
LEGAL UPDATE

Legal Services Division



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ADMINISTRATIVE RULES REVIEW COMMITTEE MEETING — OCTOBER 13, 2020

Purpose. *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

PUBLIC HEALTH DEPARTMENT, *State Medical Examiner Fees*, SPECIAL REVIEW.

Background. The committee scheduled a special review of 641 IAC 126.3, the Department's rule governing fees collected by the State Medical Examiner ("the Examiner") for performing autopsies. Such fees are set by rule and were last raised in 2017 from \$1,400 per autopsy to \$1,900 per autopsy beginning July 1, 2018. The Examiner currently provides autopsy services for 95 Iowa counties. The Examiner performs an autopsy when a death affecting the public interest occurs, including but not limited to deaths that are violent, are caused by contagious disease, are unexpected or unexplained, or occur in settings such as correctional facilities or state mental health institutions.

Commentary. Ms. Kelly Garcia, Director of the Department of Human Services and Interim Director of the Department of Public Health, speaking on behalf of the Examiner, emphasized that the Examiner is aware of the importance of the Examiner's work to grieving families as well as to the conclusion of criminal investigations. She explained that the Examiner has experienced an increased caseload and has a limited number of clinicians and is working to resolve those issues. While the Examiner has made a job posting for another pathologist, additional, sustainable funding will be needed to fill the position.

Committee members noted that the Examiner sought a fee increase in 2017, at which time the Examiner had an eight-day backlog based on unusual circumstances. The Examiner had asserted at that time that by seeking a larger fee increase, the fee would not need to be increased as frequently. Members stated that the rationale asserted by the Examiner for another possible fee increase at the present time conflicted with statements made by the Examiner in 2017 and that it is unfortunate that this is occurring during a pandemic. Members also noted that delays in the return of bodies of the deceased due to a backlog of autopsies had been brought to legislators' attention.

Committee members asked for more information about how the cost of transportation of bodies by counties is accounted for. Ms. Garcia explained that counties arrange transportation of bodies to funeral homes, that the cost of transportation is not a part of the Examiner's fee structure, that transportation issues have not contributed to the Examiner's backlog, and that the release of a body would not be delayed if transportation costs are not timely paid.

Committee members asked how many pathologists the Examiner employed in 2017 and currently, and Ms. Garcia stated that she thought there were three in 2017 but was unsure, and there are four now, with a job posting for a fifth. Members asked if the Examiner had taken steps to be more efficient with regard to funding, as directed by the committee in 2017. She was unsure of what steps had been taken prior to her becoming interim director, but explained that currently the Examiner is discussing collaboration with the University of Iowa (UI) regarding reducing their respective backlogs and recruiting clinicians to Iowa. She noted UI is also currently at capacity for autopsies. She explained that the Examiner is also

discussing with Polk County the possibility of increasing the Examiner's capacity. Members asked if the Examiner had access to out-of-state entities to perform autopsies in the event of conflicts of interest, and she was unsure, but offered to follow up, and suggested that the four pathologists on staff could resolve any particular conflict one of them might have. She noted that the Examiner has contracts with outside physicians in Iowa and is seeking similar contracts with out-of-state physicians.

Committee members asked for more information regarding the increase in the number of autopsies performed by the Examiner. Ms. Garcia explained that an increasing number of autopsies had to be performed by the Examiner instead of by county medical examiners as more counties have lost the ability to perform autopsies on their own. She cited Mason City and a number of counties surrounding Johnson County as recently no longer performing autopsies. Members asked why increased fees received by the Examiner due to the increased number of autopsies had not mitigated the Examiner's funding shortfall, and she explained that the fee amount has not kept pace with the increasing costs of an autopsy.

Committee members asked for more information about a freezer truck obtained by the Examiner. Ms. Garcia explained that it was obtained on a temporary basis but it may become permanent if needed. She explained that the truck allowed for increased storage space for bodies. She stated that the Examiner is working to obtain better storage equipment in addition to the truck. She was unsure how much the truck had cost but explained that it had not been paid for with funds appropriated to the Examiner during the 2020 Legislative Session. She stated she would follow up with information about how that appropriation was used.

Committee members described concerns raised by constituents regarding the backlog of autopsies. Members asked why the Examiner had focused more on obtaining a freezer truck than hiring additional personnel. Ms. Garcia stated that the Examiner is focusing on both, which are equally important. She explained that while she had authorized a job posting, there are only nine forensic pathologists in Iowa, and the Examiner employs four of them. She stated that the Examiner had not pursued increased storage in lieu of hiring, but the hiring process could take up to a year and may involve recruitment from outside of Iowa.

Committee members urged the Examiner to consider creative solutions to the funding shortfall such as analyzing whether more autopsies were being performed than is legally required; seeking an appropriation to resolve any cashflow issues; working more with universities, such as by having new residencies or internships established; or investigating whether additional capacity for autopsies from western Iowa could be found in Omaha. Members asked for more information about how neighboring states with shorter wait times provide funding for autopsies, and Ms. Garcia stated she is working on gathering up-to-date information on this issue and will provide it when available. Committee members asked what the wait time is for an autopsy in a pending criminal case, and she explained that it is 15 days, and criminal cases are not prioritized; only certain autopsies of children are prioritized.

Committee members asked if hiring another pathologist would resolve the backlog or if further steps are needed. Ms. Garcia explained that, so long as caseloads do not increase, an additional pathologist would mitigate the increased caseload, which is necessary in order to maintain accreditation of the Examiner, which is particularly important in criminal cases. Accreditation can be jeopardized if pathologists have caseloads that are too high. She stated she would seek more information about how counties obtain accreditation to perform autopsies. She was unsure if additional communities might cease performing autopsies. She stated she would have a better understanding of possible changes in the Examiner's caseload in the coming weeks. She stated she was unsure if any of the localities that ceased performing autopsies would ever do so again.

Ms. Liz Markham, owner and funeral director for the Conway-Markham Funeral Home and board member of the Iowa Funeral Directors Association, expressed appreciation for Ms. Garcia's work on this matter. She explained that her significant other had recently died and that she had tried to forego an autopsy with the agreement of her local medical examiner, but the Examiner had urged her to arrange for one to ensure the decedent's insurance coverage would be paid out to his child. The autopsy resulted in a 21-day delay before a funeral could be held. She noted that due to her profession, she was able to secure a

skilled embalmer before the funeral, but that not all families have access to such resources. She explained that 14 of the 21 days was wait time for the autopsy. She noted that as of the day before the meeting, the wait time for an autopsy had increased to 17 days. She stated she was advocating for all Iowa families facing such circumstances.

Committee members and Ms. Garcia agreed to work together to resolve the issues discussed.

Action. No action taken.

EDUCATIONAL EXAMINERS BOARD, *Substitute Authorizations*, 09/09/20 IAB, ARC 5169C, NOTICE.

Background. This rulemaking adds substitute authority to holders of the career and technical education authorization, the professional service license, and the native language teaching authorization. The rulemaking removes the limit on the number of days that substitute authorization holders may substitute in a classroom. The rulemaking changes the requirement for an individual to be eligible for a substitute authorization from a bachelor's degree to an associate degree, or 60 semester hours of college coursework from a regionally accredited institution. The rulemaking allows for reciprocity in certain circumstances and adds a substitute authorization as an area of concentration for paraeducators.

Commentary. In response to questions from committee members, Mr. Mike Cavin, Interim Executive Director, speaking on behalf of the board, confirmed that the rulemaking makes permanent changes to substitute authorizations, an individual does not need to obtain a minimum grade for the associate degree or 60 semester hours of college coursework required to qualify for a substitute authorization, and there is no limit to the period of time an individual with a substitute authorization can act as a substitute. Mr. Cavin explained that it has always been policy that a long-term substitute can serve for up to 90 days if the district deems that appropriate and that for any period greater than 90 days the district must request an extension from the board. Committee members asked how frequently the board refuses a request by a district for an extension. Mr. Cavin responded that he did not have that information available. Committee members asked Mr. Cavin to follow up with the committee on the number of requests for extensions that the board has received and the number of requests it has denied. Committee members also asked if a substitute can work 89 days, sit out eight days, and then return to the school to substitute for an additional 89 days. Mr. Cavin confirmed that is the case. Committee members suggested that data needs to be collected on individuals that substitute during a period established pursuant to a Governor's emergency proclamation and that data should be reviewed by the Senate and House education committees during the 2021 Session. Committee members expressed concerns about permanent changes to the requirements for substitutes being implemented via rulemaking rather than by legislation. Committee members also expressed support for maintaining high standards for teachers. Committee members noted that there was bipartisan support for the substitute requirements that were implemented for the duration of the Covid-19 pandemic.

Emily Piper, representing the Iowa Association of School Boards, briefly explained the current differences between a substitute teacher license and a substitute authorization. Ms. Piper explained that a substitute teacher license requires an individual to have a teaching license and a substitute teacher can teach in a classroom for up to 90 days. A substitute authorization requires an individual to have a bachelor's degree, but does not require the individual to have completed any teacher training. Ms. Piper stated that the association asked for, and supported, changes to the substitute requirements during the pandemic. She also stated that the association agrees with the rulemaking removing the attainment of a bachelor's degree as a qualification for a substitute authorization. Ms. Piper stated that the association, however, does not agree with the rulemaking not placing time limits on the length of time an individual with a substitute authorization can spend in the classroom as that allows that person to take the place of an individual who has completed teacher training. In addition, the rulemaking permits an individual with a substitute authorization to serve in the classroom for a longer period of time than an individual with a teacher license. Ms. Piper recommended that the board look at these time frames and not eliminate trained teachers from the classroom on a permanent basis. Ms. Piper expressed that the goal should be

to maintain quality in the classroom and to provide flexibility so districts can fill short-term gaps. Ms. Piper stated that the association wants to work with the Department of Education on these issues.

Melissa Peterson, representing the Iowa State Education Association, objected to the rulemaking making permanent changes to the requirements for substitutes. Ms. Peterson stated that while she understands the need for flexibility during the pandemic, without substantive evidence of the success of substitutes working in schools during the course of the pandemic, permanent changes to the requirements for substitutes is a disservice to students. Ms. Peterson stated that the last seven months have been a time of constant change and students have greater social, emotional, and mental health needs; and an individual with 60 hours of coursework, no training in pedagogy, and no substantive experience is not qualified to teach on a permanent basis. Ms. Peterson encouraged the committee, the board, and the House and Senate education committees to gather more evidence before the temporary substitute requirements are made permanent. Ms. Peterson stressed that more data is needed, the long-term effects need to be looked at, and that the conversations need to go beyond school administrators to include instructional leaders, teaching professionals, and para-professionals.

Action. No action taken.

REVENUE DEPARTMENT, *Local Assessors*, 09/23/20 IAB, ARC 5182C, NOTICE.

Background. This rulemaking prohibits assessors and deputy assessors from assessing a property that is owned by the assessor, a deputy assessor, or one of their immediate family members; or is a property in which the assessor, deputy assessor, or an immediate family member has a financial interest in the property or in an entity that owns the property. The rulemaking prohibits an appointee selected by a conference board from assuming the office of city assessor or county assessor until the appointment or reappointment is confirmed by the Director of the Department of Revenue. The rulemaking also requires a conference board to obtain approval from the city attorney or the county attorney prior to employing outside counsel to assist the city legal department or the county attorney in litigation concerning assessments.

Commentary. Committee members asked what entity is supposed to assess property owned by an assessor or the assessor's immediate family. Ms. Claire Wulfsen, speaking on behalf of the department, responded that an independent assessor or an assessor from another county are to be utilized to assess the property. Committee members asked whether an agreement is entered into or an assessor is appointed for that type of assessment. Ms. Wulfsen stated that she will follow up and provide that information to the committee.

Committee members expressed concern that the rulemaking makes the assessor job more difficult and it may be more difficult to fill assessor positions. Committee members stated that they have heard concerns from several county assessors that the rulemaking is going beyond what the legislation intended.

Mr. Dave Kubik, representing the Iowa State Association of Assessors, stated that the rulemaking has caused a lot of concern and discussion within the association. Mr. Kubik noted that using outside counsel for litigation dealing with assessments is common and varies by county. Mr. Kubik explained that some issues with these cases can be very specific, especially when high-value projects are involved. Mr. Kubik stated that the county attorneys are best suited to decide if they have the expertise for a particular case. Mr. Kubik stated that the rulemaking is burdensome, unnecessary, and will require extra bookkeeping at the county auditor's office.

Mr. Kubik suggested that the rulemaking needs to provide more detail as to what constitutes a charge or evidence of misconduct, nonfeasance, malfeasance, or misfeasance. Mr. Kubik also noted that there may be issues if an assessor relies on an attorney's opinion and a court later rules a different way. Mr. Kubik asserted that charges and allegations alone should not be sufficient to constitute misconduct, nonfeasance, malfeasance, or misfeasance.

Mr. Kubik explained that assessors have two bosses—the Department of Revenue and the local conference board. He asserted that the rulemaking requires an additional meeting which is unnecessary red tape and expense. Mr. Kubik also explained that assessors are the face of the taxation process and that they determine valuations; however, elected officials determine actual taxes. Mr. Kubik expressed concern with the department setting the time for the reappointment of assessors during the period when tax bills are being sent out. Mr. Kubik suggested addressing the reappointment process at a conference board meeting no more than 12 months before the end of an assessor's six-year term.

Committee members expressed concern that some county attorneys may not be involved with litigation related to assessments. Committee members stated that the county attorneys need to be engaged in the discussions concerning rulemaking on litigation related to assessments.

Action. No action taken.

Next Meeting. The next committee meeting will be held in Room 103, Statehouse, on Tuesday, November 10, 2020, beginning at 9:00 a.m. Instructions for participation by videoconference can be found at the committee's Internet Site below.

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Internet Site: www.legis.iowa.gov/committees/committee?groupID=705

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