

**1999 HOUSE JUDICIARY**

**HB 1023**

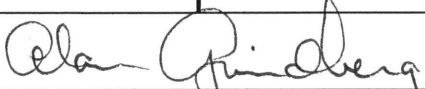
1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1023

House Judiciary Committee

Conference Committee

Hearing Date January 11, 1999

Tape Number	Side A	Side B	Meter #
1	X		0
Committee Clerk Signature 			

Minutes:

REP. BERNSTEIN: The administrative code is larger than the Century Code. We are trying to set up a system where we can get rid of old, outdated rules.

CHUCK JOHNSON (PSC) Presented prepared testimony, which is attached.

SEN. ANDRIST: There are four bills that came from the Administrative Laws Committee. The committee feels that there are too many laws being created by rule, some of which are laws which the legislature has rejected. The rule making process doesn't have the openness and exposure that the legislature does. This is an attempt to pull back on some of the rule making.

JOHN WALSTAD (LC) Gave committee a handout, a copy of which is attached.. He explained the bill to the committee.

BLAINE NORDWALL (Hum. Ser.) Presented written testimony, a copy of which is attached.

Page 2

House Judiciary Committee

Bill/Resolution Number (Untitled)

Hearing Date January 11, 1999

MIKE MULLEN (Health Dept.) This bill would require a review of every rule and would be very burdensome. If a system is to be set up it should be limited to only onerous rules.

CHUCK JOHNSON: (PSC) Presented written testimony, a copy of which is attached.

COMMITTEE ACTION: February 9, 1999

REP. KOPPELMAN moved that the committee recommend that the bill DO PASS. That motion died for lack of a second.

REP. MARAGOS moved that the committee recommend that the bill DO NOT PASS. Rep. Delmore seconded and the motion was passed on a roll call vote with 13 ayes, 2 nays and 0 absent. Rep. Klemin was assigned to carry the bill on the floor.

Date: 2/9  
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1023

House JUDICIARY Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass

Motion Made By Koppelman Seconded By None

Representatives	Yes	No	Representatives	Yes	No
REP. DEKREY			REP. KELSH		
REP. CLEARY			REP. KLEMIN		
REP. DELMORE			REP. KOPPELMAN		
✓ REP. DISRUD			REP. MAHONEY		
REP. FAIRFIELD			REP. MARAGOS		
REP. GORDER			REP. MEYER		
REP. GUNTER			REP. SVEEN		
REP. HAWKEN					

Total Yes \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

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

Date: 2/9  
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1023

House JUDICIARY Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken DO NOT PASS

Motion Made By MARAGOS Seconded By DELMORE

Representatives	Yes	No	Representatives	Yes	No
REP. DEKREY		✓	REP. KELSH	✓	
REP. CLEARY	✓		REP. KLEMIN	✓	
REP. DELMORE	✓		REP. KOPPELMAN		✓
REP. DISRUD	✓		REP. MAHONEY	✓	
✓ REP. FAIRFIELD	✓		REP. MARAGOS	✓	
REP. GORDER	✓		REP. MEYER	✓	
REP. GUNTER	✓		REP. SVEEN	✓	
REP. HAWKEN	✓				

Total Yes 13 No 2

Absent 0

Floor Assignment Klemin

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

REPORT OF STANDING COMMITTEE (410)  
February 9, 1999 1:36 p.m.

Module No: HR-26-2346  
Carrier: Klemin  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

**HB 1023: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO NOT PASS**  
(13 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HB 1023 was placed on the  
Eleventh order on the calendar.

**1999 TESTIMONY**

**HB 1023**

**TESTIMONY BEFORE THE  
HOUSE JUDICIARY COMMITTEE  
REGARDING HOUSE BILL NO. 1023  
January 11, 1999**

**Chairman DeKrey and members of the House Judiciary Committee, my name is Blaine Nordwall. I appear on behalf of the Department of Human Services. The department cannot support House Bill No. 1023.**

**I don't think anyone here holds rules in great affection. But I can't see this bill as any kind of a solution to reducing the size of the Administrative Code. On behalf of the department, I would like to propose a different approach.**

**The 1977 Legislative Assembly adopted the Administrative Agencies Practice Act and a number of related laws. These enactments were developed in a comprehensive legislative study undertaken prior to that session. Some 22 years have passed, and the Administrative Agencies Practice Act has become a frustrating and divisive bone of contention between the Legislative branch and the Executive branch. It is time to rethink a process that currently forces administrative agencies to place in rules any policy they hope to enforce, and forces the Interim Administrative Rules Committee of this legislature to examine an often incomprehensible mountain of material each time it meets.**

**The North Dakota Department of Human Services has adopted 66 chapters in the Administrative Code totaling some 1,225 pages. Virtually all of these rules set licensing standards, are used to establish rates paid by the state for services, or are used to establish eligibility for public benefits.**



These rules are adopted either because the department is expressly directed by legislation to adopt rules or because the department's policies would have no effect unless adopted as rules. The North Dakota Supreme Court has held that any policy not adopted as a rule is invalid, applying the requirements of N.D.C.C. § 28-32-03.

Rulemaking is time consuming and costly. It is virtually impossible to complete rulemaking in less than six months, and complicated or controversial rules require much longer periods. Administrators in the department typically feel rulemaking inhibits the business-like management of their responsibilities.

If House Bill 1023 becomes law, the department would be obliged to begin rulemaking projects intended to replicate necessary rules during the last quarter of each even-numbered year. I have reviewed the department's rules and found virtually none that would merit a designation as procedural or interpretive. With each passing year, as a greater proportion of the rules would have become effective after July 1, 1999, the department's biennial rulemaking projects would grow. It would soon become immense.

Mr. Chairman, members of the committee, we seek a better way, and we believe a better way will be found in a comprehensive interim study of N.D.C.C. ch. 28-32. It will not be found in forcing agencies to recycle rules every two years. For that reason, we urge a "do not pass" recommendation on House Bill No. 1023.

**Presented by:**

**Blaine L. Nordwall  
Director, Legal Advisory Unit  
ND Department of Human Services**

## H.B. 1023

**Presented by:** Charles E. Johnson  
Public Service Commission

**Before:** Judiciary Committee  
Representative Duane DeKrey, Chairman

**Date:** January 11, 1999

### TESTIMONY

Mr. Chairman and committee members, I am Charles E. Johnson, an attorney with the Public Service Commission (Commission). I appear on behalf of the Commission.

The Commission is concerned about this bill because it appears to require periodic redoing of non-procedural or non-interpretative rulemaking. The cost in agency time and money would appear to be significant if rule proceedings need be repeated every two years.

It appears that the legislature could accomplish the same end by addressing any controversial rule either through the present rule review process or through the legislative process.

For example, in 1995 the Commission's was considering a rule to require all North Dakota Telecommunication companies to provide 1+equal access. Because of its controversy, before a rulemaking was even initiated, the legislature passed a law that precluded the Commission from requiring 1+equal access until July 1, 1999. The same could be done with any other rule that does not meet with the approval of the legislature.

The Commission is also concerned about the due process rights of those who participated in the original rule making. This bill allows the voiding of a rule without any public notice or participation to the public or to those that provided input to the agency.

Also, under the bill there would be no finality to the rulemaking. It seems that no one could rely on the rulemaking beyond the limited two-year period.

In summary, it appears that the purpose of this bill could be accomplished by other means.

SLS/Legal/HB1023Testimony99.doc



EDWARD T. SCHAFER  
GOVERNOR

# State of North Dakota

OFFICE OF THE GOVERNOR  
600 E. BOULEVARD - GROUND FLOOR  
BISMARCK, NORTH DAKOTA 58505-0001  
(701) 328-2200  
FAX (701) 328-2205 TDD (701) 328-2887

April 4, 1997

The Honorable Mike Timm  
Speaker of the House  
House Chamber  
State Capitol  
Bismarck, ND 58505

RE: House Bill 1191

Dear Speaker Timm:

I respectfully return unsigned and hereby veto HB 1191. This bill expands the authority given in the 1995 session to the Administrative Rules Committee. Currently the Committee may void any part of a rule within ninety days after it is published in the administrative code. HB 1191 expands that authority to any rule upon 30 days notice to the agency which issued the rule. Under HB 1191, the committee may call up a rule regardless of how long it has been in place, and void all or any part of an administrative rule. I am troubled by the bill and its direction.

Administrative rules serve a very important function. They represent the Legislature's delegation of its authority to the agency and serve as the means by which air quality standards are set, water quality is maintained, child support obligations are determined, and a host of other complex issues are managed.. Rules are carefully reviewed by the agency, the Attorney General, the Legislative Council, the public, and the Administrative Rules Committee before they become effective. I urge us to be cautious in striking down rules that are developed under the stringent requirements of chapter 28-32 NDCC.

Specifically, these are my concerns.

First, the bill is unnecessary. The Legislature itself, by enacting a law, has the authority to change any administrative rule it chooses. The Legislature rightfully retains that authority. An agency also may change a rule through Chapter 28-32 of the North Dakota Century Code. And the Administrative Rules Committee also has limited authority to void all or part of a rule within ninety days of the rule being published. But, I do not believe we need to extend that authority beyond the initial ninety days to allow the committee to strike down a rule at anytime thereafter.

Second, I have constitutional concerns based upon separation of powers principles. The bill intrudes into essentially an executive branch arena. Our Constitution creates three branches of government that are equal—and does not contemplate one branch being more powerful than another. Power is dispersed by design. In the case of Verry v. Trenbeath, 148 N.W. 2d 567 (N.D. 1967) the Supreme Court explained this principle and said,

"..The Legislative branch deliberates upon and decides the policies and principles to be adopted for the future and enacts them into law. The executive branch administers the law so enacted."

The Honorable Mike Timm

Page 2

April 4, 1997

Our constitution provides an implied exclusion of each branch from the exercise of the functions of the others, as demonstrated by the Court in the case of City of Carrington v. Foster County, 155 N.W. 2d 377 (N.D. 1969)

In that structure, the Legislature as a whole has delegated authority to administrative agencies. But this bill allows that authority to be substituted to a legislative committee.. I am concerned that we continue to add more and more responsibilities to legislative committees, interim committees, and legislators themselves as we slowly migrate towards a full-time legislature, which is not consistent with the wishes of the voters, nor the Constitution.

Further, the bill raises serious constitutional questions concerning delegation of legislative authority. Article IV, Section 13 of the Constitution says that, "No law may be enacted except by a bill passed by both houses". HB 1191 appears to run contrary to that provision. The Administrative Rules Committee would have the authority to void any rule or part of a rule, which could change the entire meaning of the rule. So, the practical effect is to give one committee of the Legislative Assembly the authority to substitute its judgment for the judgment of the whole legislature, or that of the agency. As a result, one committee is given authority to make law, rather than both houses of the Legislature.

These constitutional concerns for this process were recognized when the Administrative Rules Committee was given its authority in the 1995 session, as demonstrated by Section 5, Chapter 310 of the 1995 Session Laws, which declares

**"Section 4 of this Act is suspended from operation and becomes effective retroactive to August 1, 1995, upon a ruling by the North Dakota Supreme Court that any portion of subsection 1 of section 28-32-03.3 as created by section 3 of this Act is unconstitutional."**

We are continuing to build upon this house of sand in section 4 of the bill, which again recognizes potential constitutional infirmity and declares,

**"Section 2 of this Act is suspended from operation, but becomes effective retroactive to August 1, 1997, upon a ruling by the North Dakota Supreme Court that any portion of subsection 1 of section 28-32-03.3 as created by section 3 of chapter 310 of the 1995 Session Laws and amended by section 1 of this Act is unconstitutional."**

The bill sets up a complex scheme of legislation which is the result of constitutional concerns., and then prepares for that possibility by suspending operation of part of the bill until the Supreme Court finds another section of the law unconstitutional.

Finally I am concerned about the practical problems the bill may create. We could cause great mischief if we allow the bill to stand. Consider these examples. Imagine the impact to the investor, in a multi-million dollar facility if he has no confidence in the regulatory climate in which he is expected to do business. Investors in Pro Gold, or Premium Beef want to have stability in the regulations under which they do business. Likewise, our people would not approve of environmental regulations which are administrative rules, being struck down by a legislative committee that has little expertise in highly technical fields such as air quality standards. Furthermore, imagine the chaos we might face if the committee found all child support rules "arbitrary or capricious", and changed the method or manner in which child support obligations were determined. These are but a few examples that I see as being dangerous and the potential ramification of allowing HB 1191 to become law. I signed the bill giving the committee limited authority for this activity in 1995, and did so with some reservation. In this

The Honorable Mike Timm

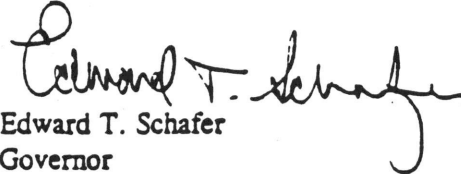
Page 3

April 4, 1997

session. I also signed HB 1030 that gives the committee an additional meeting in which to accomplish its work. I hesitate to expand that authority further, and believe it will be a serious mistake to do so.

For these reasons, I have vetoed HB 1191.

Sincerely,



Edward T. Schafer  
Governor

13:07

10:15 AM 4/5/97 David H