

1999 HOUSE JUDICIARY

HB 1132

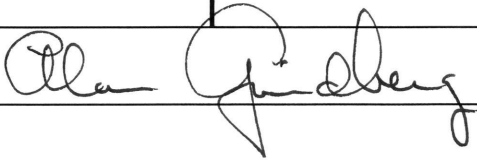
1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1132

House Judiciary Committee

Conference Committee

Hearing Date January 13, 1999

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

Minutes:

REP. BERNSTEIN: The reason I put this bill in is that I feel that 180 days is too long for an emergency rule to sit. If it is important enough to be an emergency rule it should be important enough to complete quickly. I considered making the time 60 days, but settled on 90 days as a compromise. Presented written testimony, which is attached along with handouts.

BLAINE NORDWALL (Hum. Ser.) Presented written testimony in opposition, which is attached.

MIKE MULLEN: (Hlth Dpt) Our department opposes this bill. This would limit our ability to make rules to protect the environment. This bill seems to come out a a presumption that rules are bad. Maybe some are, but most rules are good for North Dakota.. The health department cannot do this in 90 days as we must have health council approval.

January 20, 1999

JOHN WALSTAD: (LC) At the request of Chairman DeKrey, Mr Walstad appeared to explain the rule making procedure. He explained that the time only starts at the time of the effective date, not when the rulemaking procedure begins. Rules generally take effective when they are published by the rules committee, except for emergency rules. Emergency rules are adopted by publishing notice of hearing, and serving notice on those known to be interested. Then, 30 days later the hearing is held and there is an additional 30 days for public comment. The rule can then go into effect. If the rule hasn't gone through the rest of the formal adoption process and been published within 180 days of that date, it is null.

COMMITTEE ACTION: January 20, 1999

REP KOPPELMAN moved to change the 90 days to 120 days as suggested by Rep. Bernstein. Rep. Gorder seconded and the motion passed on a unanimous voice vote..

REP. MARAGOS moved that the committee recommend that the bill DO PASS AS AMENDED. Rep. Sveen seconded and the motion passed on a roll call vote of 13 ayes, 1 nay and 1 absent. Rep. Maragos was assigned to carry the bill on the floor.

90282.0101
Title.

Prepared by the Legislative Council staff for
Representative Bernstein
January 12, 1999

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1132

Page 1, line 21, after "adopted" insert "and filed with the office of the legislative council"

Renumber accordingly

Date: 1/20
Roll Call Vote #:

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1132

House JUDICIARY Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as A.

Motion Made By Maragos Seconded By Sveen

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

Total (Yes) 13 No 1

Absent 1

Floor Assignment Maragos

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

REPORT OF STANDING COMMITTEE

HB 1132: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). HB 1132 was placed on the Sixth order on the calendar.

Page 1, line 20, remove the overstrike over "~~one hundred~~" and replace "ninety" with "twenty"

Page 1, line 21, after "adopted" insert "and filed with the office of the legislative council"

Renumber accordingly

1999 SENATE GOVERNMENT AND VETERANS AFFAIRS

HB 1132

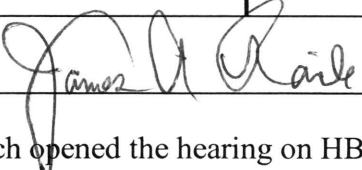
1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1132

Senate Government and Veterans Affairs Committee

Conference Committee

Hearing Date February 12, 1999

Tape Number	Side A	Side B	Meter #
1	X		3900-END
1		X	0-1794
Committee Clerk Signature 			

Minutes: Chairman Krebsbach opened the hearing on HB 1132 which is a bill which relates to the length of time that an emergency rule may remain in effect before final adoption; and to provide an effective date. There was some difficulty in locating the prime sponsor of the bill so Chairman Krebsbach indicated the committee would be in recess until the prime sponsor could be located. The chairman reopened the hearing on HB 1132 and asked for any testimony in support of the bill or neutral position on the bill. Appearing before the committee was Lynn D. Helms, Director of the Oil and Gas Division of the North Dakota Industrial Commission. He indicated the reason he stood up when asked if anyone had testimony in neutral position was that the industrial commission has not taken a position on this bill, but they have instructed him as the head of the agency for going through an emergency rules process to come in and present the facts about that process to the committee. He presented a hand out to each of the committee members and indicated that on the reverse side is a timetable for an emergency rule that they are currently

adopting in support of the oil industry. He indicated that he wanted to point out some significant things about that timetable. As such his testimony was a review of the schedule which had been handed out to the committee members. A copy of that schedule is attached. SENATOR

WARDNER: Regular rulemaking versus emergency rule making? I'm on administrative rules and to me the timeline is almost the same. MR. HELMS: In fact it is almost exactly the same.

The only difference is that on emergency rule making you can create the emergency rule and it will be in effect during the timeline of creating a final rule. SENATOR WARDNER: I guess I didn't know that. So it goes into effect immediately as soon as you develop it and so during the process of going through all the hoops and stuff that you have to go through it's in effect. MR.

HELMS: That is exactly correct. That's the reason for the emergency rule process, it takes effect immediately and it is in effect as you go through the final rule making process.

REPRESENTATIVE LEROY BERNSTEIN, district 45, appeared before the committee at this time. He indicated the reason why he introduced this bill is because exactly what the previous person testifying had indicated. An agency or a board had made rules and just let them lay there. What bothered him was that for 180 days, six months, these rules do have of course a law just as if you or I had passed legislation. As far as I know, the timeline on these rules are going to run out the first of March. And these rules will become null and void after that time, after 180 days and then we'll have to go through the process again. And this is the reason why I brought this out. I had originally stated 90 days. The judiciary committee in the house changed it, amended it to 120 days. Emergency rules go in effect at the time they are declared an emergency so if an agency already has the rules written up and starts the process, CHAIRMAN KREBSBACH:

Can I stop you for just a second? Our bills do not reflect that amendment. I don't know if we

need to get a new bill or what here? You amended it to what? 120 days. Is that the only change on the bill. REPRESENTATIVE BERNSTEIN: That's the only amendment on the bill and you are correct. This is the one I just picked up coming to the committee room. No this does not reflect the 120 days. Emergency rules go into effect when and if an agency declares an emergency. They can already write up the rules and start the whole process. And somewhere along that process they can declare these rules are emergencies and put them into effect. He indicated he had a long talk with workers comp. Julie Leier wrote him a letter, what she said in her letter basically was with careful planning this rule will be no problem and this is coming from workers comp. So I think any agency with a little careful planning can abide by these 120 days and get away from the situation of an agency or a board making laws and having them in effect whereas nobody has a chance to see it and this is what prompted this bill. SENATOR DEMERS: Is there a criteria for emergency rules versus regular rules? Is there some set of circumstances an agency has to make before they can call an emergency rule.

REPRESENTATIVE BERNSTEIN: Like on this bill I have, if an agency finds that emergency rulemaking is necessary because of imminent peril to public health, safety, or welfare because a delay in rulemaking is likely to cause a loss of revenue. That's the criteria that they can establish an emergency rule. SENATOR KILZER: Give me some examples of what the abuses have been in the past? REPRESENTATIVE BERNSTEIN: I don't like to single out any boards, but I think you're all aware my bill has to do with the milk board, with the milk stabilization board. This was the agency that prompted this. They put emergency rules into effect governing pricing criteria and this rule went into effect and they never finished the process of bringing it before the administrative rules committee. It just kind of bothered me that this happened. Now is it

flagrant? Does it happen a lot? I don't think so, but on occasion it does and I just thought I would tighten it up a bit. So that it wouldn't be a temptation to anybody in the future and I guess I look at it this way. With my tendency to procrastinate till the last amount of time to get something done this is what I'm afraid would happen to it. CHAIRMAN KREBSBACH: Representative Bernstein, I'm looking at the guideline that was provided by Mr. Helms and according to their timetable they need the 180 days and he indicated that he understands what you are getting at but this is not really the right area or place to address this. Do you have any comment in regard to that? REPRESENTATIVE BERNSTEIN: It all depends on when they want to declare a rule an emergency. When they declare a rule an emergency, then the clock starts. They can do that any time in the process. They can publish the notification of the rules and they can go as far as they want to and then decide that this rule is an emergency. Then they have 120 days to finish it up. Julile Leier with Workers Comp indicated with a little planning the rule will cause no problem. SENATOR STENEHJEM: I hope that you can get a copy of that letter to the committee members. REPRESENTATIVE BERNSTEIN: I will see to it that a copy is brought down. Discussion continued. There were no further questions at this time. Testimony of BLAINE NORDWALL, representing the Department of Human Services was presented to the committee at this time. A copy of his written testimony is attached. Questions were offered from committee members with responses by Mr. Nordwall. Appearing before the committee testifying in opposition to HB 1132 was MICHAEL J. MULLEN with the state department of health. A copy of his written testimony is attached. Questions were offered by SENATOR WARDNER. There was nothing further at this time. CHAIRMAN KREBSBACH closed the hearing at this time. **COMMITTEE DISCUSSION, March 4, 1999, Tape 1, Side**

B, Meter #'s 1660-2004: A committee discussion took place concerning a proposed amendment to HB 1132. SENATOR WARDNER reviewed the proposed amendment with the committee. After the discussion it was decided to hold off for now with any action on this bill. The committee adjourned for the day.

Discussion and Committee Action March 5, 1999, Tape 1, Side A, Meter #'s 2100-2415 A brief discussion of the amendments proposed for HB 1132 was held. Senator Wardner indicated that he believed the amendment conflicts with another part of the bill. Following discussion SENATOR WARDNER made a motion for DO NOT PASS on HB 1132, seconded by SENATOR THANE. Comments were offered by SENATORS WARDNER and THANE. ROLL CALL VOTE indicated 6 YEAS, 0 NAYS, and 0 ABSENT OR NOT VOTING. SENATOR WARDNER will carry the bill.

Date: 3/25/19
Roll Call Vote#:

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1132

Senate GOVERNMENT AND VETERAN'S AFFAIRS Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Sen. Wardner Seconded By Sen. Thane

Senators	Yes	No	Senators	Yes	No
SENATOR KREBSBACH	✓				
SENATOR WARDNER	✓				
SENATOR KILZER	✓				
SENATOR STENEHJEM					
SENATOR THANE	✓				
SENATOR DEMERS	✓				
SENATOR MUTZENBERGER	✓				

Total (Yes) 6 No 0

Absent 1

Floor Assignment Sen. Wardner

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

REPORT OF STANDING COMMITTEE (410)
March 5, 1999 1:40 p.m.

Module No: SR-40-4159
Carrier: Wardner
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1132, as engrossed: Government and Veterans Affairs Committee (Sen. Krebsbach, Chairman) recommends DO NOT PASS (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1132 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY

HB 1132

House Bill 1132

Testimony

Mr. Chairman and members of the
Judiciary Committee

The reason I introduced this bill was that if a department declares a rule an emergency, it should be important enough to finish taking it through the process as soon as possible. Given 180 ~~and~~ days they will probably use the full amount of time. From the time a rule is declared an emergency and to finish the process, 60 days is enough. So I settled on 90 days with the help of Mr. Walstad.

What concerned me was these rules have the force of law, or if you or I passed legislation.

So the sooner we get these rules through the process, the better it is for the people that are affected.

The amendment clarifies what a department has to do to finish the process

28-32-02. Rulemaking power of agency - Adoption deadlines - Hearing notice - Emergencies - Attorney general's opinion.

1. The authority of an administrative agency to adopt administrative rules is authority delegated by the legislative assembly. As part of that delegation, the legislative assembly reserves to itself the authority to determine when and if rules of administrative agencies are effective. Every administrative agency may adopt, amend, or repeal reasonable rules in conformity with the provisions of this chapter and any statute administered or enforced by the agency.

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.

3. The agency shall adopt a procedure whereby all interested persons are afforded reasonable opportunity to submit data, views, or arguments, orally or in writing, concerning the proposed rule, including data respecting the impact of the proposed rule. In case of substantive rules, the agency shall conduct an oral hearing. The agency shall consider fully all written and oral submissions respecting a proposed rule prior to the adoption, amendment, or repeal of any rule not of an emergency nature. The agency shall make a written record of its consideration of all written and oral submissions contained in the rulemaking record respecting a proposed rule.

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.

6. If the agency finds that emergency rulemaking is necessary because of imminent peril to the public health, safety, or welfare, because a delay in rulemaking is likely to cause a loss of revenues appropriated to support a duty imposed by law upon the agency, or because reasonably necessary to avoid a delay in implementing an appropriations measure, the agency may declare the proposed rule to be an interim final rule effective on a date no earlier than the date of filing with the legislative council of the notice required by subsection 4. A final rule adopted after consideration of all written and oral submissions respecting the interim final rule, which is substantially similar to the interim final rule, is effective as of the declared effective date of the interim final rule. The agency's finding, and a brief statement of the reasons therefor, must be filed with the office of the legislative council, along with any final rule adopted. The agency shall take appropriate measures to make interim final rules known to every person who may be affected by them. An interim final rule is ineffective one hundred eighty days after its declared effective date unless first adopted as a final rule.

7. Every rule proposed by any administrative agency must be submitted to the attorney general for an opinion as to its legality before final adoption, and the attorney general shall promptly furnish each such opinion. The attorney general may not approve any rule as to legality when the rule exceeds the statutory authority of the agency or is written in a manner that is not concise or easily understandable, or when the procedural requirements for adoption of the rule in this chapter are not substantially met. The attorney general shall advise an agency of any revision or rewording of a rule necessary to correct objections as to legality.

Source: S.L. 1941, ch. 240, § 2; R.C. 1943, § 28-3202; S.L. 1977, ch. 285, § 1; 1981, ch. 339, § 1; 1981, ch. 340, § 1; 1981, ch. 341, § 3; 1987, ch. 389, § 1; 1989, ch. 396, § 2; 1991, ch. 344, § 1; 1993, ch. 330, § 1; 1995, ch. 308, § 2; 1995, ch. 309, § 2; 1995, ch. 310, § 1.

Effective Date: The 1995 amendment of this section by section 2 of chapter 308, S.L. 1995 became effective August 1, 1995.

The 1995 amendment of this section by section 2 of chapter 309, S.L. 1995 became effective August 1, 1995.

The 1995 amendment of this section by section 1 of chapter 310, S.L. 1995 became effective August 1, 1995.

Note: Section 5 of chapter 310, S.L. 1995, provides, in part: "This act is effective for any rule adopted by an administrative agency after July 30, 1995."

Cross-References. Adoption of rules by state livestock sanitary board, see § 36-01-08.

Procedure on regulation of public utilities, see chapter 49-05.

In General.

Pursuant to this chapter, an administrative rule is invalid unless it is adopted in substantial compliance with this section. *Huber v. Jahner*, 460 N.W.2d 717 (N.D. Ct. App. 1990).

Agency Compliance.

If the amendments to the Administrative Agencies Practice Act commencing with the 1977 session of the legislature are to be effective, the court can no longer give credence to administrative practice or policy that has not been adopted in compliance with the act. *Smith v. North Dakota Workers Comp. Bureau*, 447 N.W.2d 250 (N.D. 1989).

Application of Invalid Rules.

Chapters of manual which prescribed the method to determine who may be appropriately served by

the developmental disabilities division did not deal only with internal management of the department so as to be exempt from the rulemaking requirements of chapter 28-32 pursuant to the definition of "rule" in section 28-32-01. And because these chapters were not adopted in accordance with chapter 28-32, they were invalid, and the department's denials of applications for case management services as a result of the application of the rules were ineffective. *Mullins v. North Dakota Dep't of Human Servs.*, 454 N.W.2d 732 (N.D. 1990).

Child Support Guidelines.

Department of human services' child support guidelines, which are a statutorily authorized schedule for court awarded child support pursuant to section 14-09-09.7, constitute a substantive rule which must be promulgated in accordance with chapter 28-32 to have validity; therefore, where mother failed to demonstrate that the child support guidelines were validly promulgated under chapter 28-32, or that they were otherwise binding upon the trial court, the trial court did not err in ordering child support which deviated from the guidelines. *Huber v. Jahner*, 460 N.W.2d 717 (N.D. Ct. App. 1990).

Section 14-09-09.7 requires the department of human services to promulgate the child support guidelines as a "substantive" rule within the meaning of this section. *Illies v. Illies*, 462 N.W.2d 878 (N.D. 1990).

Department Immunity.

Where the conduct of the Department of Human Services in adopting new rules was classically legislative, department members were entitled to absolute immunity. *Redwood Village Partnership v. Graham*, 819 F. Supp. 867 (D.N.D. 1993), *aff'd*, 26 F.3d 839 (8th Cir.), *cert. denied*, 513 U.S. 962, 115 S. Ct. 423, 130 L. Ed. 2d 337 (1994).

Evidence Admissible at Hearings.

Where no rule had been adopted pursuant to this section requiring exclusion of certain evidence, the department of human services' failure to consider the evidence was error. *Falcon v. Williams County Social Serv. Bd.*, 430 N.W.2d 569 (N.D. 1988).

Food stamp recipient was denied a fair hearing where department of human services refused to consider his evidence of medical disability presented for the first time at hearing to which recipient was entitled under state and federal regulations, because scope of hearing was not limited to propriety of finding recipient did not attend employment orientation, nor did he present medical evidence of disability too late by not presenting it or claiming an exemption before requesting a hearing. *Barnett v. North Dakota Dep't of Human Servs.*, 551 N.W.2d 557 (N.D. 1996).

Invalid Personnel Policies.

Where the personnel policies relied on by the plaintiffs were not submitted to the attorney general for an opinion prior to their adoption and were not published in the North Dakota Administrative Code, they were invalid. Although the personnel policies had been adopted by the Central personnel division, they were not binding upon the office of the attorney general. *Little v. Spaeth*, 394 N.W.2d 700 (N.D. 1986).

Where the North Dakota personnel policies manual relied upon by the plaintiffs had never been promulgated as required by this chapter, and the plaintiff did not show that the manual had ever been held out or voluntarily operated under by the attorney general as part of their employment relationship, the manual did not provide the plaintiffs with any contractual rights. *Little v. Spaeth*, 394 N.W.2d 700 (N.D. 1986).

Sanctions.

Imposition of sanction on Medicaid service provider was a discretionary exercise of director of department of human service's power, and where authorized by law and justified in fact, sanction was not an abuse of discretion. *Steen v. North Dakota Dep't of Human Servs.*, 1997 ND 52, 562 N.W.2d 83 (1997).

Workers Compensation Bureau.

The workers compensation bureau directive governing payment of claimant's travel expenses was a "substantive" rule within the meaning of this section; before such a rule may be adopted in the first instance, upon request, any interested person may request and must receive an oral hearing. *Johnson v. North Dakota Workers Comp. Bureau*, 428 N.W.2d 514 (N.D. 1988).

Section 65-02-08, which authorizes the workers compensation bureau to promulgate and enforce rules, does not relieve the bureau of responsibility for compliance with the Administrative Agencies Practices Act in establishing those rules, including fee schedules. *Johnson v. North Dakota Workers Comp. Bureau*, 428 N.W.2d 514 (N.D. 1988).

Record of workers compensation bureau's rulemaking proceeding was adequate under the Administrative Agencies Practice Act, and its promulgation of maximum hourly compensation rates for claimant's attorneys' fees and fee caps was not an arbitrary or capricious application of its statutory authority. *Little v. Traynor*, 1997 ND 128, 565 N.W.2d 766 (1997).

Collateral References.

Administrative Law and Procedure <key> 381-427.

1 Am. Jur. 2d, Administrative law, §§ 92-137.

73 C.J.S. Public Administrative Law and Procedure, §§ 87-114.

Delegation of power by statute or ordinance requiring real estate broker to procure license,, 39 A.L.R.2d 606.

Delegation of legislative powers by minimum wage statutes relating to private employment,, 39 A.L.R.2d 740.

Delegation of powers to administrative agency by statute providing for urban redevelopment by private enterprise,, 44 A.L.R.2d 1414.

28-32-03. Filing of rules - Force and effect of rules - Form and style of rules - Rules invalid unless in compliance with chapter.

1. A copy of each rule adopted by an administrative agency, and the attorney general's opinion thereon, must be filed by the adopting agency with the office of the legislative council for publication in the North Dakota Administrative Code.

2. Nonemergency rules approved by the attorney general as to legality, adopted by an administrative agency, and filed with the office of the legislative council become effective the first day of the month after the month of publication as provided for in section 28-32-03.1, except that if a later date is required by statute, specified in the rule, or provided under section 28-32-03.3, the later date is the effective date. A rule found to be void by the committee on administrative rules is void from the time provided under section 28-32-03.3. If publication is delayed due to technological problems or lack of funds, nonemergency rules, unless otherwise provided, become effective on the first day of the month after the month publication would have occurred but for the delay.

3. Upon becoming effective, rules have the force and effect of law until amended or repealed by the agency, declared invalid by a final court decision, suspended or found to be void by the committee on administrative rules, or determined repealed by the office of the legislative council because the authority for adoption of the rules is repealed or transferred to another agency.

4. The office of the legislative council may prescribe a format, style, and arrangement for rules which are to be published in the code, and may refuse to accept the filing of any rule that is not in substantial compliance therewith. In arranging rules for publication, the office of the legislative council may make such corrections in spelling, grammatical construction, format, and punctuation of the rules as deemed proper. The office of the legislative council shall keep and maintain a permanent code of all rules filed, including superseded and repealed rules, which must be open to public inspection during office hours.

5. A rule is invalid unless adopted in substantial compliance with this chapter. However, inadvertent failure to supply any person with a notice required by section 28-32-02 does not invalidate a rule. Notwithstanding subsection 2 of section 28-32-15, an action to contest the validity of a rule on the grounds of noncompliance with this chapter may not be commenced more than two years after the effective date of the rule.

Source: S.L. 1941, ch. 240, § 3; R.C. 1943, § 28-3203; S.L. 1977, ch. 286, § 1; 1981, ch. 341, § 4; 1983, ch. 82, § 61; 1989, ch. 396, § 4; 1991, ch. 342, § 4; 1993, ch. 23, § 2; 1993, ch. 330, § 3; 1995, ch. 310, § 2.

Effective Date: The 1995 amendment of this section by section 2 of chapter 310, S.L. 1995 became effective August 1, 1995.

The 1993 amendment by section 2 of chapter 23, S.L. 1993, became effective April 30, 1993.

The 1991 amendment of subsection 5 of this section by section 4 of chapter 342, S.L. 1991, became effective July 1, 1991, pursuant to N.D. Const., Art. IV, § 13.

Note: Section 5 of chapter 310, S.L. 1995, provides, in part: "This act is effective for any rule adopted by an administrative agency after July 30, 1995."

Developmental Disabilities Division.

Chapters of manual which prescribed the method to determine who may be appropriately served by the developmental disabilities division did not deal only with internal management of the department so as to be exempt from the rulemaking requirements of chapter 28-32 pursuant to the definition of "rule" in section 28-32-01. Further, because these chapters were not adopted in accordance with chapter 28-32,

they were invalid, and the department's denials of applications for case management services as a result of the application of the rules were ineffective. *Mullins v. North Dakota Dep't of Human Servs.*, 454 N.W.2d 732 (N.D. 1990).

Invalid Personnel Policies.

Where the personnel policies relied on by the plaintiffs were not submitted to the attorney general for an opinion prior to their adoption and were not published in the North Dakota Administrative Code, they were invalid. Although the personnel policies had been adopted by the central personnel division, they were not binding upon the office of the attorney general. *Little v. Spaeth*, 394 N.W.2d 700 (N.D. 1986).

Where the North Dakota policies manual relied upon by the plaintiffs had never been promulgated as required by this chapter, and the plaintiffs did not show that the manual had ever been held out or voluntarily operated under by the attorney general as part of their employment relationship, the manual did not provide the plaintiffs with any contractual rights. *Little v. Spaeth*, 394 N.W.2d 700 (N.D. 1986).

Knowledge of Rules.

Although employee and State Industrial School (SIS) orally agreed job was for one year, SIS representatives did not have the authority to circumvent the six-month probationary period and reduction-in-force provisions in administrative rules promulgated to govern the terms and conditions of the employment of classified employees of state government, and employee was charged with knowledge of SIS's hiring authority. *Knight v. North Dakota State Indus. Sch.*, 540 N.W.2d 387 (N.D. 1995).

Workers Compensation Bureau.

Section 65-02-08, which authorizes the workers compensation bureau to promulgate and enforce rules, does not relieve the bureau of responsibility for compliance with the Administrative Agencies Practices Act in establishing those rules, including fee schedules. *Johnson v. North Dakota Workers Comp. Bureau*, 428 N.W.2d 514 (N.D. 1988).

Collateral References.

Administrative Law and Procedure <key> 410.

1 Am. Jur. 2d, Administrative Law, §§ 289-314.

73 C.J.S. Public Administrative Law and Procedure, §§ 111, 114.

**TESTIMONY BEFORE THE
HOUSE JUDICIARY COMMITTEE
REGARDING HOUSE BILL NO. 1132
January 13, 1998**

Chairman DeKrey and members of the House Judiciary Committee, my name is Blaine Nordwall. I appear on behalf of the Department of Human Services.

House Bill 1132 would reduce the time available for completing work on emergency rulemaking from 180 days to 90 days.

There are three bases for emergency rulemaking. The first is imminent peril to the public health, safety, or welfare. The second is because a delay in rulemaking is likely to cause a loss of revenues appropriated to support a duty imposed by law upon the agency. The third is because emergency rulemaking is reasonably necessary to avoid a delay in implementing an appropriations measure. Emergency rulemaking is rarely done. The Department of Human Services has, I believe, used emergency rulemaking more than any other agency. In every case, the emergency rulemaking was undertaken to avoid a loss of appropriated revenues or to avoid a delay in implementing an appropriations measure.

The law governing emergency rulemaking requires that the agency adopt a final rule using exactly the same process as for nonemergency rules. I have attached a list of the tasks that need to be done to adopt a rule. Six of those tasks must be completed before we issue rulemaking notices. The statutory minimum time between the final issuance of public notice and the final day to receive public comment is 61 days. Because the Legislative Council issues notices once a month, the actual minimum time between sending the notice to the newspapers and the Legislative Council and the final day to receive public comment ranges from 67 to

97 days. After the conclusion of the public comment period, the agency must attend to 7 more tasks. It must fully consider all comments, document that activity, prepare a final rule, secure the opinion of the Attorney General as to legality, finally approve the rule, and make submissions to the Legislative Council.

As a practical matter, it is often difficult to complete final adoption of an emergency rule within the 180 days currently allowed. Ninety days cannot be achieved. House Bill 1132, if adopted, would effectively preclude emergency rulemaking.

I am not aware that the emergency rulemaking process has created problems. I am aware that it has been used to solve problems.

For all of these reasons, the department respectfully urges the committee recommend "do not pass" for House Bill 1132.

Presented by:

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

REQUIRED RULEMAKING ACTIVITIES

1. Draft proposed rule.
2. Prepare finding of emergency (emergency rules only) (N.D.C.C. § 28-32-02(6)).
3. Prepare regulatory impact determination (N.D.C.C. § 28-32-02(4)).
4. Prepare regulatory analysis (whenever requested or if there is \$50,000 impact) (N.D.C.C. § 28-32-02.2).
5. Prepare takings assessment (N.D.C.C. § 28-32-02.5).
6. Prepare a notice of proposed rule (N.D.C.C. § 28-32-02(4)).
7. File notice of proposed rulemaking with the Legislative Council (N.D.C.C. § 28-32-02(4)).
8. Publish notice twice in each daily newspaper (N.D.C.C. § 28-32-02(4)).
9. Legislative Council issues notice to subscribers once each month on first business day (N.D.C.C. § 28-32-04(4)).
10. Conduct hearing at least 30 days after the later of item 8 or 9 (N.D.C.C. § 28-32-02(4)).
11. Close public no earlier than 30 days after last rulemaking hearing (N.D.C.C. § 28-32-02(4)).
12. Undertake full consideration of all written and oral submissions (may require preparation of hearing transcript) (N.D.C.C. § 28-32-02(3)).
13. Create record of full consideration of all written and oral submissions (N.D.C.C. § 28-32-02(3)).
14. Redraft rule as necessary to reflect consideration of comments (N.D.C.C. § 28-32-02(4) and (6)).
15. Submit proposed rule to Attorney General for opinion as to legality (N.D.C.C. § 28-32-02(7)).
16. Adopt final rule if approved as to legality.
17. Submit finding of emergency and a brief statement of the reasons therefor with Legislative Council (emergency rules only) (N.D.C.C. § 28-32-02(6)).
18. Submit final rule to Legislative Council, together with a copy of the Attorney General's opinion, to Legislative Council for publication (N.D.C.C. § 28-32-03(1)).

MILK MARKETING BOARD PENDING EMERGENCY RULES

This memorandum is in response to a request to review the proceedings and status of emergency rules on milk pricing which were declared by the Milk Marketing Board to be emergency rules effective August 31, 1998.

North Dakota Century Code (NDCC) Section 28-32-02(6) provides:

6. If the agency finds that **emergency rule-making** is necessary because of imminent peril to the public health, safety, or welfare, because a delay in rulemaking is likely to cause a loss of revenues appropriated to support a duty imposed by law upon the agency, or because reasonably necessary to avoid a delay in implementing an appropriations measure, **the agency may declare the proposed rule to be an interim final rule effective on a date no earlier than the date of filing with the legislative council of the notice required by subsection 4.** A final rule adopted after consideration of all written and oral submissions respecting the interim final rule, which is substantially similar to the interim final rule, is effective as of the declared effective date of the interim final rule. The agency's finding, and a brief statement of the reasons therefor, must be filed with the office of the legislative council, along with any final rule adopted. The agency shall take appropriate measures to make interim final rules known to every person who may be affected by them. **An interim final rule is ineffective one hundred eighty days after its declared effective date unless first adopted as a final rule.** (emphasis added)

On March 2, 1998, the Milk Marketing Board issued a notice of proposed rulemaking containing the following statement of purpose:

The purpose of the proposed changes under a dock pickup pricing program would allow for hauling of milk products by contract haulers available to a single, combination or partnership of retail ownerships; would allow dealers and retailers an opportunity to experience distribution alternatives or efficiencies and pass such savings on to consumers; would allow for review or adjustment of milk pricing formulas to reflect current marketing conditions.

The notice stated that a public hearing on the proposed rules would be held on Wednesday, June 3, 1998, at the Kelly Inn in Bismarck and that written comments on the rules would be accepted until July 6, 1998. The notice was filed with the Legislative Council on March 26, 1998. The Milk Marketing Board declared the rules to be emergency or interim final rules with an effective date of August 31, 1998.

The proposed rules were submitted to the Attorney General and an opinion of the Attorney General was issued on October 1, 1998, stating that the rules are in substantial compliance with law and are approved as to legality. As of January 11, 1999, the rules have not been filed with the Legislative Council for publication in the North Dakota Administrative Code.

Under NDCC Section 28-32-02(6) an emergency (interim final) rule must be adopted as a final rule within 180 days after its declared effective date. Under this standard, the Milk Marketing Board has until February 27, 1999, to adopt the pending rules as final rules. The statutory provision does not impose a time limit on when the rules must be filed with the Legislative Council for publication in the North Dakota Administrative Code.

Testimony
on
HB 1132, Emergency Rulemaking Authority
before the
Senate Government and Veterans Affairs Committee
by
Michael J. Mullen
State Department of Health

February 12, 1999

Good morning Madame Chair and members of the Committee. I am Michael J. Mullen, Senior Adviser for Health Policy, State Department of Health. I am pleased to present the Department's testimony in opposition to House Bill No. 1132, which limits the time during which an "emergency rule" may be in effect to 120 days.

HB 1132 provides, in effect, that any administrative rule issued on an emergency basis will expire after 120 days unless within that time the agency has issued a "permanent" rule to replace the emergency rule. For the reasons I will now explain, the Department of Health cannot reasonably issue a rule within the 120 days as required under HB 1132.

Under section 28-32-02, which sets forth the authority of an agency to adopt administrative rules, an agency is required to: twice publish a notice of the proposed rule; then at least 30 days after the second notice is published, hold a public hearing on the proposed rule; then give at least 30 additional days after the hearing for persons to make written comments on the proposed rule; then, in the case of the Department of Health, present the "final rule" to the Health Council at its next meeting for approval;

then present the final rule to the Attorney General for legal review; and, then submit the final rule and the Attorney General's opinion to the Legislative Council.

After these steps have been completed, and if the rule has been submitted to the Legislative Council by the 20th of the month, the rule will be published in the next Administrative Code Supplement. The rule will become effective on the first day of the month after the date of its first publication in the Administrative Code Supplement. As the example used in the exhibit attached to my testimony illustrates, this process takes approximately 170 days to complete.

If house bill 1132 is enacted into law., there will be a gap of about 50 days -- 120 days after an emergency rule is issued it will expire, and there will be no rule until the *permanent rule* takes effect about 170 days after the rulemaking process has commenced. The Department believes this is an unsound result and that HB 1132 should be rejected.

Madame Chair, this completes my testimony. I would be pleased to answer any questions you other members of the committee have regarding HB 1132.

Rulemaking Timeline

Day 1	January 12, 1999	Proposed rule approved for publication
Day 6	January 18, 1999	Notice published 1 st time
Day 13	January 25, 1999	Notice published 2 nd time
Day 22	February 5 , 1999	Proposed rule “notice” mailed out by Leg. Council
Day 54	March 8, 1999	Hearing on 1 st business day after 30 day delay following <i>later</i> notice of hearing
Day 85	April 8, 1999	Close of comment period 30 days after hearing [not counting day of hearing]
Day 119	May 11, 1999	2 nd Tuesday of month – Health Council Meeting approve or amend rule 119 days since Jan. 11,1999
Day 120	May 12, 1999	Amended Rule submitted to Attorney General
Day 122	May 14, 1999	Attorney General issues legal opinion on rule
Day 125	May 17, 1999	Department submits Rule, legal opinion, and regulatory analysis to Legislative Council
Day 140	June 1, 1999	Since rule has been submitted to Leg. Council by the 20 th of the month, the amended Rule will be published in the next “code supplement”, June 1, 1999
Day 170	July 1, 1999	Rule becomes effective 1 st day of the month after the date of publication of the rule

2/12/99 7:44 AM

HOUSE BILL 1132

Government and Veterans Affairs Committee

Effective Length of an Emergency Rule

Friday, February 12, 1999

Testimony
By Lynn D. Helms
Director
NDIC - Oil & Gas Division

TIMETABLE FOR EMERGENCY RULE

Day

- Feb 4: Submitted proposed emergency rules to IC for approval
- 0 Feb 5: Emergency rules received by Legislative Council
Emergency rules (interim final rules) become effective
Final rules must be effective within 180 days (by August 4, 1999)
- 14 Feb 19: Final rules received by Legislative Council
Send legal ad to daily papers for emergency rules notice
Send legal ad to daily papers for final adoption of emergency rules
- 17 Feb 22: Daily papers receive request for legal ad for emergency and final rules
- 24 Mar 1: LC sends out emergency and final rules notice to interested parties
All daily papers (ten) publish emergency and final rules notice
- 25 Mar 2: All daily papers except Fargo Forum publish 2nd notice of rules
- 31 Mar 8: Fargo Forum publishes 2nd notice of rules (legal ads on Mondays only)
Hearing date for final rules must be no sooner than 30 days
- 61 Apr 7: Hearing for final rules
Thirty-day comment period starts (to receive input on proposed rules)
- 91 May 7: End of thirty-day comment period
- 94 May 10: Review all documents received and write final rules
- 120 Jun 5: Proposed amendment under HB 1132**
- 132 Jun 17: Submit proposed final rules to Industrial Commission for approval
- 136 Jun 21: Submit proposed final rules to Attorney General for an opinion
- 143 Jun 28: File final rules with Legislative Council
- 146 Jul 1: Legislative Council publishes rules
Adoption of final rules on the 1st day of the following month
- 177 Aug 1: Adoption of final rules
- 180 Aug 4: Interim final rule ineffective unless first adopted as final rule

**TESTIMONY BEFORE THE
SENATE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE
REGARDING ENGROSSED HOUSE BILL NO. 1132
February 12, 1999**

Chairman Krebsbach and members of the Senate Government and Veterans Affairs Committee, my name is Blaine Nordwall. I appear on behalf of the Department of Human Services.

House Bill 1132 would reduce the time available for completing work on emergency rulemaking from 180 days to 120 days.

There are three bases for emergency rulemaking. The first is imminent peril to the public health, safety, or welfare. The second is because a delay in rulemaking is likely to cause a loss of revenues appropriated to support a duty imposed by law upon the agency. The third is because emergency rulemaking is reasonably necessary to avoid a delay in implementing an appropriations measure. Emergency rulemaking is rarely done. The Department of Human Services has, I believe, used emergency rulemaking more than any other agency. In every case, the emergency rulemaking was undertaken to avoid a loss of appropriated revenues or to avoid a delay in implementing an appropriations measure.

The law governing emergency rulemaking requires that the agency adopt a final rule using exactly the same process as for nonemergency rules. I have attached a list of the tasks that need to be done to adopt a rule. Six of those tasks must be completed before we issue rulemaking notices. The statutory minimum time between the final issuance of public notice and the final day to receive public comment is 61 days. Because the Legislative Council issues notices once a month, the actual minimum time between sending the notice to the newspapers and the Legislative Council and the final day to receive public comment ranges from 67 to

97 days. After the conclusion of the public comment period, the agency must attend to 7 more tasks. It must fully consider all comments, document that activity, prepare a final rule, secure the opinion of the Attorney General as to legality, finally approve the rule, and make submissions to the Legislative Council.

As a practical matter, it is often difficult to complete final adoption of an emergency rule within the 180 days currently allowed. One hundred twenty days can only be achieved with great difficulty and, in some instances, cannot be achieved. House Bill 1132, if adopted, would greatly limit emergency rulemaking.

Rulemaking procedures are an easy target. So easy that the many benefits rulemaking provides to the public are forgotten. In the case of emergency rules, the procedures respond to the need to rapidly implement policy changes.

I am not aware that the emergency rulemaking process has created problems. I am aware that it is regularly used to solve problems.

For all of these reasons, the department respectfully urges the committee to recommend "do not pass" for House Bill 1132.

Presented by:

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

REQUIRED RULEMAKING ACTIVITIES

1. Draft proposed rule.
2. Prepare finding of emergency (emergency rules only) (N.D.C.C. § 28-32-02(6)).
3. Prepare regulatory impact determination (N.D.C.C. § 28-32-02(4)).
4. Prepare regulatory analysis (whenever requested or if there is \$50,000 impact) (N.D.C.C. § 28-32-02.2).
5. Prepare takings assessment (N.D.C.C. § 28-32-02.5).
6. Prepare a notice of proposed rule (N.D.C.C. § 28-32-02(4)).
7. File notice of proposed rulemaking with the Legislative Council (N.D.C.C. § 28-32-02(4)).
8. Publish notice twice in each daily newspaper (N.D.C.C. § 28-32-02(4)).
9. Legislative Council issues notice to subscribers once each month on first business day (N.D.C.C. § 28-32-04(4)).
10. Conduct hearing at least 30 days after the later of item 8 or 9 (N.D.C.C. § 28-32-02(4)).
11. Close public no earlier than 30 days after last rulemaking hearing (N.D.C.C. § 28-32-02(4)).
12. Undertake full consideration of all written and oral submissions (may require preparation of hearing transcript) (N.D.C.C. § 28-32-02(3)).
13. Create record of full consideration of all written and oral submissions (N.D.C.C. § 28-32-02(3)).
14. Redraft rule as necessary to reflect consideration of comments (N.D.C.C. § 28-32-02(4) and (6)).
15. Submit proposed rule to Attorney General for opinion as to legality (N.D.C.C. § 28-32-02(7)).
16. Adopt final rule if approved as to legality.
17. Submit finding of emergency and a brief statement of the reasons therefor with Legislative Council (emergency rules only) (N.D.C.C. § 28-32-02(6)).
18. Submit final rule to Legislative Council, together with a copy of the Attorney General's opinion, to Legislative Council for publication (N.D.C.C. § 28-32-03(1)).