



MINUTES

OCTOBER 2018 SPECIAL MEETING ADMINISTRATIVE RULES REVIEW COMMITTEE

MEMBERS PRESENT

Senator Mark Chelgren, Chair [by teleconference]	Representative Dawn E. Pettengill, Vice Chair [by teleconference]
Senator Jim Carlin [by teleconference]	
Senator Mark Costello [by teleconference]	Representative Steven Holt [by teleconference]
Senator Wally E. Horn [by teleconference]	Representative Megan Jones [by teleconference]
Senator Pam Jochum [by teleconference]	Representative Amy Nielsen [by teleconference]
	Representative Rick Olson

EX OFFICIO, NONVOTING MEMBER: Sam Langholz, Administrative Rules Coordinator, Office of the Governor [by teleconference]

LSA CONTACTS: Organizational staffing provided and minutes prepared by Jack Ewing, Senior Legal Counsel, 515.281.6048

BULLETINS NEEDED FOR THIS MEETING:

Procedural Business

Senator Chelgren convened a special meeting of the Administrative Rules Review Committee (ARRC) at 10 a. m. on Thursday, October 25, 2018, in Room 116, State Capitol, Des Moines, Iowa. He explained the purpose of the meeting, to consider authorization of emergency rulemaking by the Department of Administrative Services. A roll call of committee members was taken to ascertain that all members were present either in person or by teleconference. Committee counsel recommended that members participating by teleconference speak one at a time to allow all persons present to hear what is being said. The meeting was adjourned at 11:10 a.m.

ADMINISTRATIVE SERVICES DEPARTMENT

Representing the agency: Janet Phipps

Emergency Filing, Approval Required: Sexual Harassment, Amendments to Chapter 68

Ms. Phipps reviewed the rulemaking. In response to inquiries from committee members, she explained that the department's rationale for seeking authorization for emergency rulemaking was to implement recommendations from the report on sexual harassment at the Iowa Finance Authority by the Weinhardt Law Firm quickly, particularly in regard to clarifying and removing conflicts from the department's existing rules on this subject. She stated that the new rules would become effective later in the day if the committee votes to authorize emergency rulemaking. She explained that the new policies referenced in the rulemaking had not been published yet, but would be issued later in the day pending the committee's vote. She explained that the policies will be included in a revised employee handbook provided to every state employee and in memos to department heads, elected officials, and managers, and also posted on the department's website.

In response to an inquiry about language in the rulemaking relating to employee training, Ms. Phipps explained that, while the proposed language states that employees "should" attend training, the

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).

department is still considering whether to make such training mandatory. She explained that employees already had to receive such training pursuant to an order of the governor and that the department's training video is being revised. Committee members suggested that the department emulate the policy of the Iowa Senate, which makes such training mandatory.

In response to inquiries about the complaint process outlined in the rulemaking, Ms. Phipps explained that the language does not include a process for making a complaint outside of state government, but she hoped an employee would do so if they felt the need. Committee members urged her to include language allowing for such complaints, and she said she would take it under consideration. She explained that an employee can complain to any of the individuals described in the rulemaking. She explained that the rules and related policies do not include a specific timeline or a way of tracking progress of completion of an investigation of a complaint, as it can vary how long an investigation might take. She stated that a complainant would be kept informed about the progress of an investigation. Committee members urged the department to include at least a tentative timeline for investigations in the rulemaking.

In response to inquiries about the meaning of language in the rulemaking requiring the director of the department to investigate a complaint "unless directed by the governor to be investigated by another agency or entity," Ms. Phipps explained that in some instances it may not be appropriate for the department to carry out the investigation, such as a complaint from within the department. She explained that "entity" is not defined, but could include an entity such as the Weinhardt Law Firm. She expressed hope that the governor would trust the department to handle most complaints.

In response to an inquiry about the language in the rulemaking on release of confidential records if ordered by a court, Ms. Phipps explained that a subpoena would be considered such an order, and the department would comply with a subpoena or would need to attempt to quash it. Committee members urged her to investigate whether the language might limit the ability of county attorneys to subpoena records.

In response to inquiries about language in the rulemaking providing that an employee "may" be subject to discipline for failing to cooperate with an investigation, Ms. Phipps explained that the language should remain "may" rather than "shall" in order to allow for discretion to impose discipline in situations where a person chooses not to cooperate because they are accused of wrongdoing but believe themselves to be a victim. Committee members suggested that discipline should be mandatory for failure to cooperate with an investigation, and Ms. Phipps responded that generally it would be mandatory, but the language at issue is intended to give notice of possible discipline, rather than to make discipline mandatory. Committee members suggested distinguishing between victims and other employees in the rulemaking, and Ms. Phipps responded that some employees may not be victims but may not feel that they can cooperate based on the nature of their work environment.

In response to inquiries regarding the tracking of complaints by the department, Ms. Phipps explained that the department does not track the number of ongoing investigations relating to sexual harassment or the number of employees on paid administrative leave pending the outcome of such investigations. She further explained that she could not provide those numbers to the committee because all complaints received by the department go through a common intake process and are not tracked based on the type of complaint. Committee members urged the department to start tracking this information, particularly in light of recent reports in the media on sexual harassment in state government.

In response to inquiries on research conducted by the department prior to proposing the rulemaking, Ms. Phipps explained that the department had conducted a legal review of its policies and consulted sexual harassment policies from Utah, Colorado, and Minnesota. Committee members asked why the department had not taken an approach similar to Minnesota, and she explained that the department needed to comport with Iowa's standards for drafting of rules.

In response to an inquiry on the definition of "sexual harassment" included in the rulemaking, Ms. Phipps explained that the definition comes from the Iowa Code, and the department did not want to change the statutory definition by rule. She further explained that retaliation was not included in the definition because it is a different concept defined elsewhere, and the threshold question of whether sexual harassment occurred must be answered before possible retaliation is addressed.

Mr. Matty Smith made a public comment on behalf of the Iowa Coalition Against Sexual Assault. He stated that the process of pursuing this rulemaking seemed rushed. He stated that he had heard from too

many victims of sexual harassment who experienced ineffective responses and that it is important to get the rulemaking right. He stated that the language of the rulemaking is unclear and not good enough and that victims of sexual harassment deserve better. He urged the committee to engage in thoughtful dialogue on this subject and seek public input.

Mr. Daniel Zeno made a public comment on behalf of the American Civil Liberties Union. He stated that the issue of sexual harassment is important, and he is glad the department is working on it. He urged the committee to slow the rulemaking process down. He stated that current department rules on sexual harassment are inadequate, but the rulemaking is a step backward. He stated that the rulemaking lacks detail. He stated that the department's rules should clarify the definition of "sexual harassment" provided in the Iowa Code, not merely restate it.

Ms. Amy Campbell made a public comment on behalf of the League of Women Voters. She stated that she respected Ms. Phipps' work on the issue of sexual harassment, but also hoped for more transparency and public input. She stated that the use of double-barreled rulemaking did not provide for sufficient public input. She expressed concern that the new employee handbook reflecting the rulemaking might be distributed and then the rules might be revised again later, leading to confusion among employees. She also expressed concern that the policies referenced in the rulemaking had not yet been seen.

Some committee members expressed support for the rulemaking, stating that it provides more assistance for victims of sexual harassment than current rules and noting improved procedures for filing complaints, mandatory investigation of complaints, removal of conflicting and ambiguous language from current rules, and allowing employees to make complaints outside of the department as positive changes. They urged the department to continue to work to improve its rules on sexual harassment in the future. Other committee members expressed disappointment that the rulemaking did not include stronger enforcement mechanisms, better protections for witnesses of sexual harassment, or a timeline for investigation of complaints.

Emergency Rulemaking Authorized

A motion to approve emergency rulemaking by the department carried on a unanimous roll call vote.

Respectfully submitted,

APPROVED:

Chair Mark Chelgren

Vice Chair Dawn Pettengill