

ADMINISTRATIVE RULES REVIEW - BACKGROUND MEMORANDUM

NORTH DAKOTA ADMINISTRATIVE RULES

The North Dakota Administrative Code, published by the Legislative Council office pursuant to North Dakota Century Code (NDCC) Section 28-32-03.2, contains all the rules adopted by administrative agencies subject to NDCC Chapter 28-32 (the Administrative Agencies Practice Act). The Administrative Code consists of 116 titles. Ninety-one titles contain rules of administrative agencies. Two administrative agencies have not adopted rules. Twelve titles are assigned to agencies not now subject to Chapter 28-32, but two of those agencies voluntarily publish rules. Eight of the titles have been repealed, one was found unconstitutional, one is reserved, and one was assigned to an agency no longer in existence.

North Dakota Century Code Section 28-32-01(2) defines administrative agency as:

[E]ach board, bureau, commission, department, or other administrative unit of the executive branch of state government, including one or more officers, or employees, or other persons directly or indirectly purporting to act on behalf or under authority of the agency. An administrative unit located within or subordinate to an administrative agency shall be treated as part of that agency to the extent it purports to exercise authority subject to this chapter. The term administrative agency does not include:

- a. The office of management and budget except with respect to rules relating to conduct on the capitol grounds and in buildings located on the capitol grounds under section 54-21-18, rules relating to the state building code as authorized or required under section 54-21.3-03, rules relating to the Model Energy Code as required under section 54-21.2-03, rules relating to the central personnel system as authorized under section 54-44.3-07, rules relating to state purchasing practices as required under section 54-44.4-04, rules relating to records management as authorized or required

- under chapter 54-46, and rules relating to the central microfilm unit as authorized under chapter 54-46.1.
- b. The adjutant general with respect to the division of emergency management.
- c. The council on the arts.
- d. The state auditor.
- e. The department of economic development and finance.
- f. The dairy promotion commission.
- g. The education factfinding commission.
- h. The educational telecommunications council.
- i. The board of equalization.
- j. The board of higher education.
- k. The Indian affairs commission.
- l. The industrial commission with respect to the activities of the Bank of North Dakota, the North Dakota housing finance agency, the North Dakota municipal bond bank, the North Dakota mill and elevator association, and the North Dakota farm finance agency.
- m. The department of corrections and rehabilitation except with respect to the activities of the division of adult services under chapter 54-23.4.
- n. The pardon advisory board.
- o. The parks and recreation department.
- p. The parole board.
- q. The state fair association.
- r. The state department of health with respect to the state toxicologist.
- s. The board of university and school lands except with respect to activities under chapter 47-30.1.
- t. The administrative committee on veterans' affairs except with respect to rules relating to the supervision and government of the veterans' home and the implementation of programs or

services provided by the veterans' home.

- u. The industrial commission with respect to the lignite research fund except as required under section 57-61-01.5.
- v. The secretary of state with respect to rules adopted for the presidential preference contest under section 16.1-11-02.2.

The rules of the Dairy Promotion Commission and the Parks and Recreation Department are voluntarily published in the Administrative Code. The definition of administrative agency was amended by 1997 Senate Bill No. 2045 to change the name of the Board of Pardons to the Pardon Advisory Board, 1997 House Bill No. 1183 to provide that the Office of Management and Budget is an administrative agency with respect to rules relating to conduct on the Capitol grounds and in buildings located on the Capitol grounds under NDCC Section 54-21-18, 1997 Senate Bill No. 2336 to remove the Superintendent of Public Instruction from the list of agencies excluded from the definition of administrative agency and make the Superintendent of Public Instruction's rules subject to the Administrative Agencies Practice Act and part of the North Dakota Administrative Code, and 1997 Senate Bill No. 2398 expanding the exemption of the Industrial Commission from the definition of administrative agency to include Industrial Commission activities with regard to the North Dakota Farm Finance Agency.

Section 28-32-01(11) defines a rule as:

[T]he whole or a part of an agency statement of general applicability that implements or prescribes law or policy, or the organization, procedure, or practice requirements of the agency. The term includes the adoption of new rules and the amendment, repeal, or suspension of an existing rule. The term does not include:

- a. A rule concerning only the internal management of an agency which does not directly or substantially affect the substantive or procedural rights or duties of any segment of the public.
- b. A rule that sets forth criteria or guidelines to be used by the staff of an agency in the performance of audits, investigations, inspections, and settling commercial disputes or negotiating commercial arrangements, or in the defense,

prosecution, or settlement of cases, if the disclosure of the statement would:

- (1) Enable law violators to avoid detection;
- (2) Facilitate disregard of requirements imposed by law; or
- (3) Give a clearly improper advantage to persons who are in an adverse position to the state.

- c. A rule establishing specific prices to be charged for particular goods or services sold by an agency.
- d. A rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property.
- e. A rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property.
- f. A rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital.
- g. A form whose contents or substantive requirements are prescribed by rule or statute or are instructions for the execution or use of the form.
- h. An agency budget.
- i. An opinion of the attorney general.
- j. A rule adopted by an agency selection committee under section 54-44.7-03.
- k. Any material, including a guideline, interpretive statement, statement of general policy, manual, brochure, or pamphlet, that is explanatory and not intended to have the force and effect of law.

ADMINISTRATIVE CODE PUBLICATION

The 1977 Legislative Assembly enacted NDCC Section 28-32-03.1, which requires the Legislative Council to compile and publish the North Dakota Administrative Code. Administrative Code supplements are published the month after any rules are filed with the Legislative Council office for publication.

Prior to 1977, agencies were authorized to adopt administrative rules but there was no compilation or central source for administrative rules. Except for May 1979; March 1981; August 1982; April 1983; November 1984; May, August, and October 1985; February 1987; and February 1989, a supplement has been published every month since the initial publication of the Administrative Code on July 1, 1978.

Although rules differ in length and complexity, comparison of the number of administrative rules sections affected during biennial periods is one method of comparing the volume of administrative rules reviewed by the Administrative Rules Committee since its creation in 1979. The following table shows the number of sections of the North Dakota Administrative Code amended, repealed, created, superseded, reserved, or redesignated during each designated time period:

Time Period	Number of Sections
July 1979 - October 1980	1,440
November 1980 - August 1982	916
September 1982 - November 1984	1,856
December 1984 - October 1986	1,280
November 1986 - October 1988	2,681
November 1988 - October 1990	2,325
November 1990 - October 1992	3,079
November 1992 - October 1994	3,235
November 1994 - October 1996	2,762

The Administrative Code is distributed free to each county auditor, Supreme Court justice, and district court judge and to specific state agencies. Private subscriptions are \$400 for the initial code and \$230 per year for supplements.

The numbering for the Administrative Code is similar to the numbering used for the North Dakota Century Code. However, Century Code sections are designated by numbers having three parts separated by hyphens while Administrative Code section numbers consist of four parts--the first part designates the agency (title); the second part designates the major activity or division within the agency (article); the third part designates the subject within the major activity (chapter); and the fourth part designates the rule number itself (section).

STATUTORY PROVISIONS FOR RULES REVIEW

The 1979 Legislative Assembly enacted the statutes providing for legislative review of administrative rules.

North Dakota Century Code Section 54-35-02.5 directs the Legislative Council to appoint biennially

an Administrative Rules Committee and to designate the chairman of the committee. The committee is to operate according to the statutes and procedures governing the operation of Legislative Council interim committees.

North Dakota Century Code Section 54-35-02.6 was amended by passage of 1995 House Bill No. 1023, which was recommended by the Administrative Rules Committee. The section previously required the chairman of the Legislative Council to assign administrative rules to the Administrative Rules Committee. The section was amended in 1995 to provide that it is the standing duty of the committee to review administrative rules adopted under Chapter 28-32. The section previously allowed the committee to consider written complaints, and the 1995 amendment provided that the committee may consider oral and written comments concerning administrative rules. Section 54-35-02.6 authorizes the committee to study administrative rules and related statutes to determine whether:

1. Administrative agencies are properly implementing legislative purpose and intent.
2. There is dissatisfaction with administrative rules or with statutes relating to administrative rules.
3. There are unclear or ambiguous statutes relating to administrative rules.

Membership of the Administrative Rules Committee was affected by passage of 1997 House Bill No. 1385. The bill amended Section 54-35-02.5 to require the committee membership to include at least one member from each standing committee of the House of Representatives or Senate in the most recently completed regular legislative session.

The 1981 Legislative Assembly enacted NDCC Section 28-32-03.3, authorizing the Administrative Rules Committee to make formal objections to agency rules. If the committee objects to a rule because the committee determines it to be unreasonable, arbitrary, capricious, or beyond the authority delegated to the adopting agency, the committee may file that objection in certified form in the Legislative Council office. The objection must contain a concise statement of the committee's reasons for its action. The Legislative Council office is to transmit a copy of the objection to the agency adopting the rule in question. The Legislative Council office is also to publish the objection in the next issue of the Administrative Code supplement. Within 14 days after the filing of an objection, the adopting agency is to respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection. After the filing of a committee objection, the burden of persuasion is upon the agency in any action for judicial review or for

enforcement of the rule to establish that the rule is within the procedural and substantive authority delegated to the agency. If the agency fails to meet its burden of persuasion, the court is to declare the rule invalid and judgment is to be rendered against the agency for court costs, including a reasonable attorney's fee.

Section 28-32-03.3 was amended by 1995 House Bill No. 1284 to expand the authority of the Administrative Rules Committee in reviewing rules. The amendment allows the committee to find that all or any portion of a rule is void if the committee makes the specific finding that there is:

1. An absence of statutory authority.
2. An emergency relating to public health, safety, or welfare.
3. A failure to comply with express legislative intent or to substantially meet the procedural requirements of Chapter 28-32 regarding adoption of the rule.
4. A conflict with state law.
5. Arbitrariness and capriciousness.
6. A failure to make a written record of its consideration or written and oral submissions respecting the rule during the hearing process and comment period.

Section 28-32-03.3 allows the committee to find a rule void if the rule is initially considered by the committee within 90 days after the date of the Administrative Code supplement in which the rule change appears. An exception is that for rules appearing in the Administrative Code supplement during the period from November 1 through May 1 encompassing a regular session of the Legislative Assembly, the committee is not limited to 90 days to initially consider a rule but may initially consider the rule at the first meeting of the committee following the regular session of the Legislative Assembly. Passage of 1997 House Bill No. 1030, introduced at the recommendation of the Administrative Rules Committee, allows the committee to carry consideration of a rule to one subsequent committee meeting for purposes of the decision on whether to void a rule. The committee recommended this change to avoid the need for making a decision on whether to void a rule after consideration at only one committee meeting. House Bill No. 1191 was approved by the 1997 Legislative Assembly but vetoed by the Governor. House Bill No. 1191 would have allowed the Administrative Rules Committee to call up existing administrative rules for review upon notice to the adopting agency. In his veto message, the Governor stated that the bill is unnecessary, the Governor has constitutional concerns about the bill, and the Governor believes practical problems would result.

If the Administrative Rules Committee finds a rule to be void, the office of the Legislative Council is to

provide written notice of the finding to the adopting agency and to the chairman of the Legislative Council. Within 14 days after receipt of the notice, the adopting agency may file a petition with the chairman of the Legislative Council for review by the Legislative Council of the decision of the committee. If the adopting agency does not file a petition for review, the rule becomes void on the 15th day after receiving the notice from the office of the Legislative Council to the adopting agency. If within 60 days after receipt of the petition from the adopting agency the Legislative Council has not disapproved the finding of the Administrative Rules Committee, the rule is void.

Section 28-32-03.3 allows a rule change to be made after consideration of rules by the Administrative Rules Committee, if the agency and committee agree that the rule change is necessary to address any of the considerations for which the committee may find a rule to be void. This allows an agency to change an administrative rule when the committee expresses concerns without requiring the agency to commence a new rulemaking proceeding. If a rule change is agreed to by the Administrative Rules Committee and the agency, it must be reconsidered at a subsequent Administrative Rules Committee meeting, and public comment on the agreed rule change must be allowed.

Because the Legislative Assembly recognized that there may be constitutional questions about voiding rules by the Administrative Rules Committee, 1995 House Bill No. 1284 provided that if the North Dakota Supreme Court rules that the authority to void rules is unconstitutional, an alternative amendment to Section 28-32-03.3 will take effect. The alternative amendment is the same in all respects as the amendment allowing the committee to find rules void except that under the alternative amendment the committee may not find a rule to be void but may suspend a rule or portion of a rule. The effect of a suspension is that the rule becomes ineffective temporarily and will become permanently ineffective unless it is ratified by both houses of the Legislative Assembly during the next legislative session. The amendment requires the agency seeking ratification of a suspended rule to introduce a bill for that purpose. The authority of the Legislative Council to reverse the decision of the committee also applies in the case of a suspension of a rule.

North Dakota Century Code Section 65-02-08 provides that the Administrative Rules Committee must approve fee schedules for medical and hospital services proposed for adoption by the Workers Compensation Bureau.

The Legislative Council has assigned the committee the responsibility under NDCC Sections 28-32-02 and 28-32-15 to approve extensions of time for administrative agencies to adopt rules, establish a

procedure to distribute copies of administrative agency filings of notice of proposed rulemaking, and receive notice of appeal of an administrative agency's rulemaking action.

Subsections 2, 4, and 5 of Section 28-32-02 provide:

2. Any rule change, including a creation, amendment, or repeal, made to implement a statutory change must be adopted and filed with the office of the legislative council within nine months of the effective date of the statutory change. If an agency needs additional time for the rule change, a request for additional time must be made to the legislative council. The legislative council may extend the time within which the agency must adopt the rule change if the request by the agency is supported by evidence that the agency needs more time through no deliberate fault of its own.
4. The agency's notice of the proposed adoption, amendment, or repeal of a rule must include a short, specific explanation of the proposed rule and the purpose of the proposed rule, a determination of whether the proposed rulemaking is expected to have an impact on the regulated community in excess of fifty thousand dollars, identify at least one location where interested persons may review the text of the proposed rule, provide the address to which written data, views, or arguments concerning the proposed rule may be sent, provide a phone number at which a copy of the rules and regulatory analysis may be requested, and, in the case of a substantive rule, provide the time and place set for each oral hearing. The notice must be filed with the office of the legislative council and published at least twice in each daily newspaper of general circulation published in this state. The agency shall mail a copy of the notice to each person who has made a timely request to the agency for a mailed copy of the notice. The agency may mail or otherwise provide a copy of the notice to any person who is likely to be an interested person. The agency shall mail or deliver a copy of the rules to any person requesting a copy. The

agency may charge for the actual cost of providing copies of the proposed rule. At least thirty days must elapse between the later of the date of the second publication of the notice or the date the legislative council mails copies of an agency's notice and the date of the hearing. The thirty-day period begins on the first business day of the month in which the notices must be mailed or on the date of the second publication, whichever is later. Subject to subsection 5, notices filed on or before the last calendar day of the preceding month must be mailed by the legislative council on the first business day of the following month to any person making a request. The agency shall allow, after the conclusion of any rulemaking hearing, a comment period of not less than thirty days during which data, views, or arguments concerning the proposed rulemaking will be received by the agency and made a part of the rulemaking record to be considered by the agency.

5. The legislative council shall establish standard procedures for all agencies to follow in complying with the provisions of subsection 4 and a procedure whereby any person may request and receive mailed copies of all filings made by agencies pursuant to subsection 4. The legislative council may charge for providing copies of the filings.

Subsection 6 of Section 28-32-02 allows an agency to adopt rules on an emergency basis because of imminent peril to the public health, safety, or welfare; because a delay is likely to cause a loss of revenues appropriated to support a duty imposed by law upon the agency; or when reasonably necessary to avoid a delay in implementing an appropriations measure. An emergency rule may be declared effective no earlier than the date of filing notice of rulemaking with the Legislative Council. An emergency rule becomes ineffective if it is not adopted as a final rule within 180 days after its declared effective date.

Subsection 7 of Section 28-32-02 provides that during rules review by the Attorney General, the Attorney General may not approve a rule as to legality when the rule exceeds the statutory authority of the agency, the rule is written in a manner that is not concise or easily understandable, or procedural

requirements for adopting the rule are not substantially met.

The Administrative Rules Committee has set the annual charge for providing copies of the filings of notice of proposed rulemaking at \$50. As of June 1, 1997, there were 31 paid subscribers to this service.

North Dakota Century Code Section 28-32-02.5 requires an agency to prepare a written assessment of the constitutional takings implications of a proposed rule that may limit the use of real property. The assessment must:

1. Assess the likelihood that the proposed rule may result in a taking or regulatory taking.
2. Clearly and specifically identify the purpose of the proposed rule.
3. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners.
4. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.
5. Identify the source of payment within the agency's budget for any compensation that may be ordered.
6. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

Any private landowner affected by a rule that limits the use of the landowner's private real property may file a written request for reconsideration of the application or need for the rule. Within 30 days of receiving the request, the agency must consider the request and provide a written response to the landowner of whether the agency intends to keep the rule in place, modify the rule, or repeal the rule.

North Dakota Century Code Section 23-25-03.3 was created by 1997 House Bill No. 1410 and prohibits the State Department of Health from adopting air quality rules or standards affecting coal conversion and associated facilities, petroleum refineries, or oil and gas production and processing facilities which are more strict than federal rules or standards under the Clean Air Act and prohibits the department from adopting air quality rules or standards affecting such facilities when there are no corresponding federal rules or standards unless the more strict or additional rules or standards are based on a risk assessment that demonstrates a substantial probability of significant impacts to public health or property, a

cost-benefit analysis that affirmatively demonstrates that the benefits of the more stringent or additional state rules and standards will exceed the anticipated costs, and the risk assessment and cost-benefit analysis is independently peer reviewed by qualified experts selected by the Air Pollution Control Advisory Council.

POSSIBLE RULE REVIEW

During the 1979-80 interim, the Administrative Rules Committee reviewed all rules of the Board of Barber Examiners, the Game and Fish Department, and the Highway Department. During the 1981-82 interim, the Administrative Rules Committee reviewed all rules of the Department of Human Services. Since the 1981-82 interim, preexisting rules have not been reviewed.

During the 1995-96 interim, as rules were scheduled for review, each adopting agency was requested to provide information on:

1. Whether the rules resulted from statutory changes made by the most recent regular session of the Legislative Assembly.
2. Whether the rules are related to any federal statute or regulation.
3. The rulemaking procedure followed in adopting the rules, e.g., a description of the type of public notice given and the extent of public hearings held on the rules.
4. Whether any person has filed a complaint with the agency concerning the rules.
5. Whether a written request for a regulatory analysis was filed by the Governor or an agency, whether the rule is expected to have an impact on the regulated community in excess of \$50,000, and whether a regulatory analysis was issued. If a regulatory analysis was issued, a copy is to be provided to the committee.
6. The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost of staff time used in developing the rules.
7. An explanation of the subject matter of the rules and the reasons for adopting the rules.
8. Whether a constitutional takings assessment was prepared as required by Section 28-32-02.5. If an assessment was prepared, a copy is to be provided to the committee.