

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1479

2007 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HB 1479

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1479

House Government and Veterans Affairs Committee

Check here for Conference Committee

Hearing Date: February 1, 2007

Recorder Job Number: 2642

Committee Clerk Signature

*Morgan Renke*

Minutes:

**Rep. Koppelman:** *The state of ND passed the Administrative Practice's Act back in the 1970's. Prior to that, administrative agencies in ND essentially established policies and each agency kind of dealt with it differently. In the late 70's when these laws passed it basically put an essential law into the code to govern how administrative rules are made. It is very important about that, for those of us who are legislators I believe that is administrative rules carry in effect the force of law. It is very important to remember that because we as a legislature make up the constitutionally mandated lawmaking body of government. So when the rules are made, we are essentially delegating the right to make law from the legislative branch of government to the executive branch of government. In 1995 I sponsored a bill that passed which gave the Administrative rules committee of the legislator the authority to oversee that process in a meaningful way. Under the provisions of that bill and other ones, that committee has had the authority to void rules under very circumstances. It also allows the administrative rules committee of the legislature to agree with the agency to amend the rule if there is an issue that comes up that wasn't anticipated. It also asks that committee to remove sections from the Administrative book. We've had instances were some new federal guidelines come down for example and an agency of government comes to the administrative rules committee and say*

*rather than making us go through the lawmaking process, will you just void them for us? While that was a very fearful process when that bill was first introduced, I think most will tell you it's not a very positive string. They work closely together if the check and balance we are supposed to have under the branches of government. No one has overridden anybody else. It is a very deliberative process that is good for our state and citizens. When the administrative practices act was first passed the government came to legislators and said don't put us under that. People would just sit there and say "I think I'll make a law today". There was no oversight on this and I think it's working very well. I don't want to pick and choose agencies that ought to be included and agencies that shouldn't. There might be some good reasons for certain agencies to be exempt, and I will leave it up to the wisdom of this committee to decide when and where that is true. I do encourage you to look at this carefully, consider it deliberatively, and to make good decisions on how you want to amend this and look at who ought to be a part of this, and who ought to be exempt.*

**Rep. Kasper:** If this bill was passed the way it is, would this require a larger committee that would be responsible for that? How would you get all your work done if you had to overview all of these?

**Rep. Koppelman:** I can respond to that only with respect with those with experience. It took them awhile to get their rules put together, to go through the process. During the last session a number of us got together because we were concerned on how the administrative rules were set up. It would go through the process of rule making, and the rules would become able to take effect. The administrative rules committee would come down and take a look at that. It only makes sense for that committee to review the rules before that action takes effect. We made that happen last session with the support of agencies under the process. In doing that we also shortened up and streamlined the process. Now it doesn't take as long and isn't as

costly. The direct answer to your question is that that is a decision for the legislator and the legislator council to make. We have a pretty good membership and attendance there with good oversight.

**Rep. Dahl:** This is a pretty long list here. What is the general breakdown of the number of agencies currently under the rule?

**Rep. Koppelman:** That is a great question but I don't have the answer. I suspect and believe that more agencies are under the administrative ruling process that are not.

**Rep. Boehning:** Just looking through this list and stuff, do all these agencies currently have rules in place that govern their areas, or are they just running on other things besides roads?

**Rep. Koppelman:** I suspect they do have or they wouldn't all be here to talk to you about this.

How they make those rules I'm not sure.

**Ken Sorenson:** Testimony Attached.

**Pat Seaworth:** Testimony Attached.

**General Sprynczynatik:** Testimony Attached.

**Pam Sharp:** Testimony Attached.

**Leanne Bertsch:** Testimony Attached.

**Rep. Haas:** We are nearing the time when I said we have to terminate this hearing.

Sometime's as a chairman I think its imperative that we make decisions that maintain the integrity of the legislative process. In view of the complications of this bill and our inability to hear all the agencies today, I think we have two choices. I'm going to recommend to the committee that we do one of two things. That we either put this into a study, where these issues can be thoughtfully considered, or we simply kill this bill.

**Rep. Dahl:** I move a do not pass

**Rep. Weiler:** I Second that

**Rep. Haas:** Is there any discussion? The do not pass motion on HB 1479 passes by a vote of 10-1-2. Is there a volunteer to carry the bill?

**Rep. Dahl:** I will.

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1479

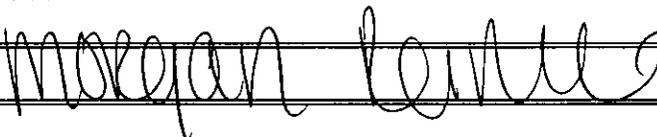
House Government and Veterans Affairs Committee

Check here for Conference Committee

Hearing Date: February 8, 2007

Recorder Job Number: 3141

Committee Clerk Signature



Minutes:

**Rep. Haas:** We have already passed this bill out of committee already, and now I'm going to ask for a motion to reconsider it. This is the bill that would have removed all agencies from the exempt list on administrative rules, and if you recall on this testimony there and we had a little bit of a discussion about it, it was unrealistic for us to get into that issue and make any kind of informed judgment with the time we had and the information. That is why I'm asking for a motion to reconsider.

**Rep. Weiler:** I move to reconsider.

**Rep. Grande:** I second that.

**Rep. Haas:** We now have a motion to reconsider HB 1479. Is there any discussion?

**Rep. Amerman:** I thought it was unfair when the presenter of the bill listed probably every agency that isn't under them right now. It's extremely not fair to you or this committee to pick and choose.

**Rep. Grande:** In all fairness to the bill sponsor, I know where he is coming from on this. We have heard this before. I actually believe I heard this when I was serving in Judiciary. He meant for all of them out and all of them stay out. I served on the administrative rules and the

feeling that is within the administrative rules committee that the administrative rule is equal to law. These agencies are setting law with no oversight and that is where the problem is.

**Rep. Dahl:** I think the administrative rules can already look specifically into each one of these agencies. I just felt that it was responsible to give us this overwhelming list. If there was a disagreement that said they can already to this.

**Rep. Haas:** The agencies that are listed on the bill are exempt from the Administrative rules. Instead it eliminates oversight by the Administrative Rules committee.

**Rep. Dahl:** Can't they already study this on the rules committee?

**Rep. Haas:** No, I don't think so. It would have to be a study that was selected by the council.

**Rep. Haas:** Is there any other discussion on the motion to reconsider? I just want to add one thing. If we do pass the motion to reconsider and if we amend it and put it into a study, it does not guarantee that the legislative council will select it as a study. There are always a lot more studies recommended that can be implemented. All of favor say 'aye', all opposed say 'no'.

The motion carries.

**Rep. Haas:** We have the amendment before us.

**Rep. Weiler:** I move the amendment.

**Rep. Boehning:** I second that.

**Rep. Haas:** Is there any more discussion on the amendment? We will take a voice vote. All of favor say 'aye', all opposed say 'no'. The amendment is carried.

**Rep. Weiler:** I move a do pass as amended.

**Rep. Grande:** I second that.

**Rep. Haas:** Is there any further discussion on the bill as amended? If not we will take a roll call vote on do pass motion as amended on HB 1479. The do pass as amended motion carries by

a vote of 10-3-0. Is there a volunteer to carry this?

**Rep. Amerman:** I will.

Date: 2-1-07  
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. "Click here to type Bill/Resolution No."

House Government and Veterans Affairs Committee

Check here for Conference Committee

Legislative Council Amendment Number HB 1479

Action Taken Do NOT pass

Motion Made By Rep Dahl Seconded By Rep Weiler

Representatives	Yes	No	Representatives	Yes	No
Rep. C. B Haas Chairman	X		Rep. Bill Amerman	X	
Rep. Bette Grande VC			Rep. Louise Potter	X	
Rep. Randy Boehning		X	Rep. Jasper Schneider	X	
Rep. Stacey Dahl	X		Rep. Lisa Wolf	X	
Rep. Glen Froseth	X				
Rep. Karen Karls	X				
Rep. Jim Kasper					
Rep. Lisa Meier	X				
Rep. Dave Weiler	X				

Total (Yes) 10 No 1

Absent 2

Floor Assignment Rep. Dahl

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)  
February 1, 2007 4:21 p.m.

Module No: HR-22-1853  
Carrier: Dahl  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

**HB 1479: Government and Veterans Affairs Committee (Rep. Haas, Chairman)**  
recommends **DO NOT PASS** (10 YEAS, 1 NAY, 2 ABSENT AND NOT VOTING).  
HB 1479 was placed on the Eleventh order on the calendar.

**House Amendments to HB 1479 (70729.0101) - Government and Veterans Affairs  
Committee 02/08/2007**

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of agency exemptions from the Administrative Agencies Practice Act.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. LEGISLATIVE COUNCIL STUDY - ADMINISTRATIVE AGENCIES PRACTICE ACT EXEMPTION.** The legislative council shall consider studying, during the 2007-08 interim, the appropriateness of each agency exemption from the Administrative Agencies Practice Act. The study should include discussion and analysis of each exemption, and a presentation by each agency entitled to an exemption, under the Administrative Agencies Practice Act. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-first legislative assembly."

Renumber accordingly

Date: 2-8-07  
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. "Click here to type Bill/Resolution No."

House Government and Veterans Affairs Committee

Check here for Conference Committee

Legislative Council Amendment Number HB 1479

Action Taken Reconsider

Motion Made By Rep Weiler Seconded By Rep Grande

Representatives	Yes	No	Representatives	Yes	No
Rep. C. B Haas Chairman			Rep. Bill Amerman		
Rep. Bette Grande VC			Rep. Louise Potter		
Rep. Randy Boehning			Rep. Jasper Schneider		
Rep. Stacey Dahl			Rep. Lisa Wolf		
Rep. Glen Froseth					
Rep. Karen Karls					
Rep. Jim Kasper					
Rep. Lisa Meier					
Rep. Dave Weiler					

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment Rep.

If the vote is on an amendment, briefly indicate intent:

Date: 2-8-07  
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. "Click here to type Bill/Resolution No."

House Government and Veterans Affairs Committee

Check here for Conference Committee

Legislative Council Amendment Number HB 1479

Action Taken move amendment

Motion Made By Rep. Weiler Seconded By Rep. Boehning

Representatives	Yes	No	Representatives	Yes	No
Rep. C. B Haas Chairman			Rep. Bill Amerman		
Rep. Bette Grande VC			Rep. Louise Potter		
Rep. Randy Boehning			Rep. Jasper Schneider		
Rep. Stacey Dahl			Rep. Lisa Wolf		
Rep. Glen Froseth					
Rep. Karen Karls					
Rep. Jim Kasper					
Rep. Lisa Meier					
Rep. Dave Weiler					

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment Rep.

If the vote is on an amendment, briefly indicate intent:

Date: 2-8-07  
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. "Click here to type Bill/Resolution No."

House Government and Veterans Affairs Committee

Check here for Conference Committee

Legislative Council Amendment Number HB 1479

Action Taken DO PASS as amended

Motion Made By Rep Weiler Seconded By Rep Grande

Representatives	Yes	No	Representatives	Yes	No
Rep. C. B Haas Chairman	X		Rep. Bill Amerman	X	
Rep. Bette Grande VC	X		Rep. Louise Potter		X
Rep. Randy Boehning	X		Rep. Jasper Schneider		X
Rep. Stacey Dahl		X	Rep. Lisa Wolf	X	
Rep. Glen Froseth	X				
Rep. Karen Karls	X				
Rep. Jim Kasper	X				
Rep. Lisa Meier	X				
Rep. Dave Weiler	X				

Total (Yes) 10 No 3

Absent 0

Floor Assignment Rep. Amerman

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1479: Government and Veterans Affairs Committee (Rep. Haas, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). HB 1479 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative council study of agency exemptions from the Administrative Agencies Practice Act.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. LEGISLATIVE COUNCIL STUDY - ADMINISTRATIVE AGENCIES PRACTICE ACT EXEMPTION.** The legislative council shall consider studying, during the 2007-08 interim, the appropriateness of each agency exemption from the Administrative Agencies Practice Act. The study should include discussion and analysis of each exemption, and a presentation by each agency entitled to an exemption, under the Administrative Agencies Practice Act. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-first legislative assembly."

Renumber accordingly

2007 SENATE JUDICIARY

HB 1479

# 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1479**

## Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: March 7, 2007

Recorder Job Number: 4594

Committee Clerk Signature *Maria L. Salberg*

**Minutes:** Relating to study of agency exemptions from the Administrative Agency Practice Act.

**Senator David Nething**, Chairman called the Judiciary committee to order. All Senators were present except for Sen. Olafson. The hearing opened with the following hearing:

### Testimony in Favor of the Bill:

**Rep. Kim Koppelman**, Dist. #13, introduced the bill stating that the Administrative rules carry the force and affect of the law. Until a bill is passed this is the law. Rep. Koppelman spoke of the history, the oversight, the duties and authority of the Administrative rules committee. The issue is they make the laws within the boundaries or parameters set 12 years ago. This committee has been given the ability to make a rule until legislation is made at the next session. The process costs money. Spoke of Agencies coming to the committee to make changes in the administrative code. The administrative code would dwarf the century code. The number of law in the books made by the administrative code are huge then the laws the legislature passes every two years in Bismarck. Many of the state government agencies are under the administrative practices act and are governed by this process. Some agencies are except. We put one under the process and it worked out very well. Rather than picking what

agencies should change this bill would put all of the agencies under this. The intent is to allow the agencies to come forward and say, we are and should remain exempt and here is why. This would be too much work and we turned it into a study.

**Sen. Nething** (meter 5:32) told a story about Moses.

**Sen. Fiebiger** asked (meter 6:18) if there was a specific problem that has led to the belief to study this? No, This is out of our responsibility to govern every part of our state and with this there is an imbalance over the groups that we are overseeing. **Sen. Nething** spoke (meter 7:40) of the difficulty this has been the past 12 years and they discussed it.

**Mike Anderson**, ND Director of Housing and Finance submitted testimony from **Karlene Fine**, Executive Dir. and Secretary Industrial Commission of ND – Att. #1

**Testimony Against the bill:**

None

**Testimony Neutral to the bill:**

None

**Senator David Nething**, Chairman closed the hearing.

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1479**

### Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: March 12, 2007

Recorder Job Number: 4892

Committee Clerk Signature

**Minutes:** Relating to study of agency exemptions from the Administrative Agency Practice Act.

**Senator David Nething**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

**Sen. Nething** reviewed the study speaking to the exemption lists. **Sen. Nelson** spoke of her opinion as being negative to the idea. Discussion of legislative council can consider doing the study.

**Sen. Lyson** made the motion to Do Pass HB 1479 and **Sen. Olafson** seconded the motion.

All members were in favor except for **Sen. Nelson** and the motion passes.

Carrier: **Sen. Olafson**

**Senator David Nething**, Chairman closed the hearing.



**REPORT OF STANDING COMMITTEE (410)**  
March 12, 2007 2:06 p.m.

**Module No: SR-46-5010**  
**Carrier: Olafson**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1479, as engrossed: Judiciary Committee (Sen. Nething, Chairman) recommends DO PASS (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1479 was placed on the Fourteenth order on the calendar.**

2007 TESTIMONY

HB 1479

House Government and Veteran's Affairs Committee  
Representative C.B. Haas, Chairman  
February 1, 2007

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Warren R. Emmer, Clerk  
N.D. Parole Board and N.D. Pardon Advisory Board  
Presenting Testimony re: HB 1479

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Good Afternoon, Mr. Chairman and members of the committee, my name is Warren R. Emmer. I am the clerk to the North Dakota Parole Board as well as the North Dakota Pardon Advisory Board. Both the Pardon Advisory Board and the Parole Board are exempt from the Administrative Agencies Practice Act. Both Boards respectfully recommend that the functions of each Board continue to be exempt from the Administrative Agencies Practice Act.

Both the Parole Board and the Pardon Board serve a very important public safety function for the state of North Dakota; they do so in a very efficient and effective manner. Requiring that the boards' functions be subject to the Administrative Agencies Practice Act would be costly in both time and money without enhancing public safety. This mandate would also expand the scope of inmate grievance of our boards' processes to include judicial review of Pardon and Parole decisions.

Allow me to point out how enactment of H.B.1479 would affect the day to day work of our two boards.

Parole Board

All Parole Board Procedures would be subject to the administrative rule making processes of NDCC Chapter 28-32. Examples include:

1. Parole Eligibility Review
2. Emergency Parole
3. Eligibility Dates

4. Risk Assessments
5. Parole Good Time
6. Intermediate Measures
7. Termination of Parole
8. Victim Notification
9. Taking parolees into custody
10. Placement of parolees into programs such as BTC and TRCC
11. Parole revocation hearings, while already subject to the Office of Administrative Hearings, would be subject to the Administrative Agencies Practice Act adjudicative proceedings procedures.

#### Pardon Advisory Board

Everything that is a Pardon Advisory Board policy would need to be reduced to a formal administrative rule. This is problematic due to the following reasons:

1. As previously stated, this would cost both time and money, without enhancing public safety.
2. The Pardon Advisory Board is an *advisory board for the Governor*. The board's recommendations should not be subject to judicial review.

STATE AUDITOR  
BERT R. PETERSON



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STATE OF NORTH DAKOTA  
**OFFICE OF THE STATE AUDITOR**  
STATE CAPITOL  
600 E. BOULEVARD AVE. - DEPT. 117  
BISMARCK, ND 58505

**TESTIMONY BEFORE THE HOUSE  
GOVERNMENT AND VETERANS AFFAIRS COMMITTEE**

February 1, 2007

House Bill No. 1479

Testimony - Presented by Ed Nagel  
Director

Chairman Haas and members of the committee, I am here to testify in opposition to House Bill No. 1479 in its current form.

Under current state law, the term "administrative agency" does not include the State Auditor's Office. The State Auditor's Office has never been an administrative agency. We believe that our office should continue to be exempt from the requirements of the Administrative Agencies Practice Act (N.D.C.C. Chapter 28-32).

Our office audits state agencies and local governments. We do not issue any rules or policies that affect the general public. It is my understanding that the purpose of the Administrative Agencies Practice Act is to allow the general public an opportunity for input on rules or guidelines issued by state agencies, which will affect the general public and are intended to have the force and effect of law.

We see no benefit to the state or the general public by requiring our office to comply with the provisions of the Administrative Agencies Practice Act.

In summary Mr. Chairman, our office would encourage that HB 1479 receive a "do not pass" from this committee as it is currently written, or that the amendment on the reverse side be made to HB 1479.

I would gladly answer any questions you may have.

Thank you.

Proposed Amendment to HB 1479

Prepared by the State Auditor's Office – February 1, 2007

Page 1, line 13, remove the overstrike over ~~The term administrative agency does not include:~~

Page 1, line 22, remove the overstrike over ~~"The state auditor."~~

Renumber accordingly

TESTIMONY  
HB 1479 – February 1, 2007  
House Government & Veterans Affairs  
Bob Hanson, Commissioner  
ND Dept. of Veterans' Affairs

Mr. Chairman, members of the committee. I am Bob Hanson, North Dakota commissioner of veterans' affairs.

The Administrative Committee on Veterans' Affairs (Committee) is one of the entities affected by this bill. It is composed of 15 members. Each of the state's 5 veterans organizations has 3 members on the Committee. These individuals are appointed by the Governor from lists of names submitted by each organization. It oversees the department of veterans' affairs and the veterans home.

This bill would require the Administrative Committee on Veterans Affairs to become involved in long, costly processes to make changes to department of veterans' affairs' programs such as the hardship grant program and the veterans aid loan program.

The hardship grant programs help our less fortunate veterans by providing grants for dental, optical and hearing needs. The money for this program comes from the income earned by the veterans postwar trust fund. The amounts of the grants can rise or fall based on what income is earned.

Our veterans aid loan program provides loans up to \$5000.00 to veterans for up to 4 years at 8% with half the interest waived if loan is paid on time.

Concerns:

1. Current system used by the Committee is flexible, efficient and economical. It has sufficient oversight and is concerned about insuring the needs of the veteran are met in a speedy, timely manner.
2. We need flexibility for our programs. Proposal lengthens process to address needs provided to veterans by the Committee. These issues can now take place in a short period of time, at regular public meetings of the 15 member committee. This Committee provides oversight on these programs.
3. Puts the needs of our veterans in jeopardy with lengthy waits for changes in the program, i.e. increases in amounts for grants for dental, hearing and optical needs of qualified veterans; or loans for items needed such as repairs to furnace, car, home and the like. .
4. Would subject veteran to potential lengthy appeals process with using the administrative law judge system. Whereas now veterans may file an appeal of a decision regarding the denial of a grant or loan with the Committee and have it heard and decided upon within a short time period. An example, a recent appeal was received one day and the hearing was held within 3 days and a decision was rendered at that time. One must remember these are issues of major concern for the veteran.
5. Costs to the Committee and the department of veterans' affairs would increase greatly if this were to pass.
6. The current system works well for our needs.

We encourage you to recommend a do not pass on HB 1479.

Thank you.

**TESTIMONY OF GARY D. PRESZLER  
STATE LAND COMMISSIONER  
North Dakota State Land Department  
HOUSE BILL NO. 1479  
Testimony in Opposition**

**HOUSE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE  
February 1, 2007**

Chairman Haas, members of the House Government and Veterans Affairs Committee, I am Gary D. Preszler, Secretary for the Board of University and School Lands (Board) and Commissioner for the State Land Department. I appear in opposition to HB1479.

Efforts to remove the exempted agencies from Chapter 28-32 rulemaking requirements are not new. In 1986 and 1987 the Administrative Rules Committee studied and took testimony from each agency exempted from the Act. In 1993, SB2023 introduced by the Interim Administrative Rules Committee and identical to HB1479 failed to pass on a vote of 1 to 45.

The activities of the Board are exempt from Chapter 28-32 rulemaking requirements, except for the activities related to Chapter 47-30.1, the Uniform Unclaimed Property Act. This is because (1) unclaimed property administration is not a part of the Constitution, whereas activities related to lands, minerals, and investments management are proprietary and authorized under the Constitution; and, (2) the Trusts do not own the unclaimed property.

Further, all activities related to goods or services and the physical servicing, maintenance, or care of agency-owned or agency-operated facilities are excluded from the definition of "rule". See Section 28-32-01 (11)(c) and (d). The Board's activities are not regulatory as with many of the agencies subject to Chapter 28-32. Instead, our activities involve providing goods and services and the management of trust-owned investment and real property.

Currently, the Board has adopted rules and regulations pertaining to the farm (real estate) loan pool, investments, minerals leasing including coal and oil and gas, and sand and gravel, and surface leasing activities. Again, most of these relate to goods or services provided, or servicing, maintenance, or care of agency-owned property and would not meet the definition of a rule.

The Constitution, the Enabling Act, and case law in ND jurisdictions and other courts provide that the lands granted to the State of North Dakota are for the exclusive benefit of the trust beneficiaries and that the Board is empowered to manage those lands and trust funds. As such, it is the Board that has the ultimate decision making authority to prudently manage those assets. Due process is provided to any aggrieved party as the Board conducts its business during open public meetings and is the appellate body settling commercial disputes with Board activities.

I respectfully request that the Board remain exempt from Chapter 28-32 rulemaking requirements and that HB1479 be amended accordingly.



# INDUSTRIAL COMMISSION OF NORTH DAKOTA

John Hoeven  
Governor

Wayne Stenehjem  
Attorney General

Roger Johnson  
Agriculture Commissioner

*Some given to some*

Testimony on House Bill 1479  
Karlene Fine, Executive Director and Secretary  
Industrial Commission of North Dakota  
Thursday, February 1, 2007

Chairman Haas and members of the Government and Veterans Affairs Committee, my name is Karlene Fine and I serve as Executive Director and Secretary for the Industrial Commission. I appear today on behalf of the Industrial Commission in opposition to House Bill 1479 as it removes the exemptions for the State's businesses—the Bank of North Dakota, Mill and Elevator, Housing Finance Agency, Public Finance Agency, Farm Finance Agency and Transmission Authority. This would also remove the exemption for the Lignite Research, Development and Marketing Program. All of these entities except for the Mill and Elevator involve either financing activities or the issuance of bonds. As you review the Administrative Agencies Practice Act you see reference time and time again of regulatory functions—a regulatory analysis, a state regulatory program, regulated community, etc. The agencies I have listed above are not regulatory agencies—they are business entities of the State.

The Industrial Commission also oversees the regulation of petroleum production; coal exploration; subsurface minerals, geothermal, etc. through the Department of Mineral Resources. For those responsibilities the Commission follows the Administrative Practices Act.

## Timing

The State's business enterprises need to have the flexibility to respond to market conditions. For example, when there needs to be a revision to loan policies the Bank must be able to respond in a timely manner. Last year when drought conditions existed in the state, the Bank proposed a Farm Disaster Assistance Loan Program which the Commission adopted. After meeting with communities in the western part of the state that were dealing with a housing crisis, the Housing Finance Agency developed programs to provide assistance in the form of a Housing Market Survey Grant Program and a Rural Housing Rehabilitation Loan Pilot Program. When the 1997 Red River flood inundated the City of Grand Forks and surrounding areas, both the Housing Finance Agency and the Bank of North Dakota were able to implement programs immediately to assist in meeting the needs of North Dakotans. If these agencies are to be effective there should not be delays and increased costs in implementing programs or in modifying existing programs.

Input

The Industrial Commission does not adopt programs without input. BND loan policies that relate to agriculture are reviewed by the six-member Credit Review Board and the seven-member Bank Advisory Board. All other loan policies are acted on by the Bank Advisory Board. In the case of the Housing Finance Agency, all programs/policies are acted on by the six-member Housing Finance Agency Advisory Board before being considered by the Industrial Commission. In regards to the Lignite Research Program the 27-member Lignite Research Council provides input on the policies. The Bank of North Dakota and the Housing Finance Agency are partners with the lending community and receive input from those partners—the lending and economic development communities.

Costs

The Bank of North Dakota and Mill and Elevator are businesses which generate income that is transferred to the General Fund. There are costs to conduct the public hearing, give public notice, retain counsel, etc. All those costs would impact the profits of these entities.

When performing regulatory duties, the Commission believes it is appropriate that those responsibilities be conducted pursuant to the Administrative Practices Act. However, when the Commission is overseeing the State's business entities, flexibility is needed to operate those businesses—these agencies must be able to react to the needs of the State and current market conditions in a timely manner. For the above stated reasons, the Industrial Commission recommends a "do not pass" on House Bill 1479.

OPPOSITION TO HOUSE BILL 1479  
Commission on Legal Counsel for Indigents  
PO Box 149, Valley City, ND 58072  
701-845-8632

The commission on legal counsel for indigents opposes House Bill 1479. It is the position of the commission that it should remain exempt from the Administrative Agencies Practice Act (the Act).

The commission is a new entity. The commission was established by the 2005 legislature to develop, monitor, and provide state funded indigent defense services in North Dakota, and has done so since January 1, 2006. That 2005 legislation providing that the Commission was exempted from the Act.

The addition of the commission to the list of agencies exempt from the Act reflected the conclusion that the commission, essentially, is not engaged in the kinds of activities similar to agencies that are subject to the Act. It appears that the state agencies to which the Act apply, are engaged in establishing substantive requirements, rather than "procedural," to implement state law and that affect the livelihood of those governed by the rules. The kinds of standards and operational guidelines the commission was envisioned as adopting, and which the commission does adopt, deal with things such as what a lawyer is expected to do when providing services for the commission, not with whether the lawyer is able to act as a lawyer in a general sense. The commission's standards and policies are not the kind of rules for which the whole in-depth rule-making process of the Act would seem appropriate. However, in the event the standards and policies were to be considered to be "rules" under the Act, being subject to the Act, would create a large burden for the commission. New issues are constantly coming to the commission's attention, and decision need to be made on many of them in an expedient fashion. It takes significant time to have rules made effective under the Act, and it is a very large expense to give the notice required under the Act.

Furthermore, the activities of the commission are not such as would lend themselves to the appeal process under the Act. The commission is a mechanism for providing a professional service by persons who are licensed by another entity. If a contractor or public defender is alleged to have provided ineffective assistance of counsel, for example, the matter should be resolved as a legal, constitutional issue, either by the defendant raising the matter in an appeal or post-conviction matter, or the defendant filing a disciplinary complaint against the attorney with the disciplinary board. If the commission were to be an "agency" under the Act, it is foreseeable that a defendant who is unhappy with the attorney who is assigned to the defendant's case would have the right to go through this appeal process to challenge the commission's attorney assignment. An indigent defendant does not have a constitutional right to an attorney of his or her own choosing. However, a defendant who was denied a request for a specific attorney for an appeal, could appeal under the Act the decision of the commission. This would just create an unnecessarily difficult and costly situation for all involved.

The commission respectfully requests that this committee give a "do not pass" recommendation on this bill.

**House Government and Veteran Affairs Committee**  
**Representative Haas, Chairman**  
**February 1, 2007**

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**North Dakota Department of Corrections and Rehabilitation**  
**Leann K. Bertsch, Director**  
**Presenting Testimony Concerning: HOUSE BILL 1479**

Chairman Haas and members of the Committee, for the record, I am Leann Bertsch, Director of the Department of Corrections and Rehabilitation.

House Bill 1479 would make the Department of Corrections and Rehabilitation (DOCR) subject to the provisions of the Administrative Agencies Practices Act (AAPA) – provisions from which the DOCR is now exempt. The DOCR should remain exempt.

Other states also exempt their department of corrections from the AAPA recognizing the inherent limitation of resources available within a corrections system to operate under the requirements of the AAPA and the need for facility security, safety, health, order and discipline and inmate rehabilitation. The DOCR operates under an extensive system of rules. Subjecting the DOCR to the requirements of the AAPA would turn even routine changes in rules into a costly and time-consuming ordeal.

It is difficult to grasp the full extent of the impact that application of the AAPA would have on the DOCR, but it is very apparent that the impact would be adverse and far reaching. I will attempt to address some of the more obvious areas of our operation that will be negatively affected.

House Bill 1479 will be problematic for the DOCR Prisons Division and the way we adjudicate inmates disciplinary hearings because we would be forced to use the Administrative Rules process for an “adjudicated hearing” as defined in the Act. This would be an overly burdensome and costly endeavor to fix a process that presently is not broken, and actually has the seal of approval from the United States Supreme Court. Even though the definition of “rule” is exempted in a prison setting, this doesn’t begin to diminish the effect this bill would have on the majority of the daily operations of the prisons.

**Inmate Disciplinary Proceedings.** The DOCR has a system of rules that we expect the inmates to obey, but when they break one of these rules, they receive an incident report, and appear before the prison disciplinary committee for a hearing. The DOCR must make sure that the inmates receive a fair and impartial hearing, and that they receive due process. On average we hold over 175 of these disciplinary hearings each month. As the United States Supreme Court recognized in their decision in the landmark prison case Wolff v. McDonnell, 418 U.S. 539 (1974), the sheer volume of these cases dictate a lower standard of due process than what is found in the rules for court cases, or even in the rules set out in the AAPA for an “adjudicated hearing”. Wolff established due process

guidelines for prison disciplinary hearings to include the inmate's right to receive a written copy of the charges against him and have a minimum of 24 hours after receipt of those charges before his case can be heard to give adequate time to prepare a defense. The inmate has the right to remain silent, and the right to have staff members help prepare and present their defense. They have the right to be present at the hearing, to receive a written copy of the committee's decision, and the right to appeal that decision to the Warden of the prison, and then also to the Director of the DOCR.

This issue of whether prison disciplinary hearings should be subject to administrative rules was raised in Jensen v. Little, 459 N.W.2d 237 (N.D. 1990). Jensen challenged his disciplinary hearing in connection with a drug testing program. The court, citing N.D.C.C. § 28-32-01(1)(m), held that the DOCR (actually, at that time the "Director of Institutions") was excluded from the definition of an administrative agency and not subject to the provisions of the Administrative Agencies Practice Act. The exclusion now appears at N.D.C.C. § 28-32-01(2)(m). The sole basis of the court's decision was the exclusion of the DOCR from the definition of an administrative agency. It appears that disciplinary proceedings will be subject to N.D.C.C. ch. 28-32, as they will be adjudicative proceedings, and the decisions will be orders.

This bill would make prison disciplinary hearings subject to the full realm of rights and procedures in the AAPA, including discovery, subpoenas, administration of oaths, and appeals - procedures the US Supreme Court has already determined to be unnecessary for this type of proceeding. This would be an untenable situation for the Prisons Division. A greater concern would be the expense of 175 administrative hearings each month, and the time it would take to comply with type of hearing. If the goal of a disciplinary hearing is to correct bad behavior, the punishment given to the inmates must be fair, but must be applied quickly.

**Inmate Grievances.** When an inmate believes that he or she has been treated unfairly, either because staff have violated one of their constitutional rights, or even unfairly taken away one of their privileges, they file what is known as an inmate grievance. The first step in the process is to fill out a grievance form, which is then investigated, and answered by their case manager. However, if they are not satisfied with the response, they have the right to appeal the case manager's decision to the warden, and then up to the Director of the DOCR if they disagree with the warden's response. This grievance procedure is very similar to those found in every prison across the country, and has been recognized by the courts as a fair, and standard practice. In fact, Congress and the Courts recognized these grievance procedures when they passed the Prison Litigation Reform Act (PLRA), which requires inmates to exhaust their administrative remedies before they are allowed to file a lawsuit. The PLRA has greatly reduced the number of frivolous lawsuits inmates have been able to file in recent years.

Under House Bill 1479, the appeal process to the grievance decisions would be considered an "adjudicated hearing" and would require these 80 monthly grievances to follow the extensive procedures of the AAPA to be followed. Not only would this be extremely costly, but it would also impede the timely resolution of grievances.

**Other Prison Hearings and Appeal Processes.** The prisons system has numerous hearings, and each hearing includes an appeal process. In each instance, this appeal process would be considered an "adjudicated hearings", and require a lengthy, untimely, and costly administrative hearing. Some examples of how this could cripple the prison system include:

**Classification decisions:** Each inmate is classified at least once each year, so there would be about 120 of these decisions each month. This process examines a number of their risk factors, and assigns a custody rating (maximum, medium, or minimum custody) If the inmates are not satisfied with their classification hearing decision, they can appeal it to the warden, only now this process could take weeks to resolve, instead of hours. The DOCR's concern is that these lengthy hearings would paralyze our ability to move inmates through the system, because we couldn't move them to a different prison until their administrative hearing was complete. A greater concern would be when we need to reclassify an inmate to a higher custody level. For example, if an inmate is caught trying to escape from our minimum security facility, and we reclassify him to maximum security because he is now considered an escape risk, adherence to AAPA hearing procedures could delay our ability to move him behind the prison walls. To effectively operate a prison, an administrator needs to be able to make decisions and act quickly. We can't afford to follow a process that spans weeks or months before we are allowed to take action.

**Inmate Transfers:** Our prisons are full, and we need to transfer inmates to facilities outside our system to make enough room for the daily new arrivals. We may also need to transfer a mentally ill inmate to the Special Assistance Unit at the James River Correctional Center for psychiatric care. Presently, inmates have the right to appeal these transfer decisions to the wardens, and they receive a response within the same day. With the proposed changes in this bill, these appeals may also be considered adjudicated hearings. Our system would be clogged while we waited for the administrative decision to move inmates to contract facilities, and the mentally ill inmate would be delayed in getting the treatment he needs, but may not want.

**Inmate Funds:** The DOCR hold inmates responsible for damages they cause to prison property, or for medical costs that aren't necessary. If an inmate requests to see the doctor, they are assessed a \$3.00 co-pay. If an inmate damages his cell, or assaults another inmate, we expect that they pay for the costs of repair, or the medical expenses. Both of these policies teach the inmates responsibility and to be accountable for their actions. If they disagree with the amount assessed, they receive a hearing, and a right to an appeal. Subjecting the DOCR to the AAPA may require the DOCR to follow the involved hearing procedures set forth in the ACT. This would cost the state more money to hold the hearings than we would collect in restitution, and these learning tools would be lost, along with an average of about \$20,000 we collect from inmates each year.

**Impact to the Division of Juvenile Services.** House Bill 1479 would greatly impact the Division of Juvenile Services (DJS). DJS has under its care, custody and control a daily

count of almost 400 delinquent youth. These youth are adjudicated delinquent in a North Dakota District Court, are found to be in need of treatment and rehabilitation, and the disposition removes custody from their parents and places them with the Division of Juvenile Services.

The mission of the Division of Juvenile Services is to provide a continuum of services to juvenile delinquent and unruly youth in North Dakota and to protect society from those juveniles who are a danger to themselves and others. This system of care operates under the philosophy that services should be provided in the least restrictive environment consistent with the practice of assuring the safety of society and the well being of the juvenile.

Applying the AAPA to DJS would have a crippling effect in our ability to implement the mission, confounding overall daily operations of the agency, as well as dramatically driving up the costs of service delivery.

While the DOCR was not asked to provide a fiscal note, the following example uses the most conservative estimates at every calculation point in order to illustrate one example of the systemic impact this legislation could have.

As previously stated, DJS has at any point in time approximately 400 youth under its custody. The average length of custody is about 19 months. Over that period of time, the median number of movements (placements) is three. In other words, a placement decision is made about 1200 times in those 400 cases. AAPA would allow the youth the opportunity to appeal any decision that results in further placement.

57% of those youth fall into a category of medium or high on the risk/needs assessment instrument used in the treatment planning process. Because of the elevated level of risk posed to the public and level of risk to self, it is reasonable to assume that DJS would as that these youth be placed into some sort of short term setting while the appeal process was underway. This could include additional requests for detention, or for shelter care. There could be an additional 684 such requests, if only moderate to high- risk offenders are considered. Seriously high need, lower risk offenders would likely be included as well.

The first step of the AAPA appeals process requires a 20- day advance notice, so one might reasonably conclude that the shortest conceivable delay in placement from time of appeal would be 20 days. If a moderate to high-risk youth engaged in the appeal process, DJS would likely request permission from the court to place into detention or some other short- term placement. If the request was for detention, the North Dakota average cost is \$142/day. A 20 -day detention stay would be about \$2800 per youth, with the potential of 684 requests. If only ½ of the potential cases chose to appeal and required the minimum of 20 days, the costs would be nearly \$1,000,000 over the average length of custody. If each youth chose to appeal their placement, the costs jump to \$1,915,000, based on a rate of \$142 per day.

It should be pointed out here that detention is not a state borne cost. The costs of detention are pushed back to the home county. If the above scenario were to play out, the local counties would be asked to pick up the cost of any youth who were detained during the time that their appeal was being considered.

An additional complicating factor is that 59% of youth committed to the custody of DJS have a mental health issue, and of that 35% meet the threshold for serious emotional disturbance. When DJS can quickly move youth to an appropriate level of care, these needs are addressed. The mental health needs of these youth would be expressed in the detention or short- term care environment, and would inevitably require intervention. Besides mental health services, the other obvious need is education. If detention is not used as a short- term option, but length of stay increases to account for time spent in administrative appeal, counties would have to consider the burden of how to provide educational services. One could assume that most youth seeking to appeal their placement would require educational services, and that at least 1/3 would require intervention for their mental health condition.

The scenario outlined above has not even begun to address the issue of bed space. There are detention beds currently operating in 7 sites in North Dakota. Detention will not be available or appropriate in many areas or circumstances. In those cases, another layer of care will need to be developed, as public safety concerns coupled with issues of personal safety will require that the youth be safely housed while the appeal is heard. Funding to build beds will be needed, and building and staffing beds is expensive.

North Dakota has not built a new juvenile corrections bed in 20 years, because the system has in place the tools necessary to make the best use of the entire continuum of resources. Each bed day in the existing system serves the purpose of moving the youth closer to the goal of successful reintegration into the home community. Building new beds simply for the purpose of housing youth while they are appealing their placement decision would be a giant step backwards for the youth corrections system in North Dakota, both in terms of responding to the needs of the young people it serves, and making good use of the resources available in our state.

This scenario depicts one dimension of the consequences involved if the decision to apply AAPA to the Division of Juvenile Services were to move forward. There are other equally compelling scenarios. Length of stay will increase. Therefore, caseload size will increase. This will necessitate a request for more personnel. A system for hearing appeals will need to be devised and staffed. There are currently no resources in place or in the budget projections that could feasibly be expected to address the sheer volume of work that will be created within this Division, given the number of youth served, and the number of situations which could be appealed.

All of this has not yet begun to address the issues that the Youth Correctional Center will face if this legislation is enacted. The Division of Juvenile Services has always worked closely with the Office of the Attorney General and the Office of Risk Management to insure that our policies and practices are responsive to the urgent behavioral and mental

health needs of youth committed to our care. In custodial situations, it is critical that facility staff make decisions quickly and with the best interests of the youth in mind. The safety of the youth as well as facility staff are the highest priority, and the flexibility to act or react to situations without delay is essential in a well run juvenile correctional facility.

This bill would be detrimental for the efficient and effective operation of the DOCR within its Adult and Juvenile Divisions. I strongly urge you to give HB1479 a "Do Not Pass".

# NORTH DAKOTA UNIVERSITY SYSTEM

## The Vital Link to a Brighter Future

### House Government and Veterans Affairs Committee

#### Testimony on HB 1479

Pat Seaworth, General Counsel

*February 1, 2007*

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Chairman Haas and members of the House Government and Veterans Affairs Committee:

I am here representing the North Dakota University System to oppose HB 1479. The NDUS opposes HB 1479 because making the State Board of Higher Education subject to the Administrative Agencies Practices Act is probably inconsistent with the state constitution. Also, it contradicts Roundtable on Higher Education principles that have led to recognition of the NDUS as among the top five state systems of higher education performers relative to the level of funding (according to the National Center for Higher Education Management Systems). Making this change would limit flexibility and add to costs of doing business.

The authority of the State Board of Higher Education to adopt rules governing management and operation of the 11 NDUS institutions and related entities, including experiment stations and extension service, the Northern Crops Institute and Upper Great Plains Transportation Institute at NDSU, the Energy and Environmental Research Center at UND and other institution centers, does not come from the legislature - it is derived directly from article VIII, section 6 of the state constitution. The Board has rules on admissions requirements, program approvals, student conduct and many other topics for which governing board guidance is required in a system with over 40,000 students, more than 15,000 employees and tens of thousands of customers. In addition, the 11 NDUS institutions all have their own policies and procedures adopted under authority delegated by the Board. NDUS customers include large and small corporations, family businesses, farmers, ranchers, individuals interested in continuing education or enrichment classes and others, in North Dakota and around the world. All Board and institution policies and procedures are adopted under well-defined and public processes that have been in place for many decades.

Subjecting the Board and its institutions to the AAPA would cause delays, require unnecessary hearings and increase costs that would be passed on to students, businesses, farmers and other customers. The NDUS respectfully asks that you not do that.

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The North Dakota University System is governed by the State Board of Higher Education and includes:  
Bismarck State College • Dickinson State University • Lake Region State College • Mayville State University •  
Minot State University • Minot State University-Bottineau Campus • North Dakota State College of Science •  
North Dakota State University • University of North Dakota • Valley City State University • Williston State College.

HOUSE GOVERNMENT AND VETERAN'S AFFAIRS COMMITTEE  
C.B. HASS, CHAIRMAN  
FEBRUARY 1, 2007

Good afternoon, Mr. Chairman and members of the House Government and Veteran's Affairs Committee. My name is Ken Sorenson. I am an Assistant Attorney General and I am submitting this testimony on behalf of the Attorney General in opposition to House Bill 1479 insofar as it will place the Attorney General under N.D.C.C. ch. 28-32, the Administrative Agencies Practice Act ("AAPA") with respect to the activities of the state toxicologist and the state crime laboratory and with respect to the risk assessment of sex offenders, the risk level review process, and public disclosure provisions under N.D.C.C. Section 12.1-32-15.

1. SEX OFFENDER REGISTRATION, RISK LEVEL ASSESSMENTS AND  
REVIEWS, AND PUBLIC DISCLOSURE

The Attorney General's Sex Offender Risk Assessment Committee (the "SORAC" Committee) meets monthly and assigns risk levels to offenders required to register under N.D.C.C. Section 12.1-32-15 for sex offenses and felony crimes against children. Each month, three to six offenders have challenged the risk level the SORAC Committee has assigned. In placing this risk assessment process under the AAPA, the risk assessment process would become subject to the adjudicative proceedings requirements of the AAPA. There will be seventy five to one hundred and fifty contested proceedings in a biennium. In addition to the tremendous expense involved with each contested proceeding, it would have the effect of delaying a final determination as to an offender's risk level until the conclusion of the process, including judicial and appellate review. This would result in delay for law enforcement in being able to address community safety issues, such as proper public notification.

The SORAC Committee is comprised of members appointed by the Attorney General, including a clinical psychologist, law enforcement officers, parole and probation, Division of Juvenile Services, treatment personnel from the Department of Corrections and Rehabilitation, crime victims advocates. The SORAC Committee operates pursuant to guidelines prepared by the Attorney General and required by N.D.C.C. § 12.1-32-15.

The Bureau of Criminal Investigation ("BCI") maintains an operational manual for administration of North Dakota's Sex Offender Registration Program under N.D.C.C. § 12.1-32-15. The manual outlines the responsibilities of the courts, the Attorney General, law enforcement agencies, correctional facility responsibilities, Department of Corrections and Rehabilitation and Parole Board responsibilities, and also addresses the offender's registration responsibilities, including the information the offender must provide and at what intervals the offender must verify registration information.

The United States Congress has passed a number of acts over the last twelve years that have resulted in both statutory changes and changes to the BCI operational manual. Some of the federal congressional acts have included calendar deadlines for compliance that can be addressed through the BCI operational manual.

Sex offender registration and risk assessment is a serious public safety issue. In addition to the problems with the risk assessment process being connected to the adjudicative proceedings process under N.D.C.C. chapter 28-32, the requirement that this process, and any changes to the process, be made subject to the administrative rule making procedures of N.D.C.C. chapter 28-32, will adversely affect the Attorney General's, as well as law enforcement's ability to manage dangerous sex offenders in the communities.

## 2. THE CRIME LABORATORY AND STATE TOXICOLOGIST

The State Crime Laboratory is required under N.D.C.C. Section 31-13-08 to adopt administrative rules for the collection of DNA samples for inclusion in the law enforcement data base. Those rules have been adopted.

Otherwise, the State Crime Laboratory and the State Toxicologist provide toxicological and chemical testing services for law enforcement and assist in the investigation or detection of crimes and the apprehension and prosecution of criminal offenders. These are important public safety operations and should not be subject to the AAPA. Otherwise, processes such as the processes for rape examination kits, drug testing, and custody of evidence may, although it is not clear, be subject to the rule making processes and adjudicatory proceedings processes of the AAPA in addition to the requirements for criminal prosecutions.