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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

November 14, 2012

The Committee on Legal Services met on Wednesday, November 14, 2012, at 10:02 a.m. in HCR 0112. The following members were present:

Representative Gardner, Chair
Representative Labuda
Representative Levy
Representative Murray
Representative Waller
Senator Carroll
Senator Morse, Vice-chair
Senator Roberts
Senator Schwartz

Representative Gardner called the meeting to order.

10:06 a.m. -- Chuck Brackney, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1a - Rules of the Executive Director, Department of Natural Resources, concerning weather modification, 2 CCR 401-1.

Mr. Brackney said I have three separate rule issues for you to consider. The first one has to do with suspending weather modification permits. If you wish to do weather modification operations, you must first get a permit, and in section 36-20-105, C.R.S., these permits are issued by the executive director. It states the director shall issue all permits provided for in

the weather modification act. Once a permit has been granted, the executive director may not revise, suspend, or revoke that permit unless the executive director provides the operator with prior notice and an opportunity for a hearing. However, section 36-20-115 (2), C.R.S., says that if it appears to the executive director that an emergency situation exists or is impending which could endanger life, property, or the environment, the executive director may, without prior notice or a hearing, immediately modify the conditions of a permit or order temporary suspension of the permit. The statute goes on to provide that if that happens, you have to have a hearing within 10 days regarding that modification. One other wrinkle concerns the office of emergency management in the division of homeland security and emergency management under the department of public safety. They are charged with keeping apprised of the state's weather conditions. If they think there is an emergency as a result of weather modification, section 24-33.5-714, C.R.S., says the office shall recommend that the executive director of the department of natural resources warn organizations or agencies engaged in weather modification to suspend their operation until the danger has passed or recommend that the executive director modify the terms of any permit. Under the statutes, if there is an emergency, the office of emergency management can make recommendations to the executive director and the executive director can take certain actions. It is the executive director who is charged with the ultimate responsibility.

Mr. Brackney said Rule 18 is about the suspension of weather modification operations by emergency managers. It says emergency managers may require the immediate temporary suspension of weather modification operations for any reason. Rule 18 deviates quite a bit from the statutory procedures for the suspension of these permits. First, although the two statutes we looked at make the executive director the authority empowered to mandate suspension, Rule 18 allows emergency managers to require suspension. The term "emergency managers" is not defined anywhere in the weather modification act or in rule. The rule also ignores the procedural safeguards in section 36-20-115 (2), C.R.S., including having a hearing after a permit has been modified or suspended. Also, while the statute concerns emergencies, the rule expands the power to suspend to encompass "any reason". Finally, the rule disregards the interdepartmental procedure for suspension of operations in response to a request from the office of emergency management. Because Rule 18 grants emergency managers the authority to require the immediate suspension of weather modification operations when section 36-20-115, C.R.S., grants this authority to the executive director, and because it disregards the statutorily enacted procedural safeguards, it conflicts with that statute and should not be extended.

Mr. Brackney said the second issue regarding weather modification has to do with the creation of an advisory committee. Rule 20 allows for the creation of an advisory committee. Rule 20 A. says that pursuant to section 36-20-108, C.R.S., the executive director may create a weather modification advisory committee. Rule 20 B. talks about the duties of that committee. We think this is improper for two reasons. First, the weather modification act used to have section 36-20-106, C.R.S., which explicitly allowed for the creation of an

advisory committee. However, that statute was repealed in 1992 and there is no longer any express statutory authority for this advisory committee. Also, section 36-20-108, C.R.S., does not mention at all a weather modification advisory committee. Secondly, we think that by doing this in rule, the executive director has avoided the whole sunset process for advisory committees that the General Assembly oversees. Section 2-3-1203 (1), C.R.S., talks about systematic legislative supervision and how newly created advisory committees are subject to the review provisions of the section. The rule not only frustrates the General Assembly's intent with regard to review of advisory committees, but it also goes against the statutory repeal from 20 years ago. Because Rule 20 allows the creation of an advisory committee absent statutory authority, the advisory committee exists outside the statutorily mandated sunset review process and, therefore, Rule 20 should not be extended.

Senator Schwartz asked if we will be hearing from the department on these issues? I would like to understand the role of the advisory committee and if there needs to be a bill to establish an advisory committee.

10:14 a.m. -- Jennifer Gimbel, Director of the Colorado Water Conservation Board, Department of Natural Resources, testified before the Committee. She said the executive director has delegated his responsibilities to the water conservation board. The intent of this advisory committee was basically a way to allow stakeholders to be involved with the process. We work constantly with stakeholders. If formalizing that process is a concern to the Committee, then we're okay with taking it out.

Senator Schwartz said I have many stakeholders in this issue and oftentimes they don't agree. As opposed to having all those issues come through yourself as the executive director, maybe there should be a stakeholder process for how you would facilitate that input in the future. Ms. Gimbel said I don't know how to answer that because we do involve the stakeholders. We do it more on an informal basis and we were just trying to formalize it a little bit. We may want to chat later about how we can fulfill those needs so you're comfortable.

Mr. Brackney said the last rule has to do with the emergency issuance of these permits. To see what an applicant for a weather modification permit has to go through, we need to look at section 36-20-112, C.R.S. An applicant has to pay the permit fee, furnish proof of financial responsibility, submit a complete operational plan, publish a notice of intent so that people will know that the weather modification operations will be taking place locally, and provide any other information that the executive director may want. The General Assembly has enacted two narrow exceptions to these. Section 36-20-109 (2), C.R.S., says that in cases where the permit is for research or experimentation the director may waive the fee. They would still have to submit an operational plan, do public notice, and all the other things. Section 36-20-114 (3), C.R.S., says that in an emergency involving fire, frost, hail, sleet, smog, fog, drought, or other emergency, the executive director may issue a permit without requiring the publication of notice. Again, all the other requirements still apply.

Mr. Brackney said that Rule 21 talks about the procedure for granting emergency permits. It says that the executive director may exempt weather modification operations from the requirements found in the rules and that a permit may be granted on an emergency basis through the waiving of one or more of these rules. According to the rule, this type of permit may be issued without following any of the permit requirements in section 36-20-112, C.R.S. But, as we've seen, the General Assembly has created only two very narrow exceptions to these and the executive director has no unilateral discretion to exempt certain permit applicants from the permitting requirements. Because Rule 21 allows for the bypass of the permit requirements of section 36-20-112, C.R.S., it conflicts with statute and should not be extended.

10:19 a.m.

Hearing no further discussion or testimony, Senator Morse moved to extend Rules 18, 20, and 21 of the Department of Natural Resources and asked for a no vote. Representative Levy seconded the motion. The motion failed on a 0-9 vote, with Senator Carroll, Senator Morse, Senator Roberts, Senator Schwartz, Representative Gardner, Representative Labuda, Representative Levy, Representative Murray, and Representative Waller voting no.

10:21 a.m. -- Chuck Brackney addressed agenda item 1b - Rules of the State Board of Human Services, Department of Human Services, concerning the food assistance program, 10 CCR 2506-1.

Mr. Brackney said the food assistance program used to be called the food stamp program or the supplemental nutrition assistance program (SNAP). We believe the problem with the rule is that the resource eligibility limits for this program - that is, how much resources you can have and still be eligible for this program - are set by agency letter according to the rule but we believe the dollar amounts need to be in the rule according to the "State Administrative Procedure Act" (APA) and certain statutes governing the program. The board does have rule-making authority with regard to this program. I'll start with section 26-2-108 (1), C.R.S., and what I hope to show here is that there are a number of references in statute saying that this sort of thing needs to be in the rules of the department. Paragraph (a) of the statute says that upon completion of the verification, the county department, pursuant to the rules of the state department, shall determine whether the applicant is eligible for assistance payments. Paragraph (b) says that in determining the amount of assistance payments to be granted, due account shall be taken of any income or property available to the applicant pursuant to rules of the state department. Paragraph (c) says when the eligibility, amount, and date for beginning assistance payments have been established, the county department shall make an award to or on behalf of the applicant in accordance with rules of the state department. One more statute on this is section 26-2-111 (1) (b), C.R.S., which is precisely on point, and it says that no person shall be granted public assistance in the form of assistance payments unless the person has insufficient income, property, or other resources to meet his or her

needs as determined pursuant to the rules of the state department. These sections talk repeatedly about how this sort of thing needs to be in rule.

Mr. Brackney said let me talk briefly about the requirements of the APA. Section 24-4-103 (1), C.R.S., says that when any agency is required by law to make rules, the provisions of this section apply. Those provisions in this case mean public notice, having a hearing, allowing comment, and submission of the rules to the attorney general's office and to our Office. What is a rule? We need to look elsewhere in the APA. Section 24-4-102 (15), C.R.S., says "rule" means the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency. Again, the whole point of this is to have the agencies go through formal rule-making, to allow public input, and to allow review by the attorney general's office and the legislative branch.

Mr. Brackney said Rule B-4224 C. has to do with resource eligibility standards and how much income and property I can have and still be eligible for the food assistance program. The rule says information regarding the resource limits for all household classifications shall be sent to all county departments of social or human services every October in an agency letter. This means that the state department is going to set these dollar amounts and then transmit them to the counties so they can put them into effect via either a paper letter or an e-mail. We believe that the setting of these resource limits constitutes a statement by the board implementing its policy and so it comes within the definition of a rule in the APA. The board has to follow the safeguards found in the APA. Also notice that in the definition of "rule" is a statement that includes "general applicability and future effect". The resource limits of Rule B-4224 C. are applicable to each applicant to the food assistance program, which means this is exactly the type of information that should be subject to the APA's rule-making process. Also, we have those two statutes from title 26, C.R.S., that repeatedly talk about this sort of thing being contained in the rules of the state board or state department. Let me say one more thing to drive this point home. The old version of the rule contained the dollar amounts in question. This is how it has been done for quite a while. Until now the board has done it this way and only in this version has sought to do this by agency letter. Because Rule B-4224 C. establishes the resource limits for the food assistance program eligibility by agency letter, it fails to meet the rule-making process required by the APA and in the statutes governing the food assistance program in title 26, C.R.S., and should not be extended.

Representative Levy said despite you're very methodical explanation of this issue, I'm not sure I agree with you. What I was wondering about is whether the change in eligibility that goes into this letter is really just a function of a calculation by taking the consumer price index and doing a multiplication based on an adjustment. Perhaps it really wouldn't be the kind of change in eligibility or income level contemplated by the statute. I can appreciate that the methodology of calculating and all of the procedural rules and substantive law around

how you calculate is in rule and has gone through the APA process but then the adjustments that have to be made periodically are just a calculation and you send it out by letter. What goes into this calculation? Mr. Brackney said I'm not sure what exactly goes into it. I assume it is at least in part the consumer price index. I would still hold to the notion that section 24-4-102 (15), C.R.S., and the definition of "rule" requires even this sort of thing to go through public rule-making and to allow comment. I see what you're saying, that you could look at this as administerial, but I'm not sure that gets it out of the rule-making requirements of the APA. Also, notice that in section 26-2-111, C.R.S., it says no person can have the assistance unless the person has insufficient income or property pursuant to the rules of the state department, not to agency letters or internal communications, but rules. I think the General Assembly contemplated that this be done through the APA rule-making process.

Representative Levy said I guess what I was wondering is what is the nature of the change? Section 26-2-111 (b), C.R.S., says as determined pursuant to rules and regulations. I think you can read that to mean the methodology for determining whether there is insufficient income property or other resources. As I read the rule and the letter change, it is the income threshold level and not how you determine that. It's just the specific calculation of what is all that yield when it's all said and done.

Mr Brackney said I don't really disagree with that point.

Representative Gardner said this is somewhat hypothetical but it follows upon what Representative Levy was talking about. As I looked at this, I thought that perhaps the department wants to not go through a full rule-making process to change 2,000 to 2,100 or something like that, then they need perhaps to put a formula in law. If they did put a formula in law would that take care of the rule-making issue so they could issue by letter or would it be your position that even if there was a formula they need to go through rule-making? Mr. Brackney said I guess the point would be that the APA wants those being regulated by the rules to know what it is they have to comply with. So as long as that formula could be figured out reasonably by people, I think that would probably work rather than the dollar amount. The dollar amount is better, no question about that. Some convoluted definition that refers to things that you would have a hard time tracking down might not work, but if it was something that you could easily tell what it is, then that might work.

10:33 a.m.

Hearing no further discussion or testimony, Senator Morse moved to extend Rule B-4224 C. of the State Board of Human Services and asked for a no vote. Representative Labuda seconded the motion. The motion failed on a 1-8 vote, with Representative Levy voting yes and Senator Carroll, Senator Morse, Senator Roberts, Senator Schwartz, Representative Gardner, Representative Labuda, Representative Murray, and Representative Waller voting no.

10:34 a.m. -- Chuck Brackney addressed agenda item 1c - Rules of the Chief of the Colorado State Patrol, Department of Public Safety, concerning minimum standards for the operation of commercial vehicles, 8 CCR 1507-1.

Mr. Brackney said we believe the state patrol's rule has been over-inclusive by including some commercial vehicles that are not regulated by the state patrol but by the public utilities commission. Section 42-4-235 (4) (a), C.R.S., requires the adoption of commercial vehicle rules based upon the corresponding rules issued by the United States department of transportation. The statute contains an exception that says rules regarding financial responsibility and insurance do not apply to a commercial vehicle that is also subject to regulation by the public utilities commission. Most commercial vehicles on the road are regulated by the state patrol; however there is a class of vehicles that are subject, by statute, to regulation by the public utilities commission. Those would be taxis, tow trucks, limousines, or chartered buses. According to section 42-4-235 (4) (a), C.R.S., the state patrol may not issue rules regarding financial responsibility and insurance for these vehicles. Just so you know, the public utilities commission has issued those rules regarding this matter for those vehicles and they are not unregulated.

Mr. Brackney said Rule IV. A., covers hours of operation, equipment standards, and inspection and repair of vehicles. Rule IV. A. starts off saying all commercial vehicles and motor carriers - which is a problem because we've seen that there is a class of vehicles that are exempt from regulation by the state patrol - shall operate in conformity with the safety regulations contained in a list of regulations from the U.S. department of transportation that they've adopted. One of those refers to minimum levels of financial responsibility for motor carriers. Of course, this is something they may not regulate with regard to those vehicles that are subject to regulation by the public utilities commission. The use of the words "all commercial vehicles and motor carriers" in Rule IV. A. includes these exempt commercial vehicles, making the current language of the rule impermissibly over-inclusive. Because Rule IV. A includes all commercial vehicles and motor carriers when section 42-4-235 (4) (a), C.R.S., excludes vehicles regulated by the public utilities commission from financial responsibility and insurance regulation by the state patrol, the rule conflicts with statute and should not be extended. As far as we know the state patrol is following the law out in the field as a practical matter and they're not seeking to enforce regulations they shouldn't be. It's just a matter of the language in the rule being over-inclusive. Finally, the state patrol is not contesting our recommendation with regard to this rule.

10:38 a.m.

Hearing no further discussion or testimony, Senator Morse moved to extend Rule IV. A. of the rules of the Chief of the State Patrol and asked for a no vote. Representative Labuda seconded the motion. The motion failed on a 0-9 vote, with Senator Carroll, Senator Morse, Senator Roberts, Senator Schwartz, Representative Gardner, Representative Labuda,

Representative Levy, Representative Murray, and Representative Waller voting no.

10:39 a.m. -- Thomas Morris, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1d - Rules of the Colorado Medical Board, Division of Professions and Occupations, Department of Regulatory Agencies, concerning the licensure and supervision of distinguished foreign teaching physicians, 3 CCR 713-33.

Mr. Morris said the issue is whether the licenses for distinguished foreign teaching physicians can be renewed for a person who is an assistant professor, as opposed to an associate professor or higher. Our conclusion is no, that it can't be renewed but the problem is that the rule at issue does authorize the renewal of this kind of license. By way of background, medical schools in the state are authorized to hire people who are not otherwise licensed here in the state. People from foreign countries can be members of the faculty at a medical school in one of two categories under the statute: As an assistant professor or as an associate professor or higher. The important fact here is that assistant professors are ranked below associate professors. The statute at issue is section 12-36-107.2, C.R.S. Subsection (5) of that section directs the medical board to promulgate rules specifying standards related to the qualification and supervision of distinguished foreign teaching physicians. Pursuant to that authority, the board promulgated Rule 140 II. C. 2. b., which allows an assistant professor to renew his or her license by providing detailed plans for acquiring licensure pursuant to some other provisions of the medical practice act. As I mentioned, we believe doing so is a conflict with the statute and to understand why, we need to go into how the statute treats these two classes of applicants, assistant professors and associate professors. Associate professors are dealt with under section 12-36-107.2 (1), C.R.S., which states an applicant may be granted a distinguished foreign teaching physician license if the following conditions are met. In subsection (1) (a), it says the applicant has a rank equal to an associate professor or higher. So, subsection (1) sets out the general conditions that you have to meet to be granted one of these licenses, including being at least an associate professor. If you're only an assistant professor, then you are governed by section 12-36-107.2 (2), C.R.S., which says that an applicant who meets the qualifications in subsection (1) but is not offered the rank of associate professor or higher may be granted a temporary license, for one year only, and if granted a license, the applicant has to practice under the direct supervision of somebody who is an associate professor. You'll notice that subsection (1) doesn't contain this language about a temporary license for one year only. The language applies only to assistant professors, not to associate professors. All of the licenses are temporary for only one year and you have to submit a renewal. Renewal is governed by section 12-36-107.2 (3), C.R.S., which states the license may be renewed annually only after the board has specifically determined that the conditions specified in subsection (1) will continue during the ensuing period of licensure. Subsection (1) says you have to be an associate professor, so you can't be an assistant professor and get a renewal under the statute. Therefore, under section 12-36-107.2, C.R.S., we have two classes of applicants and they're treated very differently. Licenses for assistant professors are governed by subsection (2), which says they're

temporary and for one year only. Renewal is governed by subsection (3), which says you have to meet the conditions of subsection (1), and the important thing there is that under subsection (1) you have to be an associate professor. There is nothing in the section that authorizes the renewal of a license for an assistant professor. The problem here is that that is exactly what Rule 140 II. C. 2. b. allows assistant professors to do. The rule says that an applicant shall, for renewal applicants not designated as associate professor or higher, provide detailed information for the applicant's plans to obtain Colorado medical licensure pursuant to a couple other sections. It doesn't really matter what those sections do because under the statute you have to meet the qualifications under subsection (1) to get a renewal and to do that you have to be an associate professor, not an assistant professor. Therefore, we believe that the rule conflicts with the statute and ought not to be extended

Mr. Morris said I anticipate that someone from the medical board will be addressing you. My understanding is that they're going to be talking about how the statute perhaps has a drafting error in it and that previous versions of the statute authorized this. I think I agree that under previous versions of the statute assistant professors probably could get a renewal of license and that was the practice of the medical board. But, in 2010, there was a sunset review and the legislature changed that statute. What you need to know about the argument that the statute contains an error is that there is a well-established standard that if a statute is unambiguous and doesn't lead to an absurd result, then you apply the statute as written. Here, we have a very unambiguous statute. Subsection (3) unambiguously says that if you want a renewal you have to continue to meet the requirements of subsection (1). Subsection (1) says you have to be an associate professor. There is a rational basis for the distinction between assistant and associate professors in that associate professors are ranked higher. Assistant professors have to operate under the direct supervision of an associate professor. It's not an absurd result and so there is no reason to look at the legislative history. If there is an error in the statute on a policy ground, that is something for the General Assembly to deal with through legislation, but under the law that we have now, this statute is very clear that an assistant professor cannot renew his or her license.

10:50 a.m. -- Marschall Smith, Program Director, Colorado Medical Board, and Eric Maxfield, Assistant Attorney General and Counsel to the Colorado Medical Board, testified together before the Committee.

Mr. Smith said section 12-36-107.2, C.R.S., and Rule 140 are instruments that allow physicians that are trained and licensed in other countries to have an opportunity to teach and practice medicine in Colorado without meeting the full requirements of licensure. The legislature found that there was a shortage of academic physicians, and so we now permit this. These doctors are called distinguished foreign teaching physicians and they practice medicine as part of their professorship at the University of Colorado school of medicine, which includes the University hospital, Denver Health, and the Children's Hospital. Every year, all distinguished foreign teaching physicians must apply for a renewal of their license

and it has always been a requirement to do this. Rule 140, as it was created in 2006, provided supervisory expectations and licensing requirements for applicants. At the present time, there are 19 distinguished foreign teaching physicians. Seven are full professors, 10 are associate professors, 2 are assistant professors, and there are no instructors. The change that occurred in 2006 was a small but important shift that allowed bringing research talent to Colorado. Previously, the avenue for getting a distinguished foreign teaching license was only for full and associate professors. The problem was this route didn't provide an avenue for those younger doctors with information or research that is unique in the world. They bring their expertise to Colorado by the creation of this amendment in 2006 and the rule. In interpreting the new statute in 2006, the rule has always permitted the renewal of distinguished foreign teaching physicians without regard to their academic rank. The changes that were made in August 2012 were through a process where the board had worked with the university to streamline the application process and to address other issues, but allowing someone to renew their distinguished foreign teaching physician license was not changed or altered.

Mr. Smith said there are two items I hope to clarify. One is that this has been a very long and involved history between the university, the legislature, and the medical board to permit this process to happen. They used to get a temporary thing and now they get a full license. In 2006 two different levels of licensure were established. They've always been allowed to be renewed and it's a key component to making this successful. The second item is that in 2006, it appears that unintentionally, a change was made that created ambiguity and actually eliminated something that was never the intention of the legislature to do. I have handouts A, B, C, D, and E and I'll go through those quickly. Handout A is the statute that existed in 2009 before the sunset review. It did allow for the renewal of both types of distinguished foreign teaching, whether you were a full, assistant, instructor, or associate level. Handout B is excerpts from the sunset review. In recommendation number 26, it said we need to take these different licensing types and move them out of one section and create their own section. Handout C is a copy of House Bill 10-1260 and in there I marked the part where I believe the error occurred. Previously they allowed for renewal of both types, whether they were a full, associate, or assistant, and they scratched out a reference to "paragraph (a)" of this section. Paragraph (a) covered (I) and (II), which were the associate and full professors and the assistant professors. It appears that the change was made when they switched from numbers, letters, and roman numerals to numbers and letters and in that conversion they made that ambiguity. It created Handout D, which is the 2010 version of the statute. It talks about both license types being for one year and allows them to be renewed. There appears to be ambiguity or confusion that was created in this construction of the new section.

Mr. Smith said in transitioning to my final remarks I want to share with you a quick story about how important Rule 140 is and an actual example of a physician that could be adversely affected if we're not allowed to renew the licenses. Her name is Dr. Birlea and she is a distinguished foreign teaching physician. She was initially licensed a year ago and the board just renewed her license. She is a physician that is trained, licensed, and board-certified

in Romania. What she did in Romania was to isolate a strain of genes that is associated with skin and hair pigmentation. She is working on eradicating a disease known as generalized vitiligo, which causes skin to change pigmentation. It is a disease that is especially affecting people of color and this is the only isolated strain of genes in the world for addressing this disease. As she explained it to me, she was able to do this because of her work in Romania, but in order to advance her work, she needed the resources available only from a school of medicine in the United States. She chose the University of Colorado in part because it would be in her ability to hold and gain a license during her entire research process. She believes she will have a cure for this disease and be able to eradicate it in the next five to 10 years. Obviously, if she has a license valid only for one year, it's not going to work. I've handed out Handout E, which is her study that explains all of this. I hope by giving you this example and by providing this information, I've demonstrated that licensure for one year really is not a realistic solution and I don't think it was ever the intention of the legislature. There was a change made that appears to cause confusion and ambiguity. No rising medical star will be attracted to Colorado if their tenure is limited to one year. The process we have is a very long and involved cooperation between the legislature, the university, and the medical board.

Representative Gardner said let's assume that the members of the General Assembly are incompetent and they can't read, and so we write things that we don't really mean but we write them in plain English. Having said all that and hearing the argument that we just didn't intend to write what we wrote and didn't intend to pass what we passed, tell me what the limits of that argument might be? I'm troubled because I get that this might not be good policy and I get that we might want to change it, but is there something wrong with Mr. Morris' analysis?

Mr. Maxfield said I don't accept the premise of your question about the General Assembly but I think I understand your question about even if it were an inadvertent oversight, it's in the books. Yes, it's on the books and what you have is both the plain language in the statute and the historical treatment by the General Assembly of different terms that are currently in the statute. Under two views of the current language - not a past version or under some view that it's a mistake - it's either ambiguous and supports the board's rule or it's unambiguous and supports the board's rule. The way it is ambiguous is the word "temporary" as the word has been used prior to 2004. Prior to 2004, you could renew your one-year license once for one year. It was called temporary. From 2004 to 2006, you could renew it for up to five years. After 2006, that cap was removed altogether. The word "temporary" was not used as a modifier to say one year, period. Rather it was a modifier to say that it's not a routine license that we provide to a routine applicant for a Colorado medical license. Under that view, although it does say temporary in the current statute, it's consistent with the past statutes on this very topic with the way the General Assembly has used that word to view that as permitting renewal. Unambiguously, if you will look to subsection (3) of the current law, it requires the board to make sure that the conditions in subsection (1) that set out the associate or higher category are met prior to renewal. Mr. Morris' view is that means only that category

may be renewed. Subsection (3) does not say only that category may be renewed. It merely says that the board must be assured that those conditions are met. If you were to now draw your attention to subsection (2) that describes the criteria and conditions for the lesser assistant professorship, it also refers to subsection (1) and those conditions. Under the plain language of the law as you have it in front of you today, the board must assure that the conditions in subsection (1) are met in order to have renewal. Those criteria are required for the first category and the second category. It's Mr. Morris' position that there's room under an ambiguous view of the statute for the board's rule as written, or it's clear and it's well within the board's authority.

Senator Morse asked assuming that we take the view that the statute is clear that you cannot renew this license, can the physician get either a general Colorado license to practice medicine or be promoted to associate professor? Mr. Smith said it is probably two to three years for Dr. Birlea to pass all the requirements to get a regular license. It is a very long, involved process that involves taking four examinations. It's about $5,000 to $6,000 to take all these tests. Dr. Birlea is currently in the middle of that process. It generally is four to five years to advance from one academic level to the next. The likelihood of granting Dr. Birlea a one-year license and then next year getting her promoted to associate professor so she can get a new license is very unlikely.

Mr. Morse said even though I agree we may have made a mistake, I agree with Representative Gardner's analysis that the language is pretty plain. If we vote not to extend the rule today, the rule will still actually be in effect until May 15, 2013, so I don't think her license will be revoked between now and then. That also gives you the opportunity this next legislative session to find a bill sponsor to try to tweak the language so that it does the kind of policy you're talking about. I don't disagree with what you've said, but this Committee is usually very strict in its interpretation of existing law.

Representative Gardner said I endorse Senator Morse's comments. I think we're stuck with what we write.

Senator Roberts said we're charged with being somewhat jealous guards of separation of powers issues. I think it's a compelling example you give and we wouldn't want that physician or any other in like circumstances to think that we don't appreciate what they're doing, but we have our task here and I would hope that you would consider approaching one of us to carry a bill to correct this.

11:09 a.m.

Hearing no further discussion or testimony, Senator Morse moved to extend Rule 140 II. C. 2. b. of the Colorado Medical Board and asked for a no vote. Representative Waller seconded the motion. The motion failed on a 1-8 vote, with Senator Schwartz voting yes and Senator

Carroll, Senator Morse, Senator Roberts, Representative Gardner, Representative Labuda, Representative Levy, Representative Murray, and Representative Waller voting no.

11:11 a.m. -- Thomas Morris addressed agenda item 2 - Consideration of a Committee Bill regarding Defining the Use of the Word "must" in the Colorado Revised Statutes.

Mr. Morris said you have a handout that has the proposed statute and bill. We've been through it a couple times. There is some language in double underline which was in response to some comments from several people, but in particular Representative Levy, about limiting unintentional application of the new definitions to existing language. It says that the new definitions would only apply to language that appears in the session laws in small capital font. If you look at the bottom of any of our bills it has that similar language that says new language appears in small capital font and language that is in strike type is language that is being repealed. That is pursuant to Joint Rule 21 a. The idea there is that if you have an existing provision of law that uses the word "shall" several times and then you have new sentences that use the word "must", that these new definitions of "shall" and "must" would only be applied to the new language. That raises the issue of whether we should update other instances of existing usages of the word "shall" in the statutes and so there are some guidelines that our Office has developed to address that particular question. There are four sections in the guidelines. The first one relates to who is going to make the determination of whether to update language. As an initial matter, that will be something for the drafters to decide. Our legislative assistants will not be responsible for that. Paragraph 2 deals with entirely new language, so when you're adding an entire new subparagraph, section, part, or article, we would comply with this new statute if it's adopted. Paragraph 3 is how do we deal with existing language and what, in particular, are we not going to do. We're not going to bring things into a bill just to update them. We're only going to think about whether to update existing language if it's already in the bill for another change. Paragraph 4 talks about whether to update the language and the first two factors are the most important. We're not going to do this if we're not sure that doing so wouldn't create ambiguity or have a substantive effect. One of the subsets of that is if that particular language has already been construed by caselaw, then we would have to tread carefully. The next two factors relate to whether it's a sensitive issue that people are likely to become unglued over and we might not want to update that language, or does the particular sponsor of that bill not want to go there, or does the committee have a reputation of one that looks into these types of things and creates a problem for the sponsor, and so we wouldn't want to go there. Lastly is our workload and if we have a really long bill that has a lot of conforming amendments, we don't need to update all the existing language in all the conforming amendments. We are looking for a motion to authorize our Office to prepare a draft bill for the Committee.

Representative Labuda said I'm thinking that for prior legislation that has "shall" and we're wanting to change it to "must", we might need to take it before the legislature to see whether we're determining if it's a duty or a requirement. Mr. Morris said we're not proposing to do

this on revision or editing. It would be through bills and the legislature would have a chance to look at it.

Representative Levy said I do have a question about when you're going to make the change and when you're not. If you don't reach back to sections that aren't involved in the bill, that's easy for somebody looking at the statute in the books to figure out. If I understood you correctly, if you're doing a major revision of a title, but you decide you don't have the time to also take on this "must" and "shall" in each instance, how does somebody reading that know that when we didn't change a "must" to a "shall" or a "shall" to a "must" that it's because we didn't take the time rather than we thought it was right the first time? Mr. Morris said if the determination under the factors under paragraph 4 indicate that it's appropriate to update them, we will unless there is some sort of time crunch. If a sponsor is wanting to recodify an entire section or part or article, we'll find the time because the goal of the legislation is to update an entire part of law. I'm talking about if we're in the middle of session and there is a rush amendment or there are a bunch of conforming amendments, it may not be possible to do the work. If we think it's appropriate to do it and the sponsor is okay with it, we will do it unless there is not enough time.

Representative Levy said say there is big sunset bill with a lot of different sections in it. If all of that is coming before us, you will go through and make the conforming amendments? What I'm most concerned about is that it is clear going forward which musts and shalls conform to this new definition. If they've been in a bill but they haven't changed then one should assume that we mean them to mean what they say. Mr. Morris said that is particularly why we changed the applicability language. The draft language used to have a standard applicability clause that would only show up in the session laws and in one year of the statutes. Here, it's going to be in the statute forever and people will be able to go back to the session laws for that year and figure out if the shall was in small caps or in regular type. If it's in regular type, you do not apply the new definitions. It should be completely unambiguous when to apply these new definitions.

11:21 a.m.

Hearing no further discussion or testimony, Representative Levy moved that the Committee approve the language in the draft bill and that we sponsor this as a Committee bill. Representative Labuda seconded the motion. The motion passed on a 9-0 vote, with Senator Carroll, Senator Morse, Senator Roberts, Senator Schwartz, Representative Gardner, Representative Labuda, Representative Levy, Representative Murray, and Representative Waller voting yes.

Representative Levy and Representative Gardner agreed to be co-prime sponsors for the bill. Senator Roberts and Senator Schwartz agreed to be the other co-prime sponsors for the bill. Representative Labuda and Senator Morse agreed to be co-sponsors of the bill.

11:25 a.m. -- Ed DeCecco, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 3 - Consideration of a Committee Bill regarding an exemption from archival fees for the legislative branch.

Mr. DeCecco said this is a follow-up to an issue I presented to the Committee last year and earlier this year related to the cost for the legislature and legislative staff to access the audio recordings at archives. Also, at the last meeting, the state archivist had mentioned there were some documents in archives from the legislature, and they are included in this bill as well. Included in the bill is the original language from 2010 that allowed archives to charge any state agency fees related to research requests or making copies of documents or archival audio. What I've done is create an exception to that authority. The scope of this exception is broad in that it applies to any audio recording or any document provided to archives or the department of personnel by the legislative branch. We have made some limitations in that it can only be made by a member of the General Assembly or their agent, which would capture their aides or interns or anyone else they decide to send over on their behalf, as well as the nonpartisan staff from the Joint Budget Committee, Legislative Council, our Office, and Audit. I did check with John Ziegler and Mike Mauer and their offices occasionally will listen to archived tapes so they wanted to be included. Our Office is probably the biggest user of them and it's most likely related to listening to the audio related to rule reviews. We have also added somewhat of a limitation by saying it must be made in the performance of a requester's official duties. The idea was the potential that if I have a personal lawsuit where I'm trying to get some legislative history, I shouldn't be going in there and using this exemption. I will note, after Mr. Morris' discussion, that I haven't made the changes he talked about. I can make some changes to the draft to delete some unnecessary shalls, but we can take care of that down the road with an amendment, too.

Mr. DeCecco went through his recommended changes to the language in the bill regarding the use of active voice and the word "shall". The Committee indicated agreement for making the changes.

11:30 a.m.

Hearing no further discussion or testimony, Senator Roberts moved the bill forward as a Committee bill as amended by Mr. DeCecco. Representative Murray seconded the motion. Representative Roberts asked if it was possible to eliminate the word "free" in the short title? Mr. DeCecco said I don't know that it would help anyone try to find the bill from an index perspective, so yes. The motion passed on a 9-0 vote, with Senator Carroll, Senator Morse, Senator Roberts, Senator Schwartz, Representative Gardner, Representative Labuda, Representative Levy, Representative Murray, and Representative Waller voting yes.

Senator Roberts agreed to be the prime sponsor for the bill. Representative Gardner agreed to be the other prime sponsor for the bill. Representative Labuda, Representative Murray,

Representative Waller, Senator Morse, and Senator Schwartz agreed to be co-sponsors of the bill.

11:35 a.m.

The Committee adjourned.