

# MINUTES

## Rules Review Committee



Representative Jon Hansen, Chair  
Senator Jean Hunhoff, Vice Chair

**Three hundred ninety-seventh meeting  
Monday, May 10, 2021**

**Room 414 – State Capitol  
Pierre, South Dakota**

The three hundred ninety-seventh meeting of the Rules Review Committee was called to order by Representative Jon Hansen, Chair, at 10:01 a.m. (CT) on May 10, 2021, via electronic conference and in Room 414 at the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members present: Representatives Ryan Cwach, Jon Hansen, Chair, and Kevin Jensen; and Senators Jean Hunhoff, Vice Chair, Troy Heinert, and Timothy Johns. Staff members present were Justin Goetz, Code Counsel, Kelly Thompson, Senior Legislative Secretary, and Hilary Carruthers, IT Support Specialist.

*All material distributed at the meeting is attached to the original minutes on file in the Legislative Research Council (LRC). For continuity, these minutes are not necessarily in chronological order.*

### Approval of Minutes

***Senator Hunhoff moved, seconded by Representative Jensen, that the April 6, 2021, meeting minutes be approved. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.***

### Staff Report

**Mr. Justin Goetz, Code Counsel,** reported that two long-time LRC employees have announced their retirement. Mr. Dave Ortbahn, Chief Research and Legal Analyst, and Ms. Rhonda Purkapile, Supervisor of Text Editing Services, are retiring effective June 8, 2021. Mr. Goetz will succeed Mr. Ortbahn as Chief Research and Legal Analyst. Ms. Kelly Thompson, Senior Legislative Secretary, will fill Ms. Purkapile's position while continuing to serve as committee secretary for the Interim Rules Review Committee. Applications are being accepted for the Code Counsel position until June 4, 2021.

### Rules Reviewed

**Bureau of Human Resources:** Amend rules to allow for specific changes pertaining to the administration of the health, life, and flexible benefit plans offered to state employees and their dependents, including the elimination of the retiree health plan.

**Ms. Mallori Barnett, Bureau of Human Resources,** reviewed the proposed rules.

***Representative Jensen moved, seconded by Senator Hunhoff, that the review of the rules proposed by the Bureau of Human Resources is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.***

**South Dakota Retirement System:** Amend rules to:

- Correspond with the changes resulting from the passage of [House Bill 1030](#) by the 2021 Legislature relating to required minimum distributions consistent with IRC § 401(a)(9);
- Clarify certification requirements when a retired member is reemployed;
- Update language relating to the maximum annual retirement benefit consistent with statutory changes;
- Revise the process for unforeseeable emergency distributions; and
- Repeal obsolete language and provisions.

**Ms. Samantha Koldenhoven, South Dakota Retirement System (SDRS),** reviewed the proposed rules. Ms. Koldenhoven acknowledged that SDRS had been made aware by Mr. Goetz that they had allowed an extra day for receipt of public comments regarding the proposed rules. As no such comments were received, the agency determined the additional day did not affect their notice of public hearing.

Senator Hunhoff said while they had given the public extra time to comment, the agency received no extra time for review of such comments. She advised SDRS to familiarize themselves with the rules process to avoid similar situations in the future. Senator Hunhoff also encouraged SDRS that when describing the proposed rules, they should cite the section or page number where the rule language is located.

***Senator Hunhoff moved, seconded by Representative Jensen, that the review of the rules proposed by the South Dakota Retirement System is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.***

**Department of Agriculture and Natural Resources:** Amend rules to allow for an external embargo on regulated articles originating outside of South Dakota's border, giving the Department of Agriculture the authority to regulate those articles in the same manner as the current emerald ash borer quarantine within South Dakota.

**Ms. Brenda Sievers, Department of Agriculture and Natural Resources,** reviewed the proposed rules.

Senator Hunhoff asked what constitutes a "facility" for the purposes of receiving external embargoed articles and whether a campground would qualify under the definition. Ms. Sievers replied that the term refers to a processing facility that brings in wood products from other states. Senator Hunhoff inquired if campgrounds could be defined as a facility. Ms. Sievers stated they could, elaborating that the Department of Game, Fish and Parks likely has its own rules about accepting out-of-state wood products in those campgrounds under its jurisdiction.

Representative Jensen inquired if the Department of Game, Fish and Parks has provided information to campers regarding the use of firewood from quarantined areas. Ms. Sievers responded that the requirements are noted on the department's website.

***Senator Hunhoff moved, seconded by Senator Johns, that the review of the rules proposed by the Department of Agriculture and Natural Resources is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.***

**Department of Social Services:** Amend rules to clarify that services, procedures, and drugs granted an emergency use authorization are not necessarily excluded from coverage on the basis of South Dakota Medicaid's non-coverage of experimental services, procedures, and drugs.

**Mr. Jeremy Lippert, Department of Social Services,** reviewed the proposed rules.

Senator Hunhoff asked if the proposed rules change was recommended by the federal government or prompted by the COVID-19 pandemic. Mr. Lippert responded that while states are required to cover some medications being administered as a result of the pandemic due to federal legislation and health directives, that was only one of several reasons for the proposed changes.

***Representative Jensen moved, seconded by Senator Johns, that the review of the rules proposed by the Department of Social Services is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.***

**Law Enforcement Officers Standards and Training Commission (Office of the Attorney General):** Amend rules to:

- Require that a hiring agency conduct an adequate background investigation for officers and 911 telecommunicators, and that the commission is notified when an officer ceases employment with a law enforcement agency;
- Require at least 2 hours of response-to-resistance training for law enforcement officers to meet their continuing educational requirements and provide that an officer who fails to maintain all required continuing educational requirements will have their certification become inactive;
- Require the executive secretary to place on a national decertification index the officer's name in the case of a revocation or suspension of the officer's certification and that the investigation into allegations of misconduct will continue even if an officer consents to decertification;
- Amend the definition of "moral turpitude" to refer to the statutory definition, with regard to the discipline of officers and 911 telecommunicators;
- Require officers and 911 communicators to cooperate with investigations, disclose arrests, intervene in situations when another officer is subjecting a person to excessive force, and prohibit the use of marijuana or controlled substances;
- Amend the procedures for filing a complaint against law enforcement officers or 911 communicators; and
- Strike unneeded language from the rule regarding the burden of proof at a hearing on a complaint against law enforcement officers and 911 telecommunicators.

**Mr. Paul Bachand, Law Enforcement Officers Standards and Training Commission,** and **Mr. Chad Mosteller, Office of the Attorney General,** reviewed the proposed rules.

Representative Jensen asked who would determine not to hire an individual for a law enforcement position based on their social media activity and whether review of such activity violates the person's First Amendment rights. Mr. Bachand replied that the agency chief makes the final call on whether to hire an individual, and violation of someone's First Amendment rights is a legal determination.

Senator Hunhoff inquired as to whether a master database is maintained to track notices of discontinuance of employment for law enforcement officers. Mr. Mosteller confirmed a law enforcement training database is maintained which tracks the status of all officers.

Responding to Senator Hunhoff regarding how an officer's certification becomes inactive and if the reasons why an officer does not complete the required training are noted, Mr. Bachand said a status is designated as inactive if an officer fails to comply with the training requirements. Mr. Mosteller added that the commission generally knows from the local department why there has been a delay in an officer's training although they do not specifically ask each department why an individual has not completed the required training.

Senator Hunhoff asked why another law enforcement agency would need to ask for law enforcement investigation records. Mr. Bachand indicated that investigation records are generally an issue when the officer seeks reemployment with another law enforcement agency.

Senator Hunhoff asked how long it takes for a person wanting to file a complaint requesting the revocation of an officer's certification to receive the necessary forms to do so. Mr. Bachand stated the complaint form is provided to the complainant within 10 days of the agency's receipt of their request. Mr. Mosteller said generally a hard copy form is sent immediately after a person calls to request one, and that an online form is also available that the public can access on their own.

Senator Hunhoff questioned why a single commission member makes the decision to request further investigation into a complaint, direct that a hearing be held, or dismiss the complaint. Mr. Bachand explained that the commission assigns that duty to a member for a specific period of time and during that term, the member is not allowed to sit on the board deciding the case.

Senator Hunhoff asked about the five-day deadline to report situations in which an officer failed to intervene when a fellow officer is subjecting a person to excessive force, what deadlines exist in other states, and what the timeframe is to report an officer-involved shooting. Mr. Bachand responded that while most reporting is immediate, more time may be needed for situations that occur over a weekend during which time a department's administrative office may be closed. Mr. Mosteller stated in the case of an officer-involved shooting, the agency immediately notifies the commission.

Senator Hunhoff noted that people's memories of an incident tend to fade from the time of occurrence to five days after and if the priority is to get the best information possible, the timeframe for reporting should be shorter. She said as we are seeing with incidents across the country, these are serious events and should be handled as such.

Representative Jensen inquired as to whether the law allows for sworn officers to be hired temporarily, and whether they receive the same scrutiny from the commission. Mr. Mosteller confirmed both practices.

Representative Cwach asked if the proposed rules limit the definition of "moral turpitude" to that contained in statute, and why in one rule the mere act of moral turpitude is grounds for revocation or suspension but in another rule, the officer must be convicted of it to receive the same punishment.

Mr. Bachand responded the commission thought it appropriate to address moral turpitude on all levels and not just those resulting in convictions.

Representative Cwach asked if a member of the public who files a complaint against a law enforcement officer receives notification on the results of the investigation into the complaint. Mr. Mosteller said yes, when the investigation is completed. Representative Cwach asked if that should be in rule, noting he hears from people who feel government is not responsive to complaints. Mr. Mosteller replied that while he did not think having that in rule was necessary, he understood the point.

Representative Cwach asked about proposed rules regarding the use or possession of marijuana by an officer, and whether the officer could lose their job for having and using the substance, even if they possess a valid prescription for medical marijuana. Mr. Bachand said yes, they could, because it is still prohibited under federal law.

Referencing Initiated Measure 26 which becomes law on July 1, 2021 and would allow a law enforcement officer to keep their job under these circumstances, Representative Cwach inquired as to how the commission could reconcile the proposed rule with the new law. Mr. Bachand described a scenario in which there is an officer-involved shooting and a urine analysis completed on the officer after the incident indicates the officer has marijuana in his system, saying that violates federal law. Representative Cwach mentioned the conflict with state law and asked how other states handle law enforcement officers who have prescriptions for medical marijuana. Mr. Bachand stated the commission did not look into how other states approach the medical marijuana issue.

Representative Hansen said it is appropriate that law enforcement officers be held to a higher standard and the proposed rules are a step in the right direction. Senator Johns agreed, saying employers do have a say over whether their employees can use controlled substances.

Senator Heinert said he was troubled that the commission did not research how other states address the issue of law enforcement officers and medical marijuana, and it was his preference that the rules be reverted. Representative Cwach commented that the commission should have checked into other states' policies and he was inclined to vote against approving the rules because of Initiated Measure 26 and the conflict between state and federal law.

***Representative Hansen moved, seconded by Representative Jensen, that the review of the rules proposed by the Law Enforcement Officers Standards and Training Commission (Office of the Attorney General) is complete. Motion prevailed on a roll call vote with 4 ayes and 2 nays. Voting aye: Hansen, Hunhoff, Jensen, and Johns. Voting nay: Cwach and Heinert.***

**[South Dakota Lottery \(Department of Revenue\)](#)**: Amend rules to adopt official game rules that are set and adopted by the Multi-State Lottery Association and New England Lotteries for Powerball and Lucky for Life.

**Mr. Norm Lingle, South Dakota Lottery**, reviewed the proposed rules.

Representative Jensen asked if the extra dollar to be charged for the new Double Play option will go towards prizes in the base Powerball game. Mr. Lingle clarified that the funds will go into a separate prize pool to be used specifically for Double Play prize payouts.

***Representative Jensen moved, seconded by Representative Hansen, that the review of the rules proposed by the South Dakota Lottery (Department of Revenue) is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.***

**Public Utilities Commission:** Adopt rules to improve, clarify, and update existing rules language pertaining to:

- Confidentiality;
- Rate filing;
- Energy facility plans;
- Siting rules;
- Local exchange competition;
- Telecom services;
- Pipeline safety; and
- Stray voltage training qualifications.

**Mr. Chris Nelson, Public Utilities Commission,** reviewed the proposed rules.

Senator Hunhoff asked if definitions exist for submitting party and for non-submitting party. Mr. Nelson indicated that no definition exists, but that submitting parties are those who file a document in a Public Utilities Commission docket, and non-submitting parties are those who are party to a docket but do not file. Senator Hunhoff queried whether both solar energy facilities and wind energy facilities were defined in law. Mr. Nelson confirmed that definitions specific to each type of facility are contained in statute.

Representative Hansen inquired if the administrative rules pertaining to wind energy facilities cover residential or small users. Mr. Nelson said the Public Utilities Commission only has siting authority for wind farms with a capacity of 100 megawatts or more and does not regulate wind projects with smaller capacities.

***Senator Hunhoff moved, seconded by Representative Jensen, that the review of the rules proposed by the Public Utilities Commission is complete. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.***

### **Comment and Discussion on Proposed Form 16, Housing Cost Impact Statement**

Mr. Goetz presented for comment proposed Form 16, the housing cost impact statement required to be included with certain proposed rules following the passage of [Senate Bill 92](#) by the 2021 Legislature.

Effective July 1, 2021, agencies planning to promulgate rules prescribing new standards or requirements for building or remodeling a residential structure must submit a housing cost impact statement detailing the need for the new standard or requirement and the estimated cost of compliance.

Senator Hunhoff asked if the building industry had been asked for input on the proposed form. Mr. Goetz replied it was his understanding that the legislation had involved industry input and, by virtue of the form being drafted to capture the plain language of the statute, the elements of the form were the product of indirect industry input.

Senator Hunhoff said the proposed Form 16 should be included as an agenda item for the next Interim Rules Review Committee meeting to allow for public comment; committee members could concur on its use as drafted at that meeting. Representative Hansen agreed and requested that testimony on and consideration of the proposed Form 16 be added to the agenda for the June 7, 2021, meeting.

### **Adjournment**

***Representative Jensen moved, seconded by Senator Hunhoff, that the meeting be adjourned. Motion prevailed on a roll call vote with 6 ayes. Voting aye: Cwach, Hansen, Heinert, Hunhoff, Jensen, and Johns.***

Chair Hansen adjourned the meeting at 11:55 a.m.