



MINUTES

JULY 2024 MEETING ADMINISTRATIVE RULES REVIEW COMMITTEE

MEMBERS PRESENT

Senator Mike Klimesh, Chair
Senator Nate Boulton
Senator Mike Boussetot
Senator Chris Cournoyer
Senator Cindy Winckler

Representative Michael R. Bergan, Vice Chair
Representative Amy Nielsen
Representative Rick L. Olson
Representative Michael V. Sexton
Representative David E. Young

EX OFFICIO, NONVOTING MEMBER: Steve Blankenship, Administrative Rules Coordinator, Office of the Governor

LSA CONTACTS: Organizational staffing provided and minutes prepared by Jack Ewing, Administrative Code Editor, 515.281.6048, and Kate O'Connor, Division Editor/Supervisor, 515.281.6329

BULLETINS NEEDED FOR THIS MEETING: 6/12/24, 6/26/24

Procedural Business

Senator Klimesh convened the regular, statutory meeting of the Administrative Rules Review Committee (ARRC) at 11 a.m. on Tuesday, July 16, 2024, in Room 116, State Capitol, Des Moines, Iowa. The minutes of the June 11, 2024, meeting were approved. Committee members recognized Mr. Morgan Williams, a barrister participating in a foreign exchange program, who attended the meeting as a guest of Representative Olson. Members also recognized new member Senator Chris Cournoyer and new Administrative Rules Coordinator Steve Blankenship. Mr. Ewing discussed a transition in software used by the Legislative Services Agency to process rulemaking documents. The next meeting was scheduled for Tuesday, August 13, 2024, at 11:00 a.m. The meeting was adjourned at 2:05 p.m.

Fiscal Overview

Mr. Chris Ubben, Division Editor/Supervisor, presented the LSA fiscal report. Committee members asked the source of the savings identified for ARC 8084C, regarding an optional 90-day supply for select medications. He explained that the majority of the savings is the result of reducing three dispensing fees to one dispensing fee.

ECONOMIC DEVELOPMENT AUTHORITY

Representing the agency: Lisa Connell

ARC 8047C (NOIA), Major Economic Growth Attraction (MEGA) Program, Ch. 67, also Filed Emergency
ARC 8046C

No discussion on ARC 8047C or ARC 8046C.

Rulemaking type is indicated in parentheses following the ARC number. The acronyms have the following meanings: Notice of Intended Action (NOIA), Amended Notice of Intended Action (ANOIA), Notice of Termination (NOT), Adopted and Filed Emergency (AFE), Filed Emergency After Notice (FEAN), and Adopted and Filed (AF).

ARC 8072C (AF), Iowa Energy Center Grant Program, Ch. 404

Committee members asked if the program would generate a net savings relative to the money spent on the program, and Ms. Connell responded in the affirmative. Members noted that the majority of past awards from the program had gone to Regents institutions and asked why this was the case. She explained that the intent of the rulemaking is to increase diversity in award recipients by revising the criteria, such as including private asset development and sustainability. She also noted that the authority no longer receives new funding for the program; the rules only govern the use of funding previously received.

No action taken on ARC 8072C.

EDUCATION DEPARTMENT

Representing the agency: Thomas Mayes

ARC 8048C (AF), Senior Year Plus Program, Ch. 22

Committee members asked if the removal of the course limit only applies to students who are dual enrolled. Mr. Mayes explained that it applies to dual enrollment through individual private instruction (IPI) and competent private instruction (CPI). Members asked how a student in IPI pays for concurrent enrollment. He explained that the district of residence generates a supplement for the student. Members noted it is atypical for a school district to become aware of a student in IPI in this manner, and he agreed. Members asked how such a student is counted by the district in this way, and he explained that it depends on the nature of the student's enrollment, but the billing is per course. Members asked why no fiscal impact was found for the rulemaking. Mr. Mayes explained that the rulemaking did not change the status quo for students in IPI, which has a small number of students. He also noted this approach treats students in IPI and CPI equitably. Members asked how much funding is generated collectively for community colleges for dual enrollment. He indicated he will find that information and provide it to the committee.

No action taken on ARC 8048C.

ARC 8049C (AF), Private Instruction and Dual Enrollment, Ch. 31

Committee members expressed concern regarding the disbursement of dual enrollment funding for students in private instruction after a school district's October 1 enrollment count. Members stated that funds moving from a school district to a community college for a student not included in the October 1 enrollment count will create problems. Members urged caution when redundant rule language is eliminated under Executive Order 10.

No action taken on ARC 8049C.

ARC 8050C (AF), Standards for Teacher Intern Preparation Programs; Standards for Practitioner and Administrator Preparation Programs, Chs. 77, 79

Committee members expressed concern that the rulemaking combines standards for individuals with a baccalaureate degree with standards for individuals who do not have a baccalaureate degree. Mr. Mayes explained that the new chapter of rules includes divisions for the standards for each group and that the overall regulatory scheme for each group is statutory in nature.

No action taken on ARC 8050C.

EDUCATIONAL EXAMINERS BOARD

Representing the agency: Joanne Tubbs

ARC 8062C (NOIA), Authorizations—Career and Technical Cluster Endorsement, Rule 22.9(3)“c”, also Filed Emergency ARC 8061C

No discussion on ARC 8062C or ARC 8061C.

PROFESSIONAL LICENSURE DIVISION

Representing the agency: Emily DeRonde

ARC 8079C (AF), Complaints and Investigations, Ch. 9

Committee members asked how the investigation process that is part of peer review is defined. Ms. DeRonde explained that Iowa Code chapter 272C sets out the peer review process, each board adopts rules on the subject, and a person becomes a peer reviewer by contracting with the Department of Inspections, Appeals, and Licensing.

Committee members asked for more information about why facts prompting a board investigation remain sealed after the investigation concludes. Ms. DeRonde explained that the department recently made a change in policy relating to investigation information being incorporated into final board decisions and noted there had also been instances where PDFs with confidential information have been unredacted by mistake. She stated the department has no intention to deprive the public of facts prompting an investigation and is working to develop a process to make such facts publicly available in a separate document.

No action taken on ARC 8079C.

ARC 8081C (AF), Discipline, Ch. 13

Committee members asked if the standards of the various boards adopting the rulemaking were combined due to Executive Order 10. Ms. DeRonde responded in the affirmative.

No action taken on ARC 8081C.

PUBLIC HEALTH DEPARTMENT

Representing the agency: Victoria Daniels, Nick Crawford

ARC 8070C (AF), Reportable Diseases, Poisonings and Conditions, and Quarantine and Isolation, Ch. 1

No discussion on ARC 8070C.

ARC 8064C (NOIA), Consumable Hemp Products, Ch. 156

Ms. Threse Harms, on behalf of the Iowa Hemp Alliance (IHA), stated that the IHA opposed the rulemaking as it, and the underlying legislation, were unconstitutional and violated federal law. She stated that the IHA had concerns with both how the department would implement the rulemaking as it is ambiguous, and how many Iowa businesses would be able to comply with the rules. She requested that the department delay implementation of the rulemaking so that issues with the rules could be resolved. She noted that many IHA members had existing inventory and products that may not comply with the rulemaking by the July 17, 2024, effective date, and 50 to 80 percent of IHA members' products would be prohibited under the rules. She stated that one business had already ceased operations due to the proposed rulemaking. She stated that the delta-9-tetrahydrocannabinol (THC) limits and container size conflict with the permissible limits in the federal 2018 Farm Bill. IHA members would be required to dispose of inventory or repackage products to comply with the proposed rules, and many members' manufacturers and suppliers had indicated an unwillingness to comply with Iowa's rules. As an example of the waste generated by the rules she explained that members would be forced to repackage products to decrease the total milligrams (mg) of THC per container, however, as no limitation is placed on the number of containers a consumer may purchase reducing the mg of THC per container provides no additional public health benefit. She further explained that the department had created confusion in the industry regarding full spectrum and broad spectrum consumable hemp products and whether the rules and criminal penalties applied to both. Full spectrum consumable hemp products may contain up to the federally allowed limit of 0.3 percent THC by weight, while broad spectrum consumable hemp products do not contain any THC. The department's guidance documents, however, use these terms interchangeably. She stated that the rulemaking was poorly drafted, allowed for arbitrary enforcement by both the department and law enforcement, and did not allow adequate time for businesses to come into compliance.

Committee members asked for clarification on what constituted a broad spectrum consumable hemp product. Ms. Harms explained that there were three different types of products: one contained an isolate that is only cannabidiol (CBD); one was a broad spectrum product that contained CBD, CBG (cannabigerol), CBN (cannabinol) and other components; and the third contained all of the broad

spectrum components as well as THC. Members asked Mr. Ewing what type of delay could be imposed by the committee. Mr. Ewing explained that as this is a notice of intended action (NOIA), the committee could impose a 70-day delay, however, because it is an NOIA, the statute refers to a 70-day delay as a suspension. The committee could by two-thirds vote (7 members) suspend the department from adopting the rulemaking for that period.

Mr. Brad Epperly, on behalf of the Iowa Grocery Industry Association, stated that 2024 Iowa Acts, House File 2605, originated with the department. All stakeholders involved in negotiations related to the bill understood a “container” to mean the same as existing containers, there were no negotiations regarding serving size, and 10 mg of THC per container was agreed upon and signed into law by the Governor. He stated that the department’s guidance was contrary to the bill that was passed. He further stated that the department filed the original bill, was involved in the legislative process, registered in favor of the bill that passed, and then proposed rules contrary to the enacted statute. He asked the committee to work with the department as necessary to avoid putting businesses at risk.

Mr. Scott Selix, an owner of Lua Brewing, Climbing Kites, and several local restaurants, agreed with Mr. Epperly that 10 mg of THC per container was what stakeholders contemplated in the legislation that passed. He stated that he had text messages from some legislators, including several on the committee, stating that Climbing Kites would be able to continue operating, and then he received guidance from the department that made 90 percent of his products illegal. He asked the department to confirm that serving and container limits were in the proposed rulemaking. Mr. Crawford responded that 4 mg per serving and 10 mg per container were included in 2024 Iowa Acts, House File 2605. He explained that while definitions for “serving” or “container” were not included, the department had been granted the authority in section 4 of the bill to define those terms, as section 4 required that a consumable hemp product comply with packing and labeling requirements established by rules adopted by the department. He further explained that in order to implement packaging and labeling requirements serving and container sizes must be established, and that the department used the same reference amount used by the federal Food and Drug Administration in 21 CFR 101.12, Table 2. Mr. Selix stated that the department’s serving and container size rules had gone into effect on July 1, 2024, before the committee had a chance to learn what the definitions would be. He stated that since 2019, Climbing Kites had been required to submit to the department for approval the mg per serving for every container for each product. THC as a serving had been approved similarly to how alcohol is approved. For a serving of alcohol, 14 grams of alcohol is the maximum allowed, as permitted by federal law, regardless of the amount of additional liquid that a consumer ingests. One shot of liquor is a serving, 12 ounces of a light beer is a serving, and as beer gets stronger, the serving size is reduced. He stated that the legislature defined a serving of THC as 4 mg and was concerned with the amount of THC that a consumer ingested, not the amount of additional liquid consumed. He stated that Climbing Kites had always limited the sale of its product to individuals 21 years of age and older and included a warning label on its products. He stated that the department had made it impossible for Climbing Kites to comply with the new warning label requirements. He explained that July 12 was the deadline to submit art for Climbing Kites’ labels, the cans would be produced in late September, the product would be packed in October, and be available for sale in November or December. Despite the department not having the warning label available, it had indicated the warning label requirements would go into effect approximately September 14. He stated that the department had failed to respond when Climbing Kites reached out and that he had no idea how to comply with the rules. He asked the department why all of Climbing Kites’ products had been removed from the department’s approved list, even those that contained less than 4 mg of THC, and why the products had been removed from Iowa stores. Mr. Crawford explained that if a new retailer or manufacturer wanted to manufacture or distribute THC products they must submit a list of the products to the department, and the department had 30 days to respond pursuant to the department’s administrative rules. He explained that review of the product list submitted by Climbing Kites was still within the 30-day window. Mr. Selix clarified that he was referring to products that had already been approved. Mr. Crawford replied that he would have to confer with the department’s regulatory team. Mr. Selix asked how long he had to wait for an answer, and noted in the interim he is unable to sell products. He stated that Tennessee passed a similar law last spring which does not go into effect until January 1, 2025, so that businesses have time to comply. In comparison, the department was giving businesses four weeks. He asked the committee to impose a 70-day suspension to allow issues with the rulemaking to be resolved.

Committee members asked how suspending the rules for 70 days would allow Climbing Kites products back on store shelves. Mr. Selix responded that he did not know and that the company was currently in litigation to get answers. Members stated that two products containing more than 4 mg of THC were currently available on Climbing Kites' Internet site and asked if the rulemaking applied to the products. Mr. Selix responded that all products that would be in violation of the rules were no longer available in Iowa; however, they were still available for shipment to other states. He stated that in order for a Climbing Kites product to be approved by the department it must first be manufactured. If the department declined to approve the product, the potential existed for him to be arrested for a felony because he would then be in possession of an illegal product. He stated that Climbing Kites was manufactured in Illinois and Ohio because of the department's actions. Members asked why Climbing Kites was pulled from the department's approved list and what the company needed to do to get its products back on the approved list. Mr. Crawford responded that he needed to confer with the department's regulatory team before providing an answer. He directed committee members to the FAQ document provided to the members, and also posted on the department's Internet site on May 24, 2024, in which the department provided specific examples of products that would be considered in compliance and products that would be considered out of compliance. Members asked if the FAQ were contingent on approval of rulemaking that supported the legislative intent of 2024 Iowa Acts, House File 2605. He confirmed that was correct.

Committee members asked Mr. Ewing to explain the rulemaking process for these rules. He explained that as early as the next day, July 17, the department could adopt the rules and depending on when the rulemaking was filed it would be in front of the committee in a couple of months, and become effective 35 days after publication. Alternatively, the department could adopt the rules as emergency after notice and the rules would be effective as early as July 17. In that case, the committee would have another opportunity to review the rules after the rules were published, and have the opportunity to suspend the emergency rules at that time. He further explained that the option available to the committee today was to suspend adoption of the rules for 70 days. Members asked if the department had filed emergency rulemaking. He explained that had not yet occurred and could not occur until July 17 at the earliest. If the department used regular rulemaking, the committee would review the rules before the rules are effective and could impose a 70-day delay or a delay until the adjournment of the next session. If the department used emergency rulemaking, the rules could be effective as soon as July 17 and the committee would review the rules again after the rules were already in effect. The committee could then suspend the rules for 70 days or until the end of the next session. A minimum of 35 days after an NOIA is published, the department may adopt the rulemaking. Thirty-five days after after publication of this NOIA would be tomorrow, July 17. Members also asked about the procedures for a committee objection. He stated that an objection on an NOIA did not have much of an effect because an NOIA had no legal authority. He also stated that an objection had to articulate a legal defect that the committee saw in the rulemaking, the objection would be published in the Iowa Administrative Code along with the rulemaking, and in the event of litigation related to the specific objection the burden of proof would shift to the government. He noted that he was not aware of any precedent regarding what happened if an objection occurred when litigation was already ongoing. He also clarified for members that people do not generally sue over noticed rules as it was merely notice of what eventually will happen, so it would be more impactful to object to adopted rules.

Committee members asked the department to explain the process used prior to 2024 Iowa Acts, House File 2605, to approve products that contain hemp, and where that process was documented. The department replied that the process was based on a standard from legislation and corresponding rulemaking from approximately 2018 or 2019, and that were related to the federal Farm Bill. Members explained that they were trying to determine if the committee suspended the rules would the process for approval revert to the prior process and allow businesses to continue selling their products. Mr. Ewing explained that the committee is currently reviewing noticed rules that have no legal effect. If a 70-day suspension is imposed, the status quo for product approval would remain in place for those 70 days. Members asked Mr. Crawford to explain the process under Iowa Code section 17A.5 that allows the department to file emergency rulemaking after the rulemaking is noticed if the rule conferred a benefit or removed a restriction on the public, or was necessary because of imminent peril to the public health, safety, or welfare. He stated that the department fulfilled those two requirements as the rules provide clarity to registrants and consumers, and the warning label requirements make the public aware of the dangers of using the products. Mr. Selix stated that he and other stakeholders still had products on shelves that would not meet the warning label requirements if the rules go into effect tomorrow. He

further stated that the products had been sold for four years, there was no imminent threat to public safety, and asked why the department could not wait four to six months to give businesses time to comply. He implored the committee not to allow the rules to go into effect tomorrow. Mr. Crawford confirmed for members that it is the department's intent for the rules to become effective tomorrow, July 17.

Committee members asked if the department had a template that producers could use for the warning label, and if not, why not. Mr. Crawford replied that very specific warning label language had been included in the original draft rules released on May 24. The department, however, received feedback that the prescriptive language would cause problems for manufacturers who sell products in multiple states. The language in the current proposed rules allowed some leeway regarding the warning label, similar to other states, and the department does not provide a template. Members asked how long the draft rulemaking currently before the committee had been available to stakeholders and the public. Mr. Crawford responded that the department had made two changes from the language that had been available since June 7, including a clearer definition for "accredited laboratory" and the changes to the warning label requirements, and that those two changes were being shared today. Members asked when the proposed rulemaking document was actually created. He replied that he could not give an exact date and that the rules were released publicly for the first time on May 24. Members reiterated that the rules had changed since that time and the changes had not been released publicly. He replied that the department followed the rulemaking process as required. Members asked for confirmation that the rules before the committee had not been made available to the public or stakeholders until today, and that the department intended to implement the rules the next day. He answered in the affirmative.

The meeting was recessed. When it reconvened, the Chair asked that questions from the public be directed to the committee rather than to the department. Ms. Ashley Hartman, on behalf of Global Source Distribution and Happy Can, stated that based on its understanding of the new law and the department's guidance, the company developed a 4 mg THC seltzer product and a four-serving drink with 10 mg total THC. When the company checked the consumable hemp registration portal on July 2, 2024, all of its products, including the new products, had been deleted from the portal. The current portal required products to be submitted manually which was very time consuming. Six products were submitted on July 1, 2024, and Happy Can had not received notice from the department whether the products were approved or denied. As part of the new approval process, THC per container and THC per serving must be provided. She described additional examples where 21 CFR 101 varies from the rules. She stated that while the department is allowed by law to take 30 days to approve a submitted product, historically the department approved products in one to seven days, and that had not been Happy Can's experience since the new law was passed. Happy Can hired a compliance specialist and had taken other measures in an effort to comply with the new law. The department refused to provide Happy Can with guidance on the new rules because of pending litigation even though Happy Can was not a party to the litigation.

Mr. Earl Ramey, owner of Iris Aisle, is a consumable hemp grower and manufacturer who offers a one-ounce tincture of Iris Aisle which is equivalent to a 30-day supply. He stated that during the debate on 2024 Iowa Acts, House File 2605, the Senate mistakenly thought that 4.5 mg was the allowable THC level for Iowa's medical cannabidiol program when in fact it is 4.5 grams. He stated that the new statute was too vague to allow the department to add further restrictions that criminalize the activities of some Iowans.

Ms. Catherine Lucas, Department of Public Safety (DPS), asked that if the committee chose to impose a delay that it not be imposed on the part of the rules that related to synthetic consumable hemp, as synthetics are not well regulated and are extremely potent. Mr. Ewing confirmed that the committee could choose to only suspend certain parts of the rules, although he cautioned against only suspending parts of sentences. He stated that the committee would need to be very clear on what parts of the rules were suspended and what parts were not suspended. He further stated that the department may not adopt the portions of the rulemaking that are not suspended if those rules cannot function independently from the rules that are suspended. Members asked if the committee could restrict parts of the rules from being enacted through emergency rulemaking. He replied that is not an option, however, after the rules are adopted the committee could suspend certain parts of the rulemaking.

Ms. Lucas stated that DPS supports the rulemaking. Committee members asked what parts of the rules DPS would like to retain if a 70-day suspension was imposed. She replied that at a minimum the rules

relating to the definition of synthetic consumable hemp products should be retained. Mr. Ewing explained that the posture of this rulemaking was to rescind the existing chapter and to adopt a new version of the chapter. He asked if the intent was to retain parts of the existing chapter, or to rescind the entire existing chapter and have only parts of the new version of the chapter go into effect. He explained that merely suspending certain parts of the rulemaking in and of itself did not prevent the existing chapter from being rescinded. Members stated that piecemealing the rules during the committee meeting could have unintended consequences.

Mr. Ramey stated that rulemaking on THCA (tetrahydrocannabinolic acid), which is not intoxicating, resulted in him having to destroy \$356,000 worth of product in July 2023. He suggested that THCA not be regulated on the farming side. Ms. Harms stated that the warning label, container size, and synthetics were all issues of concern for manufacturers and retailers. She stated that the 21-and-over requirement should address any safety concerns, requested that the committee consider a 70-day suspension, and stated that the ongoing litigation challenges the law in its entirety and not just certain provisions of the law as had been suggested earlier in the meeting. Mr. Selix stated that even if the committee imposed a 70-day suspension, the 10 mg limit and the 21-year-old-plus limitation remained in place via the statute.

The committee recessed for a second time. Upon reconvening, a motion for a 70-day suspension of the adoption of ARC 8064C pursuant to Iowa Code section 17A.4(8) was made. Several members spoke in favor of the motion to allow adequate time to ensure that the rulemaking aligns with 2024 Iowa Acts, House File 2605, and to address the concerns brought forward during the meeting.

After the motion failed, committee members asked for confirmation that the rules and criminal penalties would go into force the next day. The Chair confirmed that was the case and stated that the committee would have the opportunity to review the rules again in a couple of months. Members stated that the members who voted no ceded their legislative powers as the legislature was aware what it was passing when 2024 Iowa Acts, House File 2605, was passed, and that the department had mishandled the rulemaking process. Members stated that immeasurable damage would be done to Iowa businesses.

70-Day Suspension

A motion for a 70-day suspension of adoption of ARC 8064C failed on a 4-6 roll call vote. Voting aye were Senator Boulton, Senator Winckler, Representative Nielsen, and Representative Olson. Voting nay were Senator Klimesh, Representative Bergan, Senator Bousset, Senator Cournoyer, Representative Sexton, and Representative Young.