

**MINUTES OF THE DECEMBER 2012 MEETING
OF THE
ADMINISTRATIVE RULES REVIEW COMMITTEE**

Date of meeting: The regular, statutory meeting of the Administrative Rules Review Committee (ARRC) was held on Tuesday, December 11, 2012, at 9 a.m. in Room 116, State Capitol, Des Moines, Iowa.

Members present: Senator Wally Horn, Chair, and Representative Dawn Pettengill, Vice Chair; Senators Merlin Bartz, Thomas Courtney, John P. Kibbie, and James Seymour; Representatives David Heaton, Jo Oldson, Rick Olson, and Guy Vander Linden were present.

Also present: Joseph A. Royce and Jack Ewing, Legal Counsel; Stephanie A. Hoff, Administrative Code Editor; Larry Johnson, Deputy Counsel, Office of the Governor; fiscal staff; caucus staff; and other interested parties.

Convened Sen. Horn convened the meeting at 9:05 a.m.

Fiscal overview Aaron Todd presented the LSA fiscal report. He reported that the fiscal impact summaries will be made available by e-mail subscription on the LSA website within the next month. Mr. Todd also introduced Adam Broich, who will succeed Mr. Todd beginning at the January meeting. Rep. Pettengill commended Mr. Todd's work.

UTILITIES DIVISION Cecil Wright represented the division.

ARC 0455C The proposed amendment to 15.5(2) and proposed ch 27 pertain to pole attachments of investor-owned and telecommunications companies that are now under the jurisdiction of the FCC. The rules allow the board to assert jurisdiction over the rates, terms and conditions of pole attachments of these companies to ensure that the pole attachments are connected in compliance with the Iowa Electrical Safety Code. In response to an inquiry from Sen. Bartz, Mr. Wright explained that pursuant to ch 25, the board has jurisdiction over the pole attachments for electric cooperatives, municipals and other governmental entities. In addition, he stated that stakeholders support proposed board jurisdiction over the pole attachments of investor-owned and telecommunications companies.

Special Review A special review of 20.3 regarding electrical extensions was requested. Mr. Wright began by explaining how rates are set for public utilities and how those rates are spread over specific customer classes. He stated that the rule requires the utility to pay for the first extension of electrical facilities up to three times the estimated annual revenue. For any amount over those costs, the residential customer or developer that requested the extension is required either to pay for construction 30 days in advance or to provide a surety or letter of credit. When new customers are added, the residential customer or developer is refunded a portion of the advance. Mr. Wright stated that the rule also provides an exception to allow the utility and the customer or developer to agree to a different payment arrangement, but any agreed-upon payment arrangement must be available to all customers or developers in similar situations to avoid discrimination.

Stating that he had requested the special review, Sen. Bartz explained that payment for electrical extensions for the first two phases of a development in St. Ansgar had been provided through a surety; however, the utility refused to provide an electrical extension for the third phase without a surety, despite the record of payment by the city on the first two phases. In response, the city cited 20.3(13)"f," which allows for different payment arrangements, and the city suggested in a letter to the board that the utility propose a different payment arrangement; the city declined.

Sen. Bartz inquired about the different payment arrangements allowed for in the rule and where they are being used in the state. Mr. Wright responded that to his knowledge, this is the first complaint the board has received regarding 20.3(13)"f." He added that utilities do not have specific criteria for tariffs and that it does not appear that the utility in question has created an exception that addresses the type of development described by Sen. Bartz. However, Mr. Wright stated that the board, in response to the first informal complaint about this issue, may open a docket regarding this complaint to consider the addition of criteria to the rule that would provide an exception in circumstances such as those related to the three-phase housing development in St. Ansgar.

Utilities Board (continued)

Sen. Bartz asserted that utilities, with prompting by the board, need to create policy guidelines for alternative payment arrangements allowed by rule.

In response to an inquiry from Rep. Heaton, Mr. Wright stated that in the first two phases, the city did not draw down a letter of credit because the city had paid only the surcharge and the development was built in 12 months.

DENTAL BOARD Melanie Johnson represented the board.

ARC 0471C The proposed amendment to 10.5(1) pertains to the expansion of the definition of “public health settings” where dental hygienists, under the supervision of dentists, may provide services. In response to an inquiry from Sen. Horn, Ms. Johnson stated that information about the development of the amendment was conveyed on the board’s website and through quarterly board meetings. In response to an inquiry from Rep. Pettengill, Ms. Johnson stated that changes to facilities where services are provided would most likely not be necessary.

ARC 0473C No questions on proposed amendments to chs 11 and 15 regarding initial registration for dental assistants.

ARC 0465C No action on amendments to ch 20 relating to dental assistant trainees and dental assistants.

ARC 0472C No questions on proposed amendments to 35.1 concerning the Iowa practitioner program and review committee.

ECONOMIC DEVELOPMENT AUTHORITY Tim Whipple and Kristin Hanks represented the authority.

ARC 0441C No action on amendments to ch 1 pertaining to the organization of the authority.

ARC 0440C No action on ch 38, regional sports authority districts.

ARC 0442C Amendments to chs 68, 74, 75, 165, 171 to 175, and 187 to 189 pertain to the high quality jobs program, application review, wage and benefit requirements, and contracting procedures. Mr. Whipple clarified for Sen. Kibbie that the \$500,000 minimum investment threshold for the enterprise zone program is a statutory limitation and explained the change from the Notice that transfers the issuance of certain sales tax refunds from the authority to the department of revenue. Rep. Heaton questioned the statutory authority for the phase-in of large wage increases related to the qualifying wage threshold. In response, Mr. Whipple stated that the authority is within the intent of the statute and that the amendments protect the public interest in addressing an aspect of the determination of the wage thresholds not addressed in statute and by phasing in the increase in wages to mitigate the impact of large, sudden wage increases on communities when the method for calculating thresholds is changed.

ARC 0447C Proposed amendments to 71.1 to 71.6 relate to the targeted jobs withholding tax credit program. Ms. Hanks clarified for Sen. Courtney that the changes in the definition of “business” are proposed to conform to 2012 Iowa Acts, Senate File 2212, and she clarified for Sen. Bartz that the definition no longer applies to nonprofit enterprises but now applies to enterprises that are operated for profit and under single management.

EDUCATION DEPARTMENT Director Jason Glass, Dave Tilley, Mike Cormack, and Larry Bice represented the department. Other interested parties included Mike May, board member; David Driscoll, former commissioner of education in Massachusetts; Lorrie Long of Graceland University; Jodi Grover of Upper Iowa University; and Barry Wilson on behalf of the Iowa Association of Colleges for Teacher Education.

ARC 0475C No action on ch 61, Iowa reading research center. Mr. Tilley stated that no comment was received on the proposed chapter. In response to an inquiry from Rep. Pettengill, Mr. Tilley stated that ultimately the center will provide multiple strategies and supports for schools to address literacy at every grade level. Rep. Heaton expressed the hope that the center would maintain the focus on literacy at the Pre-K through third grade levels even as the center expands its scope to address literacy at every grade level.

Education Department (continued)

ARC 0476C

The amendments to 79.13 and 79.15 relate to the pre-professional skills test for candidates seeking admission to teacher preparation programs and to subject and pedagogy assessments of candidates upon their completion of teacher preparation programs and prior to licensure. Mr. Cormack reviewed the rule making and public comment related to the timing of the requirements, the alternative performance-based assessment and the costs of testing and noted the changes from the Notice, including the addition of the January 1, 2013, effective date. Mr. Glass summarized the rule-making process outlined in the documentation provided to the committee by the department. He stated that Educational Testing Service (ETS) Praxis II is the assessment to be used beginning January 1, 2013, and that a valid and reliable performance-based assessment will be adopted in rule for use beginning in fall 2013. Mr. Glass stated that the underlying legislation had an immediate effective date and that the changes should have been implemented as of July 1, 2012, but were instead delayed to accommodate teacher candidates and to receive public comment. He indicated that the implementation of the rule could no longer be delayed regardless of the fairness issue. Mr. Glass cited a report by the American Federation of Teachers (AFT) that calls for “aligning and elevating teacher preparation and the teaching profession,” a goal associated with the amendments.

Discussion pertained to the fairness to candidates, including the time frame for implementation, the costs and validity of the assessment as a measure of the candidates’ knowledge of subject and pedagogy, and the alignment of the assessment with candidates’ programs; the interpretation of scoring at the 25th percentile; and the status of the development of the performance-based assessment.

In response to an inquiry from Rep. Olson, Mr. Cormack stated that the department will make available to students information for test preparation as provided in the 25 states that use the Praxis II examination and that the direction to choose the “best” rather than the “correct” answer on the Praxis II examination is characteristic of most standardized examinations. In response to an inquiry from Mr. Johnson, Mr. Driscoll stated that at the national level, the Secretary of Education supports the AFT’s goals. Mr. Bice clarified the required score at the 25th percentile on the distribution of scores. Rep. Pettengill and Rep. Vander Linden expressed the opinion that the required score should be higher. Sen. Courtney expressed concern that the newly imposed examination could, in the first years of implementation, exclude from teacher education programs candidates with potential to become excellent teachers. Sen. Kibbie stated that the time frame for implementation has been the focus of comment and could be addressed by the legislature.

Mr. May stated that raising the standards for teacher candidates will ensure the quality of education for all students and of teaching as a profession. Mr. Driscoll expressed support for the implementation of assessments to raise standards for teacher licensure and to ensure the quality of and respect for the teaching profession. Ms. Long and Ms. Grover described the current testing regime for teacher candidates in elementary education at their respective private institutions. Mr. Wilson expressed concern regarding the alignment of the examination with a candidate’s program and the imposition of a new standard in the last semester of a candidate’s program.

EDUCATIONAL EXAMINERS BOARD Duane Magee and Darcy Lane represented the board.

ARC 0445C

Proposed amendments to ch 13 pertain to assessment requirements for Iowa licensure. Mr. Magee clarified for Rep. Pettengill the purpose for and the incorporation of the new assessment requirements for candidates seeking temporary permits, and for Sen. Bartz, the coordination between the rules of the board and of the department regarding the assessments.

ARC 0446C, ARC 0448C, ARC 0449C, ARC 0450C, ARC 0444C, and ARC 0451C were excused from review.

ARC 0443C

Proposed 22.5 pertains to the preliminary native language teaching authorization. Mr. Magee clarified for Rep. Pettengill the purpose of and the requirements for the authorization for native speakers to become foreign language teachers. In response to an inquiry from Rep. Heaton, Mr. Magee stated that the assessment of proficiency in the language and the recommendation of the local district will ensure that the formal, universal form of a language will be taught.

Educational Examiners Board (continued)

In response to an inquiry from Sen. Bartz, Ms. Lane stated that a comment from the Iowa State Education Association (ISEA) questioned whether an alternate pathway into the teaching profession would hold candidates to the highest standard. Sen. Bartz suggested that absent a definition of “native speaker,” the board consult with an authority that represents Native American tribes since the rule could prohibit a non-foreign speaker of a native language from becoming licensed while allowing a foreign speaker of a native language to become licensed.

PROFESSIONAL LICENSURE DIVISION ARC 0462C was excused from review at this meeting.

PUBLIC HEALTH DEPARTMENT ARC 0474C was excused from review at this meeting.

REVENUE DEPARTMENT ARC 0452C, ARC 0467C, ARC 0466C and ARC 0468C were excused from review at this meeting.

SOIL CONSERVATION DIVISION ARC 0477C was excused from review at this meeting.

ADMINISTRATIVE SERVICES DEPARTMENT Caleb Hunter and Michelle Minnehan Golightly represented the department. Other interested parties included Mimi Habhab, Cecil Wright, Craig Goettsch and Kristian Anderson.

ARC 0460C

The amendment to 50.1 pertains to the definition of “confidential employee” for purposes of the merit system. Mr. Hunter stated that with the input of four department employees, one from each department enterprise, the definition is amended to include an employee who is in a confidential relationship with a director, chief deputy administrative officer, division administrator, or similar position, and is part of a management or legal team of that top-level administrator. Under the definition, a confidential relationship means a relationship in which one person has a duty to the other not to disclose information. He noted that the committee at its October 2012 meeting lifted the objection to 50.1, definition of “confidential employee.” Mr. Hunter also stated that the definition is rooted in and consistent with Iowa Code section 8A.412, which excludes confidential employees from the merit system.

Discussion pertained to the merit system; the application of the definition and the positions and number of employees affected by the definition; the language of the definition, specifically, the meaning of “confidentiality” and of “information” versus “confidential information”; and whether the amendment expands a statutory definition through rule making.

In response, Mr. Hunter stated that the amended definition is intended to allow exemptions to be created as needed in particular situations on an agency-by-agency basis and that, based on the department’s self-analysis, about 3 to 5 percent of positions in other executive branch agencies could be affected. Mr. Hunter stated that a confidential employee would be able to testify independently at committee hearings. Ms. Golightly stated that the definition is tightly drafted and explained that the department would work with agencies in applying the definition based on the agencies’ structures. Mr. Johnson added that the definition is in compliance with the Iowa Code and that there is no need for a statutory change.

Ms. Habhab stated that rules are already in place to deal with nonperformance and reductions in force, expressed concern that the definition includes no guidelines for its application, and requested that a session delay be imposed. Mr. Wright stated that the rule making does not comply with Iowa Code section 17A.4(2), which requires an accounting of opposition to the rule, and that the definition will affect all state employees, resulting in two classifications of employees: contract and confidential. Mr. Goettsch stated that it is not clear to whom the definition applies and that the amendment to the definition makes policy, which is the purview of the legislature, not the department. Mr. Anderson stated that the definition could place all administrative law judges (ALJs) for the department of corrections in the realm of management and, as an unintended consequence, remove ALJs from their role under Iowa Code section 903A.3 as independent decision makers who, at disciplinary hearings, determine inmates’ earned time credits.

Motion to delay

Sen. Kibbie moved a session delay on 50.1, definition of “confidential employee” for purposes of the merit system (ARC 0460C).

Administrative Services Department (continued)

- Motion failed On a roll call vote of 5 to 4, the motion failed. (Note: The imposition of a session delay requires 7 votes.)
- Motion to refer Following discussion, Sen. Kibbie moved a general referral on 50.1, definition of “confidential employee” for purposes of the merit system (ARC 0460C).
- Motion carried On a voice vote of 9 to 0, the motion carried.

ENGINEERING AND LAND SURVEYING EXAMINING BOARD Craig Johnstone represented the board.

- ARC 0470C No action on amendments to 8.2(6)“a” pertaining to unethical or illegal conduct. Mr. Johnstone stated that based on the suggestion of the committee, the definition of “governmental body” had been clarified.

TRANSPORTATION DEPARTMENT Mark Lowe represented the department.

- ARC 0438C Proposed amendments to 615.22 concern the elimination of the department’s authority to determine whether a person has the ability to pay a criminal penalty, fine, surcharge or court costs before the department suspends the person’s driver’s license for failure to pay. Mr. Lowe clarified for Rep. Pettengill that the amendments bring the rule into conformance with a 2009 statutory change.

SECRETARY OF STATE Geri Huser of the title guaranty division of the Iowa finance authority represented the secretary of state. Other interested parties included Mike St. Clair and Randee K. Slings on behalf of the Iowa Land Title Association and Bill Wimmer and Angela Davis of Wasker, Dorr, Wimmer, & Marcouiller, PC, on behalf of the Home Builders Association of Iowa and the Iowa Lumber Association.

- ARC 0464C Ch 45 pertains to the mechanics’ notice and lien registry. Ms. Huser noted that a summary of public comment appears in the preamble and that the title guaranty division and the secretary have met with LSA to draft and file legislation that amends Iowa Code chapter 572 to address the technical and substantive changes believed to be necessary for operation of the registry. She stated that there continue to be differing opinions regarding the intent of the legislation regarding to which parties the registry applies, and she summarized the four issues of contention that remain.

Discussion pertained to the requirement that a contractor who uses neither subcontractors nor suppliers must still file a notice of commencement of work to preserve lien rights.

Mr. St. Clair stated that the Association wants the rules to be workable. Ms. Slings commended the amended language regarding hidden liens in 45.4(1) and stated that the legal description needs to be set as a priority. Mr. Wimmer stated the opinion that there is no statutory authority to require a notice of commencement by a contractor without subcontractors or suppliers and requested that the requirement not go into effect. Ms. Davis commended the participants in the rule-making process.

Sen. Kibbie explored a 70-day delay on 45.4 to allow further discussion among interested parties. Rep. Pettengill expressed support for the delay, given the language of the statute.

- Motion to delay Sen. Kibbie moved a 70-day delay on 45.4.
Ms. Huser stated that as of January 1, 2013, the courts will not accept mechanics’ lien filings and thus, a delay would prevent the filing of mechanics’ liens. In response to an inquiry from Mr. Royce, Ms. Huser stated that a delay would shut down the system because no one would be able to file a notice of commencement of work. The alternative offered by Ms. Huser is that the registry can operate without the requirement that a general contractor without subcontractors file a notice of commencement of work.

Pending further discussion, Sen. Kibbie withdrew the motion.

Following discussion, Mr. Wimmer stated that a delay would prevent the posting of any commencement of work. Ms. Huser confirmed for Mr. Wimmer that 45.4 need not be delayed for the registry to operate.

- Motion withdrawn Sen. Kibbie withdrew the motion to delay 45.4.
- Motion to refer Sen. Bartz moved a general referral of ch 45.
- Motion carried On a voice vote of 7 to 1, the motion carried.

Committee business On behalf of the committee, Sen. Horn presented a gift to Sen. Kibbie, who is retiring after 22 years on the committee. Sen. Horn and Sen. Courtney expressed appreciation, affirmed by the committee's applause, for Sen. Kibbie's years of service to the committee and to the legislature. Sen. Kibbie thanked the committee and stated that there is no better committee.

The minutes of the November 13, 2012, meeting were approved.

The next meeting was scheduled for Tuesday, January 8, 2013, at 10 a.m. and Wednesday, January 9, 2013, at 9 a.m.

Adjourned

The meeting was adjourned at 2:10 p.m.

Respectfully submitted,

Stephanie A. Hoff

APPROVED:

Chair Wally Horn

Vice Chair Dawn Pettengill