

MINUTES
HOUSE HEALTH & WELFARE COMMITTEE

DATE: Tuesday, January 12, 2016
TIME: 9:00 A.M.
PLACE: Room EW20
MEMBERS: Chairman Wood, Vice Chairman Packer, Representatives Hixon, Perry, Romrell, Vander Woude, Beyeler, Redman, Troy, Rusche (Van Tassel), Chew
**ABSENT/
EXCUSED:** None
GUESTS: Fred Birnbaum, Idaho Freedom Foundation; Ryan Fitzgerald, IACP; Alex Adams, Board of Pharmacy, Elizabeth Criner, ISDA; Lance Giles, Idaho Optometrical Physicians.

Chairman Wood called the meeting to order at 9:00 a.m.

After a roll call was taken, **Chairman Wood** welcomed the committee members and introduced **Rep. Van Tassel**, who is substituting for **Rep. Rusche**. Chairman Wood then introduced the committee's page, **Kate Poole**.

Chairman Wood reminded the committee about Rule review, amended bills, motions, voice votes, and the legislative target dates. The proofreaders for the committee minutes are Chairman Wood, **Vice Chairman Packer, Rep. Perry, and Rep. Hixon**. Committee meetings will stream both audio and PowerPoint presentations.

Dennis Stevenson, State Administrative Rules Coordinator, Department of Administration, presented an overview of the Pending, Fee, and Temporary Rule making process. The joint germane subcommittees submit Rules for Legislative Services Office analysis. The joint germane subcommittees, although limited in their scope, can report any concerns to the legislative committee. Proposed Rules are available online for review. Pending and Temporary Rules, unless rejected in part or entirely, are considered approved. Fee Rules are approved by a Concurrent Resolution of both houses. Pending Rule rejections are processed by a single Concurrent Resolution. An Omnibus Resolution is used to reject any Fee Rule. Temporary Rules must be approved to remain in effect after the session ends.

Responding to questions, **Mr. Stevenson** explained why changing wording is not allowed and the process would allow any legislator to bring a codified rule before the legislature.

Mitchell Toryanski, Legal Counsel, Idaho Bureau of Occupational Licenses, presented information to the committee on the North Carolina State Board of Dental Examiners v. the Federal Trade Commission (FTC), a U.S. Supreme Court Opinion that may increase the legal exposure of Idaho's regulatory boards to federal antitrust claims.

The Court's ruling stipulated a state using active market participants (AMP) as regulators must provide active board supervision to qualify for state-action immunity from federal antitrust laws. **Mr. Toryanski** described the provisions of the Sherman Act, Federal Trade Commission Act, and the Clayton Act.

The FTC, established in 1914, promotes consumer protection and prevents anti-competitive business practices. To do this, the 5 Senate-confirmed commissioners enforce antitrust laws, review proposed mergers, and investigate business practices.

State antitrust sovereignty was established by Parker v. Brown (U.S. Supreme Court, 1943), which stipulated a state's actions are not subject to federal antitrust laws. This immunity is further provided to local governments and some private entities.

North Carolina (NC) dentists began competing with non-dentists for teeth whitening services. The NC Board of Dental Examiners, after reviewing complaints, concluded that non-dentists were, through this action, practicing dentistry illegally, although no rules stipulated teeth whitening as part of the dentistry practice. The board issued cease and desist letters to non-dentists, their landlords, and other boards (such as cosmetology). Although the practice ended, the non-dentists contacted the FTC and filed an unreasonable-restraint-of-trade complaint. The complaint was reviewed, agreed to by an Administrative Law Judge, and appealed by the board, citing state immunity. The case was sent to the U.S. Court of Appeals, 4th Circuit, which agreed with the non-dentists. The board then appealed to the Supreme Court of the United States (SCOTUS), which rendered a 6-3 decision in favor of the non-dentists.

Although Idaho's regulatory boards are nearly all controlled by AMP, state supervision is evident. The Governor appoints board members. Both Executive and Legislative branches review appropriations, fees, statutes, and rules. The Bureau Chief and most Executive Directors are not AMP. The Board Counsel, investigators, prosecutors, and hearing officers are not AMP. The right to judicial review exists for any licensee not pleased with their board's action. This design does not give boards or members immunity, but provides a certain measure of protection. The Attorney General is now analyzing the case and its impact.

Answering questions, **Mr. Toryanski** said every decision this board made, had it been slightly different, would not have led to the final loss. They had procedures in place for injunctions and due process for the citizens. Instead they declared this a violation of law and ordered it stopped without recourse or due process. Had the procedure been included in their practice definition the Courts would have viewed their action, beyond the lack of due process, most likely within their authority scope.

ADJOURN:

There being no further business to come before the committee, the meeting was adjourned at 9:49 a.m.

Representative Wood
Chair

Irene Moore
Secretary