

**MINUTES OF THE APRIL 2011 MEETING
OF THE
ADMINISTRATIVE RULES REVIEW COMMITTEE**

- Date of meeting: The regular, statutory meeting of the Administrative Rules Review Committee (ARRC) was held on Monday, April 11, 2011, in Room 103, State Capitol, Des Moines, Iowa.
- Members present: Representative Dawn Pettengill, Chair, and Senator Wally Horn, Vice Chair; Senators Merlin Bartz, Thomas Courtney, and John P. Kibbie; Representatives David Heaton, Rick Olson, Janet Petersen, and Linda Upmeyer were present. Senator James Seymour was not present.
- Also present: Joseph A. Royce and Jack Ewing, Legal Counsel; Stephanie A. Hoff, Administrative Code Editor; Brenna Findley, Administrative Rules Coordinator; fiscal staff; caucus staff; and other interested parties.
- Convened Rep. Pettengill convened the meeting at 8:30 a.m.
- Fiscal overview** Sue Lerdal presented the LSA fiscal report.

INSPECTIONS AND APPEALS DEPARTMENT David Werning and Jeff Farrell represented the department. Other interested parties included Susan Cameron on behalf of the Iowa Sheriffs and Deputies Association.

- ARC 9400B Ch 11 pertains to the procedure for contested cases involving permits to carry weapons and acquire firearms. Mr. Werning reported that the change in 11.2(1) suggested by Sen. Bartz had been made.
- Ms. Cameron expressed concern about local agencies, such as counties, bearing the full cost of the appeals process, especially when a denial is upheld.
- In response to an inquiry by Rep. Heaton, Mr. Farrell stated that, to date, only six appeals cases had been heard and that the cost of an appeal charged to a county would be approximately \$400. Sen. Courtney expressed concern about the cost of appeals and asked whether, because of the cost, county supervisors might encourage sheriffs not to deny permits though such action would be contrary to the intent of the statute. In response, Ms. Cameron stated that, in her opinion, sheriffs are exercising due diligence before denying a permit, including consultation with county attorneys and the department of public safety.

NATURAL RESOURCE COMMISSION Willie Suchy and Tamara Mullen represented the commission.

- ARC 9423B This amended notice adds a second public hearing and extends the period for public comment for proposed 22.10 to 22.15, which pertain to procedures to be used by the department to develop a three-year voluntary pilot program to open private lands to public hunting while providing landowners grant funds to create, manage, and enhance wildlife habitat. Mr. Suchy stated that another public hearing had been added and the period for public comment extended at the request of interested parties. In response to an inquiry from Sen. Courtney, Mr. Suchy stated that the public comments thus far requested care in the execution of the program. Ms. Mullen clarified for Sen. Bartz that the amended notice extended the period for public comment but no changes were made to the proposed rules. Ms. Mullen clarified for Rep. Pettengill that comments presented at the public hearings, including those about liability, would be considered before adoption of the rules. At the request of Rep. Upmeyer, Ms. Mullen offered to provide the committee with the responsiveness summary in which 622 public comments are summarized.
- ARC 9419B Proposed ch 44 establishes special event permit requirements for ATVs and snowmobiles and includes the special event rules for parks and recreation areas, forestry, fishing tournaments, dog trials, and fireworks displays. Ms. Mullen reported that the department has reached a consensus with stakeholders on the rules. A majority of public comment focused on the definition of “special event,” which will be revised based on comments by stakeholders.
- Rep. Pettengill inquired about 44.3 regarding the basis for the permit required for a field and retriever meet or trial held on private land. In response, Ms. Mullen offered to provide further information to Rep. Pettengill regarding the statutory basis for this stipulation and for the \$2 application processing fee cited in 44.8.

Natural Resource Commission (cont'd)

Rep. Pettengill also asked whether the rules would make snowmobile and ATV events more difficult to conduct. Ms. Mullen replied that no comments in opposition to the rules regarding snowmobiles and ATVs were received and offered to ask David Downing, a representative of the department, to respond to Rep. Pettengill. Sen. Bartz noted that, according to the Iowa Snowmobile Association, the information required on the permits, not the rules themselves, was at issue and offered to discuss the permit language with David Downing.

ARC 9421B, ARC 9422B, and ARC 9420B Ms. Mullen combined the presentation of the proposed rescissions of 61.7(16), special event permits; ch 65, fireworks displays in state parks and recreation areas; and ch 88, fishing tournaments, respectively. These rules have been updated and included in proposed ch 44 (see ARC 9419B).

PROFESSIONAL LICENSURE DIVISION Sharon Dozier, Judy Manning and Pierce Wilson represented the division. Other interested parties included Joe Kelly and Diana Kautzky on behalf of the Iowa Hearing Association and Deanna Triplett and Jason Haglund on behalf of the Iowa Behavioral Health Association.

ARC 9424B Amendments to chs 121, 122, and 124 and new ch 123 pertain to hearing aid dispensers. Ms. Dozier stated that the primary change is the adoption of ch 123 that incorporates Iowa law and rules and FDA standards regarding practice in one chapter. Ms. Dozier stated that no public comments were received and no one attended the public hearing; the board adopted the rules without any changes. Rep. Pettengill indicated that concern about the rules had been expressed to her. In response to a comment by Sen. Courtney, Ms. Dozier stated that she understood the concern relates to how a business is named. Nevertheless, she pointed out that the rules reflect statutory language and reiterated that no one commented about the rules during the public comment period.

Mr. Kelly and Ms. Kautzky expressed regret about not providing comment before the adoption of the rules; asserted that the language in the rules regarding how a business is named is based on outdated statutory language that needs to be changed to reflect the range of services provided by businesses in addition to the sale of hearing aids; noted that a business owner should not be considered unethical if "hearing aid" is not included in the business's name; and requested a 70-day delay so that the statute might yet be amended during the current legislative session.

In response to an inquiry by Sen. Courtney, Ms. Kautzky stated that the outdated language is not harmful yet it does not allow the name of the business to adequately reflect the range of services offered that are unrelated to hearing aids, such as wax removal, hearing screenings for businesses, and occupational hearing tests.

Motion to delay Sen. Courtney moved a 70-day delay on Item 9 (124.2(6)).

Motion carried On a voice vote of 9 to 0, the motion carried.

ARC 9416B Proposed amendments to chs 31, 32 and 33 pertain to marital and family therapists and mental health counselors. Ms. Manning stated that the board sought comment from interested parties before the amendments were published under notice of intended action, and those comments were incorporated into the proposed amendments. No additional comments were received after publication of the notice. Sen. Bartz expressed general concern about the need for the public to be informed about prospective rule makings. Ms. Manning stated that the board provides proposed rules to interested parties by e-mail before the publication of a notice of intended action. Mr. Royce reminded the committee of the electronic availability of rule makings for acquisition by the public via the LSA Web site. Rep. Pettengill inquired about the content-equivalent program. In response, Ms. Manning explained the incorporation of the content-equivalent program into the rules to ease the process of licensure.

Professional Licensure Division (cont'd)

- Ms. Triplett stated that the association had received the pre-notice from the board; however, she expressed concern about the lateness of the board's response to the association's concerns and asked that the board continue to work with the association on the rules. Mr. Haglund requested that the licensure process be made more transparent so that the association might better assist licensees. In response to an inquiry by Rep. Pettengill regarding transparency, Mr. Haglund replied that the definitions need to be broadened to include all types of practice settings. Rep. Pettengill requested that Ms. Manning provide the committee with the comments made by the association.
- ARC 9430B The amendment to 131.8(1) removes the requirement for the board to send a renewal notice to a licensee. Mr. Wilson reported that the licensee will have the option of requesting a renewal notice by e-mail.
- ARC 9432B The proposed amendment to 134.2(11) is intended to clarify what is considered conclusive evidence relating to conviction of a crime. Rep. Pettengill inquired about whether a licensee can be disciplined even when there is not a conviction. Rep. Olson pointed out that a deferred sentence is a conviction but a deferred judgment is not a conviction and inquired about the rationale for the amendment. In response to both inquiries, Mr. Wilson stated that the attorney general had proposed the amendment. Mr. Wilson suggested that the attorney general explain the rationale for the amendment, and Rep. Olson requested that ARC 9432B be placed on the May agenda for that purpose. Sen. Bartz concurred, noting that, because this amendment will be proposed by all boards of professional licensure, revision of the language as soon as possible will be necessary.
- ARC 9428B The proposed amendment to 363.2(11) is intended to clarify what is considered conclusive evidence relating to conviction of a crime. Because the language of this amendment is identical to that of ARC 9432B, Mr. Wilson also offered to have ARC 9428B placed on the May agenda.
- MEDICINE BOARD** Mark Bowden and Kent Nebel represented the board.
- ARC 9413B Proposed amendments to ch 11 establish mandatory continuing education for physicians who provide chronic pain management and end-of-life care. Mr. Nebel stated that continuing education would be required of physicians who routinely practice in these two areas. Discussion pertained to the impetus for the continuing education requirement in the two areas, the definition of chronic pain management, the calculation and cost of required hours of continuing education, how physicians will select themselves for the training and the ramifications of self-selection, the nature and volume of public comment, and the regulation of standards of care.
- ARC 9414B Proposed amendments to 13.2 require patient-physician agreements and encourage the use of the Iowa prescription monitoring program and drug testing by physicians who prescribe controlled substances or opiates to treat patients with chronic pain. Mr. Nebel stated that a patient-physician agreement, formerly encouraged but now mandated, sets forth standards by which medications are prescribed and steps to be taken in cases of abuse or misuse of the medications. Mr. Bowden stated that physicians have sought information about drug abuse and diversion of drugs and that the impetus for the rules came from the law enforcement community, and the development of the rules was encouraged by both the law enforcement community and interested parties from the medical community.
- ARC 9415B Discussion pertained to the effect of the rules on the patient-physician relationship and on other health care providers and whether the rules address the problem of drug abuse and improper prescription practices. Sen. Bartz pointed out an inconsistency among Items 1, 3, and 5 in the classifications of medications. Mr. Nebel stated that the inconsistency will be corrected.
- Proposed amendments to 23.1 establish as grounds for discipline failure by a physician with HIV or HBV to report HIV or HBV status to an expert review panel established by a hospital and to an expert review panel established by the public health department. Mr. Nebel stated that such disclosure is required by state law and is necessary to establish standards for patient safety. In response to an inquiry by Sen. Courtney, Mr. Nebel stated that the physician's disclosure of HIV or HBV status is kept confidential by law.

CITY DEVELOPMENT BOARD Marie Steenlage and James Halverson represented the board.

ARC 9438B Proposed amendments to chs 7 and 8 pertain to additional documentation required on petitions for annexation, specifically, a statement describing whether a city has applied any smart planning principles to a territory. Discussion pertained to the inclusion of the concept of smart planning principles in applications for annexation. Mr. Halverson stated that smart planning principles are considered by the board not as criteria for the board's decision making but rather as indicators of a city's thoughtful consideration of these ten principles; he noted that the principles are based in statute. Ms. Steenlage added that smart planning principles are intended to be a guide or a basis for discussion of the planning process.

REVENUE DEPARTMENT Victoria Daniels represented the department.

ARC 9434B No action on the amendment to 235.1 pertaining to changes made to rebate requirements for the Newton racetrack under 2009 Iowa Acts, Senate File 478, and no action on amendments to 241.3 to 241.5 concerning clarification of the scope and applicability of state hotel and motel tax pursuant to Iowa Code chapter 423A.

ENVIRONMENTAL PROTECTION COMMISSION Russell Tell, Chuck Corell, and Jon Tack represented the commission.

ARC 9425B Proposed amendments to chs 38, 39, 49 and 82 and proposed ch 48 pertain to ground heat exchanger (GHEX) loop borehole systems. Mr. Tell highlighted requirements specific to these systems and reported on public comment regarding labeling and competitive bidding of commercial systems and minimum experience requirements for geothermal drilling. Discussion pertained to certification, including fees; dedicated use of permit and license fees; testing related to certification; continuing education; and setbacks. Rep. Heaton commended the department for the effort to open the certification for drilling GHEX loop borehole systems to currently certified well drillers.

ARC 9371B Proposed 61.3(4) establishes a sampling procedure based on criteria necessary to support recreational uses in lakes, specifically, swimming. At the March meeting, the committee voted to request an informal regulatory analysis regarding this rule making and requested further review of the rule making at the April meeting. Discussion pertained to the purpose of the rule making, in particular, the criteria to measure clarity; management of the lakes under discussion; and review of public comment. Mr. Corell reported that the informal regulatory analysis is still in progress and will include information about the impact on economic development in the watersheds of the lakes under review.

ARC 9330B At the February meeting, the committee imposed a 70-day delay on 61.2(2)"g"(8) and requested clarification of and further information about the impact of the rule. Mr. Tack explained that whenever the U.S. Army Corps of Engineers (Corps) issues 404 permits for the discharge of dredged or fill materials into the nation's waters, the Clean Water Act (CWA) requires states to certify that the 404 permits and the conditions therein are consistent with state water quality standards. As a result, the CWA authorizes states to add conditions to the permits through state certification.

Mr. Tack addressed three questions raised by committee members at the February meeting. First, regarding the effect of the rule on tiling and other farming activities, Mr. Tack stated that the CWA exempts from a 404 permit prior converted cropland, including normal farming activities, the repair of a tile line, and new tiling of existing crop land. Second, regarding quarries, Mr. Tack stated that quarries in Iowa are dug from dry ground and would not require a dredge and fill permit. Third, regarding drainage districts, Mr. Tack stated that maintenance of an existing drainage ditch is exempt from a 404 permit by the Corps. In any of these cases, only if a jurisdictional water of the U.S. were affected would a 404 permit be required.

Sen. Bartz expressed concern that the rule moves the jurisdiction over categories of wetlands and over construction of drainage ditches from the Natural Resources Conservation Service (NRCS) to a 404 permit under the Corps. Mr. Tack stated that only when the Corps determines, in consultation with NRCS, that a 404 permit is required does the Corps consult with the department. Mr. Tack explained that this rule does not determine whether a 404 permit is or is not required; the rule determines when the blanket certification under the rule applies and when the Corps needs further consultation with the department after the permit determination is made.

INSURANCE DIVISION Angela Burke Boston represented the division.

ARC 9398B This rule making pertains to individual health insurance coverage for children under the age of 19. At the March meeting, Rep. Pettengill requested that the division present additional information regarding proposed 15.11(6) and 36.13 at the April meeting. Specific issues related to the open enrollment period and the references to adults rather than children in the language of the rule. Ms. Burke Boston reported that 13 formal written comments were received, and three persons attended the public hearing. She provided copies of the written comments and a copy of ARC 9398B as the division proposes to amend it based on the comments received. The following changes will be made: The open enrollment period will be changed from July 1 to July 15 to July 1 to August 14; companies that wish to offer child-only policies outside the open enrollment period will be permitted to do so; the qualifying events will be amended to reflect the event’s impact on the parent or guardian of the child rather than on the child; and availability of other coverage shall not include coverage through the Iowa Comprehensive Health Association (HIPIOWA) or the temporary high-risk pool.

PUBLIC HEALTH DEPARTMENT Barb Nervig represented the department.

ARC 9435B No questions on the proposed amendment to 126.3(1) pertaining to increases in some of the fees that apply to services provided by the state medical examiner division.

ARC 9436B No questions on proposed amendments to ch 155 concerning the substance abuse and gambling treatment program committee.

HUMAN SERVICES DEPARTMENT Ann Wiebers, Jennifer Vermeer and Deb Johnson represented the department. Other interested parties included Sen. Steven Sodders, Paul and Samantha Sodders, Mary Rawls and David Schrader.

ARC 9404B Amendments to 75.23(9) pertain to purchase of annuities related to Medicaid eligibility. In response to a request by Rep. Olson, Ms. Wiebers presented an example to illustrate the application of the rule.

ARC 9418B No questions on the termination of proposed amendments to chs 77 to 79 and 83 pertaining to assisted living services under the HCBS elderly waiver.

ARC 9403B Amendments to chs 78 to 80 update, streamline, and clarify Medicaid policy for HCBS waiver services. Ms. Vermeer reported that 70 comments, a majority of those received, pertained to respite, which is a service used to provide a break for the usual caregiver from the care of the Medicaid member. Ms. Vermeer explained that while the caregiver is working, the caregiver is not the one providing necessary care; thus, the provision of respite during a caregiver’s usual working hours does not provide a break from the caregiver’s usual care-giving responsibilities. She added that the rule making clarifies the use of respite as it specifically applies to day camps.

Rep. Petersen pointed out an apparent contradiction between the purpose of respite care, which is to enable the member to remain in the member’s current living situation, and the restriction of respite care to 24-hour residential camp. In addition, Rep. Petersen requested a definition of day care in reference to a child with severe disabilities. In response, Ms. Johnson stated that Centers for Medicare and Medicaid Services (CMS) has stated that Medicaid does not pay for day care so that the parent might be able to work; however, CMS has not given clear guidance about the definition of day care and the definition of respite.

Rep. Heaton inquired about the fiscal impact of the rule on parents and on the 24-hour residential camps and day camps and inquired about restructuring the rules to make them more workable. Ms. Vermeer suggested restructuring day camp services to separate the disability-related services from day care services and requiring parents to assume greater financial responsibility for child care elements as a possibility.

Sen. Sodders inquired about the distinction between day care services and continuing education (disability-related services). Ms. Vermeer replied that a means would be required for separating services offered by the day camp because Medicaid will pay for the medical services component but not for the day care component. Sen. Sodders pointed out that a day care-type component of 24-hour residential camp seems to be similar to day care provided in day camp. In response, Ms. Johnson stated that 24-hour residential camp does meet the definition of respite because the

caregiver is provided a break. Ms. Vermeer added that the department is attempting to broaden the definition while maintaining compliance with federal regulations.

Human Services Department (cont'd)

Mr. Paul Soddors asked that the rule be adjusted to address the needs of parents whose children benefit both from day camp and from being at home and to accommodate his child and other children. Mrs. Soddors asked that respite not be limited to a 24-hour residential camp. Ms. Rawls asserted that the rule does change policy and stated that the rule does not provide options for parents who have no other choice while they are working. Mr. Schrader observed that allowing respite for 24-hour residential camp but not for day camp is inconsistent policy and requested a 70-day delay.

Motion to delay Sen. Kibbie moved a 70-day delay on 78.34(5)“d,” 78.38(5)“h,” 78.41(2)“g,” 78.43(3)“d,” and 78.52(5)“a.”

The committee requested that a letter be sent to Sen. Charles Grassley and Sen. Tom Harkin to request that they discuss the issue of respite care services with the Department of Health and Human Services and urge that day camps be allowed as part of respite care services.

Motion carried On a voice vote of 7 to 1, the motion carried.

ARC 9431B No questions on proposed amendments to 79.16 regarding the Iowa electronic health record incentive program.

ARC 9402B No questions on amendments to ch 81 or on ch 166 pertaining to quality improvement initiative grants.

Committee business The minutes of the March 14, 2011, meeting were approved.

The next meeting was scheduled for Tuesday, May 10, 2011, at 8:30 a.m.

Mr. Royce noted the terms of the committee members expire on April 30, 2011.

Adjourned The meeting was adjourned at 12:35 p.m.

Respectfully submitted,

Stephanie A. Hoff

APPROVED:

Chair Dawn Pettengill

Vice Chair Wally Horn