption, it is unnecessary. If, nonetheless, deemed desirable, it would suffice to say that "retirement plan or benefit system" shall mean "retirement plan or retirement benefit system" with a citation to Franklin.

The attempt to further define the exemption in terms of "discontinuation of employment" goes beyond the Court's interpretation and unnecessarily burdens the very kinds of benefit systems the exemption was designed to protect. Such a definition also conflicts with interests of potential beneficiaries of retirement and benefit systems if they do not "discontinue" their employment.

The attempt to add a further limitation to the exemption by restricting exempted plans to only those "where contributions are based on the anticipated financial needs of the retiree" is, in our interpretation of the law, beyond the scope of authority of the Commission.

It is merely an addition to the law which could work a disqualification on numbers of exempted plans because of the considerations, often by the potential beneficiaries or their representatives, other than anticipated needs. For example, some employees and employers may agree that proportionally more

be paid in wages and less in contributions to a retirement plan which would apparently disallow the exemption under the proposed rule.

Section 601A.2 provides statutory guidance for denial of the exemption, namely, where the plan is a mere subterfuge adopted to evade the law. The proposed additional disqualifying factor on the exemption does not arise from nor does it implement this legislative intent which expresses the precise basis and only basis upon which the Section 601A.12 exemption is to be disallowed.

Subrule 1.1(9) -- The proposed rule that injury shall include an offense against a person's dignity conflicts with the Court decisions in this area. The Court's disallowance of such a separate category of recovery on a statutory claim is because it would encourage harassment suits but add nothing by way of condemnation of invidious discrimination. Private actions for pain and suffering can be brought in tort if a person has such a claim, and the Civil Rights Act is not intended as a vehicle for the expansion of tort law.

Item #2 -- An amendment being allowed to a complaint at any time runs the unnecessary risk of denial of due process to a Respondent. Some time limit in advance of a hearing is a necessary safeguard.

Item #5 -- If a reopening of a closed matter is permitted on the Agency's own motion, it should be made clear that only one such reopening be permitted and that the twenty-day limit apply to the Commission's motions.

Item #7 -- The expansive interpretation of the accommodation required to be made by an employer is contrary to the legislative direction that there is not discrimination on the basis of disability where the nature of the occupation is the basis for the non-selection. Nothing in Chapter 601A authorizes the Commission to adopt standards applicable to larger federal and state government contractors.

Item #8 -- Employers would be required to accommodate a handicapped individual by structural changes, job restructuring, hiring readers or interpreters despite the hardship imposed. Only if the hardship is undue is accommodation not required. This is a proposal which could have a particularly adverse impact on small employers and one which, at least in part, runs counter to the statutory limit specifically providing that the nature of the occupation need not be changed.

Thank you for your consideration of these additional remarks and the more detailed coverage of this issue contained in our January 5 letter and the attachment to this letter.

Sincerely,

D. G. Hauser

D. G. Hauser
Vice President

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Attachment

Attachment to IMA March 13, 1979 letter to Iowa Civil Rights Commission

March 13, 1979

Further Comments Regarding Iowa Civil Rights Commission Proposed Amendments to Regulations Appearing in December 13, 1978 Iowa Administrative Bulletin:

A. Item 1, Subrule 1.1(8) -- If the purpose of the Commission's proposed rule is to limit the application of Section 601A.12, Code of Iowa (1977), as the Iowa Supreme Court did in Franklin Manufacturing Company v. ICRC; the most direct and appropriate explanatory regulation would simply state that "retirement plans and benefit systems" as used in Section 601A.12 means retirement plans and retirement benefit systems. The wording of the ICRC's proposed regulation goes far beyond the purpose explained in Chairperson Bataille's January 23, 1979 letter.

The Iowa Court in Franklin did not limit the application of the Section 601A.12 exemption to only those provisions of retirement plans relating to "discontinuation of employment." Such an interpretation of Section 601A.12 would mean that the sole purpose of the exemption would be to allow employers to consider an employee's sex and age in determining the normal and mandatory retirement date under the plan. Such considerations of sex may not be consistent with federal law.

The Commission's narrow reading of the Section 601A.12 exemption would prevent an employer from using sex or age considerations in actuarial tables to figure the necessary contributions or the required payout of a retirement plan. An employer could be prevented from requiring higher contributions of an older employee in a defined benefit pension plan, or from excluding a new employee who is employed within five years of normal retirement age, as is permitted by the federal Employee Retirement Income Security Act of 1974, (E.R.I.S.A.) in defined benefit plans. Section 1011, ERISA, IRC subsection 410(a)(2).

For example, if an employer had an employee defined retirement benefit of $5,000 per year after retirement at age 65, and the employer who did not discriminate and hired a 62-year old person as a new employee at $15,000 per year salary, the employer would find himself faced with a potential pension liability of $25,000 for a three-year employee if the new employee retired at 65 and lived to age 70. Thus the Commission's proposed rule would discourage employers from hiring older employees.

The permissibility of age considerations in entry into a defined benefit plan was specifically noted in the legislative hearing reports on the recent amendments to the Federal Age Discrimination Act. The proposed Iowa regulation would disallow any consideration of age with respect to a pension plan unless that consideration dealt solely with "discontinuation of employment," i.e., the normal or mandatory retirement age in the plan.

The Commission defends its proposed rule by stating that the regulation does not address the issue of whether an employer must accept any new employee into his retirement plan regardless of age. The Commission must be mindful that the Iowa law contains a broad prohibition against age discrimination with no ceiling age on that prohibition. Without the Section 601A.12 exemption contained in Iowa law, any consideration of age in offering or withholding employment benefits could violate such a broad prohibition. It is up to the legislature to determine the wisdom of the possible elimination of the Section 601A.12

exemption.

Another primary requirement for pension plans under E.R.I.S.A. is that the pension plan be actuarially sound, E.R.I.S.A. Section 302(c)(3) and 1013(a), ERISA, IRC subsection 412(c)(3). The amounts of necessary contributions for a defined benefit plan must be based on an actuarial estimate of the cost. These actuarial estimates, out of necessity, must consider the age and sex of the probable beneficiaries of the plan to come up with the required contribution and maintain financial solvency for the plan.

In Los Angeles v. Manhart, 55 L.Ed.2d 657, at 657, the U.S. Supreme Court ruled that even in a defined benefit plan, contributions of male and female employees must be equal. If a contribution differential based on sex is eliminated, the benefits paid out of the plan to females must be likewise reduced, or the employer subsidy of benefits for females will be greater than that for males. Under Manhart, presumably, it is permissible to provide identical contributions for all employees, regardless of sex, but the resulting monthly annuity for females will be smaller. The Supreme Court specifically noted that neither Title VII nor the Equal Pay Act prohibit the determination funding requirements for an establishment's benefit plan by considering the composition of the entire work force. 55 L.Ed.2d at 671. The consideration would include a review of the age and the sex of such employees which the Commission's new regulation would consider illegal.

In light of the Manhart case, equal contributions by employees in a defined benefit plan may very well result in retirement benefits which are not based upon the anticipated costs of retirement and the financial needs of the retiree, but which are based on the amount of the employee's contribution and actuarial tables considering the age and sex of all employees in the plan. Likewise, pension plans which come within the term "defined contribution plans" may also require equal contributions of employees, but would result in pension benefits which relate to the amount of the contribution, and not to the anticipated financial costs of the needs of the retiree. That is, a defined contribution plan by its nature requires the same formula be applied to all eligible employees regardless of age or sex -- a feature different from defined benefit plans -- but by their nature cannot be predicated on "anticipated financial cost."

The Commission notes further that cost of providing an employment benefit shall be no defense to its defined requirements for coverage of retirement plans and benefit systems. The Commission should take note of the proposed interpretation of the Department of Labor with respect to the federal prohibition on age discrimination.

The Department reviewed the impact of the 1978 amendments to the Federal Age Discrimination in Employment Act (ADEA) to find that with respect to life insurance and long term disability, where an employer can demonstrate under Section 4(f)(2) of the federal law that a percentage reduction in coverage of a benefit in any one year is justified by an increase in cost of the benefits, no violation of the ADEA would result.

B. Subrule 1,1(9) -- The Commission maintains that damages for injury to "personal dignity" are justified by the language of Chapter 601A. The Commission cites the language that "damages shall include but are not limited to actual damages," to support "any" remedy the Commission deems appropriate including damages to "personal dignity."

Such statutory language does not authorize the expansion of the specific remedies listed, to damages which exceed actual damages.

A recent evaluation of similar language which permitted the Court to grant "legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation, judgments compelling employment, reinstatement and promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section," did not support a recovery for pain and suffering. ADEA, 29 USC subsection 626 (b). Slatin v. Stanford Research Institute, 18 FEP Cases 1475 (4th Cir., 1979).

This circuit court supported the same rationale, as was expressed by three other circuit courts, that the legislative history did not support the extension of pain and suffering damages, and that allowance of damages for pain and suffering was inconsistent with the enforcement scheme of the law. Vazquez v. Eastern Airlines, Inc., 579 F.2d 107, 17 FEP Cases 116 (1st Cir., 1978); Dean v. American Security Insurance Co., 559 F.2d 1036 (5th Cir., 1977); cert. denied 434 U.S. 1066 (1978); and Rogers v. Exxon Research and Engineering Co., 550 F.2d 834 (3rd Cir., 1977).

These courts point out that it is unlikely that the legislature would grant a right to pain and suffering damages without providing guidelines for their allowance. Allowance of this type of damages introduces an element of uncertainty into the conciliation process.

It should also be noted that the Iowa Civil Rights Act has from its inception included language calling for remedies "including, but not limited to . . . (those listed)." Yet even with this broad language of the Commission's power to fashion a remedy, the Iowa Supreme Court in Ironworkers Local No. 67 v. Hart, 191 N.W.2d 758, 768 (Iowa 1971) held that the Commission had no authority under the language of the statute to enter a judgment for compensatory damages per se. Similarly, the Iowa legislature has rejected specific listing of damages for pain and suffering in the available ICRC remedies and continues to limit the Commission's authority in that regard.

C. Item 2 -- Chairperson Bataille cites the Ironworkers Local No. 67 v. Hart, supra, case as support for the Commission's proposed rule on amendment of a complaint at any time, even during or after evidence has been taken on the case at public hearing.

A review of the context of the Ironworkers quotation will show that the Iowa Supreme Court was at that time considering whether a complaint may be filed by a person not aggrieved. The Court was not considering whether the allegations of a complaint were amended in a timely fashion so as to apprise the respondent of the charges against him or to complete the necessary statutory conciliation procedures with respect to all charges.

The Iowa court did however stress the importance of due process and fair play in Commission proceedings.

The federal courts continue to recognize the fact that this due process requirement should limit the issues of a discrimination suit to those raised in pretrial conciliation efforts. Marshall v. Tecumseh Products Co., 18 EPD paragraph 8873, (W.D. Tenn. Dec. 1978). This limitation does not unduly restrict a complainant's right to amend a complaint prior to the conciliation procedure, but it does protect a Respondent's due process rights.

D. Item 3 -- Chairperson Bataille stresses the neutrality of the Commission's administrative hearing officer in making a probable cause finding as a representative of the agency, yet she points out in her next statement that the agency is a party litigant for purposes of a motion for reconsideration. Ms. Bataille denominates the agency as a "neutral" for some purposes in the litigation of a case, and as a party litigant in the same case. There is no legislative support for an administrative rule which would allow an agency to reopen its final decision in contested cases. Ms. Bataille asserts that unless the statute expressly forbids agency action, the agency is free to take whatever action it feels "justice requires."

Such an expansive reading of the agency's power to formulate its rules and actions could have disasterous results.

As the Iowa Supreme Court has frequently noted, the function of an agency is an administrative one to enact reasonable rules and regulations necessary in carrying out the legislative enactments, not what the agency deems "justice" to be. "(The agency) may not make law, or by rule, change the legal meaning of the common law or statutes." Randolph Foods v. State Tax Commission, 258 Iowa 13, 137 N.W.2d 307 (1965).

E. Items 7 and 8 - Subrules 6.1 & 6.2(6) -- IMA's opposition to this proposal stems from the fact that the Commission is attempting to require all Iowa employers to comply with regulations that the federal government has chosen only to demand of a specialized group of employers, i.e., government contractors. Such federal standards applied to all Iowa employers have no basis in law and would work an undue hardship on Iowa employers if they are required to comply with these proposals.

Additionally, the Commission is attempting to require Iowa employers not only to abide by the burdens and requirements heretofore only applied to government contractors, but is also attempting to require all Iowa employers to affirmatively accommodate the disabilities of all employees and applicants unless such accommodation would result in undue hardship to the employers' business.

Section 601A.6 prohibits disability discrimination unless based upon the nature of the job. It's clear that the Civil Rights Act's prohibition on discrimination based upon the nature of the job and the Iowa Civil Rights Commission's proposals of 1) holding Iowa employers to the onerous and specialized federal standards, and 2) requiring employment accommodation unless "undue hardship" would result go far beyond the Commission's regulatory authority as granted by the legislature.

Ms. Bataille's letter states that the proposed rule 6.1(1) defines with greater clarity the term "handicapped person." A comparison of the Commission's proposal with their present rule reveals that their proposal is considerably more vague than the present rule. Iowa employers need clear and distinct rules so that they are aware of and can interpret the standards.

In the present rule specific definitions and medical limitations are applied to the terms "substantial handicap," "blindness," and "deafness." According to the Commission's proposed rules, Iowa employers must search for and interpret the meaning to be given to the broad language of "physical or mental impairment which substantially limits one or more major life activities." The proposed

rules go on to expand the general conditions to be included in the term "substantially handicapped." But the proposed rules do not define with any clarity the practical application of these broad terms to Iowa employers because the present rules specifically designate the scope of covered disabilities and because they are as protective of the rights of disabled individuals as are the proposals.