

**2023 HOUSE JUDICIARY**

**HB 1154**

# 2023 HOUSE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Room JW327B, State Capitol

HB 1154  
1/9/2023

Relating to assault on a health care facility employee; and to provide a penalty.

Chairman Klemin opened the hearing on HB 1154 at 11:00 AM. Members present: Chairman Klemin, Vice Chairman Karls, Rep. Bahl, Rep. Christensen, Rep. Cory, Rep. Henderson, Rep. S. Olson, Rep. Rios, Rep. Satrom, Rep. Schneider, Rep. VanWinkle, Rep. Vetter. Absent: Rep. Roers Jones

## **Discussion Topics:**

- Amendment
- ND licensing
- No fiscal note
- Imbalance of power
- Unintended consequences
- Veto administration of cases.

Rep. D. Ruby: Introduced the bill. Testimony #12654

Dr. Jake Schmitz, Chiropractor: Testimony #12557

Jim Nicolai, Interim Solicitor General: Testimony #12651

Chairman Klemin requested a fiscal note from AG's office.

Tim Dawson, ND Administrative Law Judge: No written testimony.

Chairman Klemin: We will be waiting for proposed amendments plus a fiscal note.

## **Additional written testimony:**

Jonathan Alm, attorney, Department of Health & Human Services- Testimony # 12586

Chairman Klemin closed the hearing at 11:58 AM.

Delores Shimek, Committee Clerk

# 2023 HOUSE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Room JW327B, State Capitol

HB 1154  
1/9/2023

Relating to assault on a health care facility employee; and to provide a penalty.

Chairman Klemin opened the hearing on HB 1154 at 2:30 PM. Members present: Chairman Klemin, Vice Chairman Karls, Rep. Bahl, Rep. Christensen, Rep. Cory, Rep. Henderson, Rep. S. Olson, Rep. Rios, Rep. Satrom, , Rep. Schneider, Rep. VanWinkle, Rep. Vetter. Absent: Rep. Roers Jones

## **Discussion Topics:**

- Fiscal Note
- Proposed amendment
- Summary judgement

Chairman Klemin: Explained the bill.

Closed the hearing at 2:41 PM.

Delores Shimek, Committee Clerk

# 2023 HOUSE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Room JW327B, State Capitol

HB 1154  
1/16/2023

Relating to assault on a health care facility employee; and to provide a penalty.
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Chairman Klemin opened the meeting on HB 1154 at 2:23 PM. Members present: Chairman Klemin, Vice Chairman Karls, Rep. Bahl, Rep. Christensen, Rep. Cory, Rep. Henderson, Rep. S. Olson, Rep. Rios, Rep. S. Roers Jones, Rep. Satrom, Rep. Schneider, Rep. VanWinkle, Rep. Vetter

## Discussion Topics:

- Committee Action
- Fiscal note discussion.

Rep. D. Ruby: Introduced an amendment. 23.0223.01001. Testimony #22563

Tim Dawson, Director, Administrative Law Judge: No written testimony.

Rep. Vetter moved the Dan Ruby amendments 23.0223.01001 plus if there is a written response; if there is a written response to a motion for summary judgment, summary judgment is not available to the parties in an adjudicative proceeding.

Seconded by Rep. VanWinkle

Representatives	Vote
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Landon Bahl	Y
Representative Cole Christensen	Y
Representative Claire Cory	Y
Representative Donna Henderson	Y
Representative SuAnn Olson	Y
Representative Nico Rios	Y
Representative Shannon Roers Jones	Y
Representative Bernie Satrom	Y
Representative Mary Schneider	Y
Representative Lori VanWinkle	Y
Representative Steve Vetter	Y

Roll call vote: 13 Yes 0 No 0 Absent

Motion carried.

Rep. VanWinkle moved the Ruby Amendment 23.0223.01003 #22565

Seconded by Rep. Vetter

<b>Representatives</b>	<b>Vote</b>
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Landon Bahl	Y
Representative Cole Christensen	Y
Representative Claire Cory	Y
Representative Donna Henderson	Y
Representative SuAnn Olson	Y
Representative Nico Rios	Y
Representative Shannon Roers Jones	Y
Representative Bernie Satrom	Y
Representative Mary Schneider	Y
Representative Lori VanWinkle	Y
Representative Steve Vetter	Y

Roll call vote 13 Yes 0 No 0 Absent

Motion carried.

Rep. Vetter moved a Do Pass as Amended with #23.0223.01004

Seconded by Rep. VanWinkle

<b>Representatives</b>	<b>Vote</b>
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Landon Bahl	Y
Representative Cole Christensen	Y
Representative Claire Cory	Y
Representative Donna Henderson	Y
Representative SuAnn Olson	Y
Representative Nico Rios	Y
Representative Shannon Roers Jones	Y
Representative Bernie Satrom	Y
Representative Mary Schneider	Y
Representative Lori VanWinkle	Y
Representative Steve Vetter	Y

Roll call vote: 13 Yes 0 No 0 Absent

Motion carried. Carrier: Rep. Christensen

Meeting closed at 2:43 PM.

Delores Shimek, Committee Clerk

24 1/16/23

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1154

Page 1, line 1, after "28-32-22" insert "and subsection 3 of section 54-57-03"

Page 1, line 2, after "proceeding" insert "and hearings before an administrative law judge"

Page 1, line 12, remove "An administrative agency rule that allows the granting of summary judgment must"

Page 1, line 13, remove "require all parties agree in writing there are no genuine issue of material fact."

Page 1, after line 15, insert "If there is a written response opposing a motion for summary judgment, summary judgment is not available to the parties in an adjudicative proceeding."

**SECTION 2. AMENDMENT.** Subsection 3 of section 54-57-03 of the North Dakota Century Code is amended and reenacted as follows:

3. ~~Informal~~ Subject to section 28-32-22, informal disposition of an administrative proceeding or adjudicative proceeding may be made by an agency at any time before or after the designation of an administrative law judge from the office of administrative hearings."

Renumber accordingly

**REPORT OF STANDING COMMITTEE**

**HB 1154: Judiciary Committee (Rep. Klemin, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1154 was placed on the Sixth order on the calendar.

Page 1, line 1, after "28-32-22" insert "and subsection 3 of section 54-57-03"

Page 1, line 2, after "proceeding" insert "and hearings before an administrative law judge"

Page 1, line 12, remove "An administrative agency rule that allows the granting of summary judgment must"

Page 1, line 13, remove "require all parties agree in writing there are no genuine issue of material fact."

Page 1, after line 15, insert "If there is a written response opposing a motion for summary judgment, summary judgment is not available to the parties in an adjudicative proceeding."

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3. ~~Informal~~Subject to section 28-32-22, ~~informal~~ disposition of an administrative proceeding or adjudicative proceeding may be made by an agency at any time before or after the designation of an administrative law judge from the office of administrative hearings."

Renumber accordingly

**2023 SENATE JUDICIARY**

**HB 1154**



# 2023 SENATE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Peace Garden Room, State Capitol

HB 1154  
3/13/2023

A bill relating to the informal disposition of an administrative proceeding and hearings before an administrative law judge.
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2:21 PM Chairman Larson opened the meeting.

Chairman Larson and Senators Estenson, Luick, Sickler, Braunberger and Paulson are present. Senator Myrdal is absent initially but joined the meeting at 2:47 PM.

**Discussion Topics:**

- Evidentiary hearings
- Summary judgments
- Deference

2:21 Representative Ruby introduced the bill.

2:27 PM Doctor Jake Schmitz testified in favor of the bill. #24314

2:35 PM Allyson Hicks, General Counsel, North Dakota Attorney General's Office, testified opposed to the bill. #24325

2:46 PM Jonathan Alm, Attorney, North Dakota Health, and Human Services testified opposed. #24140

2:49 PM Chairman Larson closed the public hearing.

2:49 PM Chairman Larson closed the meeting.

*Rick Schuchard, Committee Clerk*

# 2023 SENATE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Peace Garden Room, State Capitol

HB 1154  
3/14/2023

A bill relating to the informal disposition of an administrative proceeding and hearings before an administrative law judge.
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9:16 AM Chairman Larson opened the meeting.

Chairman Larson and Senators Myrdal, Luick, Estenson, Sickler, Paulson and Braunberger are present.

### Discussion Topics:

- Committee action

9:19 AM Senator Sickler moves to Do Not Pass the bill. Motion seconded by Senator Braunberger.

9:23 AM Allyson Hicks, Assistant Attorney General, General Council Division, North Dakota Attorney General's Office gave oral testimony.

9:24 AM Roll call vote was taken.

<b>Senators</b>	<b>Vote</b>
Senator Diane Larson	Y
Senator Bob Paulson	Y
Senator Jonathan Sickler	Y
Senator Ryan Braunberger	Y
Senator Judy Estenson	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Motion passes 7-0-0.

Senator Sickler will carry the bill.

This bill does not affect workforce development.

9:25 AM Chairman Larson closed the meeting.

*Rick Schuchard, Committee Clerk*

**REPORT OF STANDING COMMITTEE**

**HB 1154, as engrossed: Judiciary Committee (Sen. Larson, Chairman) recommends DO NOT PASS (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).** Engrossed HB 1154 was placed on the Fourteenth order on the calendar. This bill does not affect workforce development.

**TESTIMONY**

**HB 1154**

Dr. Jake Schmitz, DC, MS  
4233 44th Avenue South, Fargo, ND 58104  
701-770-0185  
[drjakedc4u@gmail.com](mailto:drjakedc4u@gmail.com)

- Licensed Chiropractor in ND (and previously NC)
- Owner of Freedom Chiropractic Health Center in Fargo
- Founder and president of the Association of Wellness Chiropractors
- Business co-owner of several entities in ND involving land, minerals, water, and real estate
- Associates degree at Williston State College, BS in Chemistry at Dickinson State University, Doctor of Chiropractic at Northwestern Health Sciences University, Master's degree in Human Nutrition and Functional Medicine at University of Western States, and finishing Doctorate in Clinical Nutrition at University of Western States
- Married with 4 children

Chairman Klemin, Representatives of the House Judiciary Committee,

Hello and thank you for the opportunity to speak to you today. My name is Dr. Jake Schmitz, and I am here today representing myself as a licensed chiropractor in the state of North Dakota (ND). I have been a practicing chiropractor in Fargo for just over 11 years.

I support the proposed HB 1154. The reasoning behind this bill is twofold. First, this bill prevents administrative agencies from moving for summary judgment in administrative cases without license holders' written approval that there are no material facts in dispute. Second, this bill balances the unequal power distribution agencies receive when they act in their quasi-judicial capacity. Currently in ND, licensees have less rights to defend themselves than criminals do. That is why I am here today.

I will cover each of these issues and why this bill is vital for due process and fairness within the confines of NDCC 28-32. The unfortunate reality of administrative cases is the deference argument agencies use with administrative law judges. If the "experts" on the board dictate there are no facts in dispute, that is typically the end of it. As it stands currently, administrative law judges grant deference to agencies, regardless of whether the license holder disagrees about the facts.

In the administrative hearing process, administrative agencies have a disproportionate amount of power over the license holder in question. The mission statement of the Office of Administrative Hearings is "*To resolve administrative disputes through **holding fair and impartial hearings** [emphasis added] and issuing reasoned and timely decisions.*" The mission is being subverted by state agencies through the motion for summary judgment.

This has impacted me personally (financially, emotionally, professionally). In my case, I argued the facts were in dispute, and the administrative law judge disregarded my arguments and instead ruled in favor of the board, granting summary judgment. I had a weeklong hearing scheduled, but when the administrative law judge granted summary judgment, my hearing was canceled. I was not given a hearing, and 2 years later the Supreme Court ruled this was inappropriate (the ruling was reversed and remanded).

Below is the highlight of Schmitz v. State Board of Chiropractic Examiners 2022 ND 113 from the Supreme Court website:

***“A formal, evidentiary hearing is required whenever an administrative agency acts in a quasi-judicial capacity unless the parties either agree otherwise or there is no dispute of a material fact. A summary judgment is inappropriate if a fact-finder must draw inferences and make findings on disputed facts to support its decision. Even when facts are undisputed, a summary judgment may not be granted if reasonable differences of opinion exist as to the inferences to be drawn from those facts.”***

I want to explain the difference very briefly between administrative civil proceedings and ordinary civil proceedings, because they are, in fact, different; especially where summary judgment is concerned. District Court judges have more leeway in examining whether facts are genuinely in dispute. Administrative law judges cannot do that, as referenced by the Supreme Court. The moment an administrative law judge draws inferences from the facts, summary judgment is no longer applicable. HB 1154 prevents administrative law judges from having to decide this issue. There will no longer be any dispute about disputed facts because both parties will have to agree, one way or the other.

This bill is very simple. It requires a hearing for all licensing complaints, unless both parties agree in writing to forgo a hearing. This is vital for due process to remain intact. In my own case, the Supreme Court ruled that a hearing is required for licensing issues.

HB 1154 fixes the problem the Supreme Court found. This also prevents another license holder from having to go through what I went through. I spent over \$125,000.00 in pursuit of an opportunity for a hearing (due process). This bill would keep that from ever happening to another licensee.

Proposed Amendment:

The following is a proposal to make this bill even more robust. Line 10, “subject to agency approval” should instead say “subject to approval of the parties”. In the spirit of the bill, this change gives both parties equal footing in the administrative hearing process.

Please vote a DO PASS for HB 1154. The right of license holders to defend their livelihood, their businesses, and their reputations depends on it.

Thank you for your time. I greatly appreciate the opportunity to testify in front of you today. I will welcome any questions you may have.

Maximum blessings,

A handwritten signature in black ink, appearing to read 'Dr. Jake Schmitz'. The signature is stylized and cursive, with a large 'D' and 'S'.

Dr. Jake Schmitz



**Testimony**  
**House Bill No. 1154**  
**House Judiciary Committee**  
**Representative Lawrence Klemin, Chairman**  
January 9, 2023

Chairman Klemin, and members of the House Judiciary Committee, I am Jonathan Alm, an attorney with the Department of Health and Human Services (Department). I appear before you in opposition of House Bill 1154. I apologize for not being personally present as I am attending another hearing.

The Department processed 627 requests for fair hearings between July 1, 2020, and June 30, 2022. The use of summary judgment by any party is part of the fair hearing process. House Bill 1154 removes the Department’s ability to properly use the summary judgment process unless an agreement is obtained in writing. While House Bill 1154 allows for the use of a summary judgment when all parties agree in writing, the Department believes a very low number of appellants, if any, would agree in writing that there are no genuine issues of material fact.

In 2021 and 2022, the Department used the summary judgment process, through the Office of Attorney General, only 10 times. Without the use of the summary judgment process, the Department will need additional appropriation to proceed to a hearing as it must pay the Office of Attorney General to prepare the appeal and attend the hearing, the Office of Administrative Hearings to review and hold the hearing, and witness and guardian ad litem fees to attend the hearing. The Department needs an additional \$100,000 for the biennium for the anticipated additional expenses due to the limitations imposed by this Bill.

This concludes my testimony. Thank you.



Drew H. Wrigley  
ATTORNEY GENERAL

STATE OF NORTH DAKOTA  
OFFICE OF ATTORNEY GENERAL  
www.attorneygeneral.nd.gov  
(701) 328-2210

HOUSE JUDICIARY COMMITTEE  
MONDAY, JANUARY 9, 2023

TESTIMONY OF JAMES E. NICOLAI  
OFFICE OF ATTORNEY GENERAL  
HOUSE BILL NO. 1154

Mr. Chairman, members of the Committee.

I am Jim Nicolai, Interim Solicitor General, and I appear on behalf of the Attorney General to provide testimony in opposition to this bill and to recommend a **DO NOT PASS** for House Bill 1154.

House Bill 1154 will limit the ability to use the important mechanism of summary judgment in administrative proceedings before the Office of Administrative Hearings (OAH) unless all parties “agree in writing there are no genuine issues of material fact.”

As background, the summary judgment proceedings before OAH under Chapter 28-32 of the North Dakota Century Code mirror the summary judgment process available in both state and federal courts throughout the United States. Our State Supreme Court has described summary judgment numerous times as “a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law.” Numerous federal courts have similarly described summary judgment as



designed to “secure the just, speedy and inexpensive determination of every action.” Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting F.R. Civ. P. 1)). It is a favored process designed to be considered in every action. Id.

Contrary to what is proposed in House Bill 1154, use of the summary judgment process in state and federal courts does not require the parties to agree there are no genuine issues of material fact. In my experience, such agreement is rare even though litigation frequently involves no genuine factual disputes or depends solely on issues of law. By conditioning the availability of summary judgment on the parties’ consent, this bill will significantly interfere with the prompt resolution of litigation, unnecessarily lengthen the litigation process, require evidentiary hearings even in situations where there are no issues of fact to resolve, and increase the expense of litigation not only for the Attorney General’s office but also for every state agency that utilizes the OAH administrative process. In my opinion, it also may trigger a need to appoint more administrative law judges (ALJs) to handle the increased number and length of hearings.

Parties in litigation rarely agree on the matters in dispute, even when represented by competent and reasonable counsel. The ability to reach an agreement in writing is even more problematic with self-represented individuals or in situations where an attorney is unwilling to consent to an agreement. House Bill 1154 will create a legal advantage for unreasonable or intransigent parties and attorneys. It also will increase the costs of administrative hearings and interfere with an otherwise appropriate and prompt resolution of an administrative

proceeding. For all these reasons, the Attorney General opposes this bill and recommends a **DO NOT PASS** on House Bill 1154.

Thank you for your time.

23.0223.01001  
Title.

Prepared by the Legislative Council staff for  
Representative D. Ruby  
January 9, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1154

Page 1, line 1, after "28-32-22" insert "and subsection 3 of section 54-57-03"

Page 1, line 2, after "proceeding" insert "and hearings before an administrative law judge"

Page 1, after line 15, insert:

**"SECTION 2. AMENDMENT.** Subsection 3 of section 54-57-03 of the North Dakota Century Code is amended and reenacted as follows:

3. ~~Informal~~Subject to section 28-32-22, ~~informal~~ disposition of an administrative proceeding or adjudicative proceeding may be made by an agency at any time before or after the designation of an administrative law judge from the office of administrative hearings."

Renumber accordingly

23.0223.01001  
Title.

Prepared by the Legislative Council staff for  
Representative D. Ruby  
January 9, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1154

Page 1, line 1, after "28-32-22" insert "and subsection 3 of section 54-57-03"

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Renumber accordingly

23.0223.01003  
Title.

Prepared by the Legislative Council staff for  
Representative D. Ruby  
January 11, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1154

Page 1, line 12, remove "An administrative agency rule that allows the granting of summary judgment must"

Page 1, line 13, remove "require all parties agree in writing there are no genuine issue of material fact."

Page 1, line 15, after the period insert "If there is a written response to a motion for summary judgment, summary judgment is not available to the parties in an adjudicative proceeding."

Renumber accordingly

**Testimony**  
**Engrossed House Bill No. 1154**  
**Senate Judiciary Committee**  
**Senator Larson, Chairman**  
March 13, 2023

Chairman Larson, and members of the Senate Judiciary Committee, I am Jonathan Alm, an attorney with the Department of Health and Human Services (Department). I appear before you in opposition of Engrossed House Bill 1154.

The Department processed 627 requests for fair hearings between July 1, 2020, and June 30, 2022. In 2021 and 2022, the Department used the summary judgment process, through the Office of Attorney General, only 10 times. The use of summary judgment by any party is part of the fair hearing process. Engrossed House Bill 1154 removes a party's ability to properly use the summary judgment process if there is any written response opposing the motion for summary judgment. While Engrossed House Bill 1154 allows for the use of a summary judgment when there is no written opposition, parties will simply oppose a motion for summary judgment even if they have no reasonable or legal basis to do so. Engrossed House Bill 1154 only requires a written opposition, such as "I oppose".

With the limitations on the use of the summary judgment process, if either party provides any written opposition, the Department will need additional appropriation to proceed to a hearing as it must pay the Office of Attorney General to prepare the appeal and attend the hearing, the Office of Administrative Hearings to review and hold the hearing, and witness and guardian ad litem fees to attend the hearing. The Department needs an additional \$55,000 for the biennium for the anticipated additional expenses due to the limitations imposed by this Bill.

This concludes my testimony. Thank you.

Dr. Jake Schmitz, DC, MS  
4233 44th Avenue South, Fargo, ND 58104  
701-770-0185  
[drjakedc4u@gmail.com](mailto:drjakedc4u@gmail.com)

Madam Chair Larson, Senators of the Senate Judiciary Committee,

Hello and thank you for the opportunity to speak to you today. My name is Dr. Jake Schmitz, and I am testifying in support of HB 1154. A fundamental right of license holders is the right to a hearing to defend against allegations or disputes. The hearing is done through the Office of Administrative Hearings. The mission statement of the Office of Administrative Hearings is *"To resolve administrative disputes through **holding fair and impartial hearings** [emphasis added] and issuing reasoned and timely decisions."* The mission is being subverted by state agencies through the motion for summary judgment.

In an adjudicative proceeding, either party can move for summary judgment. Summary judgment can be found in ND Rules of Civil Procedure Rule 56(c)(3), and it reads, *"**The judgment sought shall be rendered if the pleadings, the discovery and disclosure materials on file, and any declarations show that there is no genuine issue as to any material fact...**"* Plainly speaking, summary judgment is a way to expedite the proceeding by skipping the hearing and going straight to a judgment by the judge. It isn't appropriate, however, for administrative proceedings, unless the parties agree to the contrary. The Supreme Court was clear on this point.

Below is the highlight of Schmitz v. State Board of Chiropractic Examiners 2022 ND 113 from the Supreme Court website:

***"A formal, evidentiary hearing is required whenever an administrative agency acts in a quasi-judicial capacity unless the parties either agree otherwise or there is no dispute of a material fact. A summary judgment is inappropriate if a fact-finder must draw inferences and make findings on disputed facts to support its decision. Even when facts are undisputed, a summary judgment may not be granted if reasonable differences of opinion exist as to the inferences to be drawn from those facts."***

In all cases, a hearing is expected and should be guaranteed. This isn't happening. Tim Dawson, director of the OAH, said in his House testimony for this bill, **that agencies prevail 75-85% of the time in front of an ALJ.** The next question would be, how often do agencies move for summary judgment? Well, Jim Nicolai, the assistant solicitor general of the attorney general's office, in his testimony in the House in opposition to this bill said, **"The summary judgment process is utilized in almost every case that I've been involved with in the actual state court system."** Why wouldn't an agency simply move for summary judgment every time? They have no incentive not to.

The unfortunate reality of administrative cases is the deference argument agencies use with administrative law judges. If the "experts" on the board dictate there are no facts in dispute, that is typically the end of it. As it stands currently, administrative law judges grant deference to agencies, regardless of whether the license holder disagrees about the facts. I am grateful for this committee for passing SB 2296, which if it passes the House, will go a long way towards fixing the deference problem.

However, HB 1154 is still needed to guarantee due process is upheld through a hearing. This is important to me, and it has compelled me to be an advocate for others due to how much this issue has impacted me personally. In my case, I argued the facts were in dispute, and the administrative law judge

ruled in favor of the board, granting summary judgment to the chiropractic board. I had a weeklong hearing scheduled, but when the administrative law judge granted summary judgment, my hearing was canceled. I was not given a hearing, and 2 years, and \$125,000 later the Supreme Court ruled this was inappropriate (the ruling was reversed and remanded).

A formal, evidentiary hearing is required; not briefs about summary judgment motions, not depositions, not pre-hearing conferences. Without having your "day in court" you are being deprived of due process. A hearing is when you can call experts to testify, present your evidence and get the opportunity to refute the opposition's evidence, and create your legal arguments. This happens in a hearing, not in briefs. The Supreme Court agrees with this position, which is the impetus for HB 1154. Everyone should be given the opportunity to present their evidence and defend themselves from any agency action in front of a judge. That isn't currently the case, as evidenced by both the assistant solicitor general and OAH director's testimony, and my personal experience.

This bill, as amended and adopted by the House, still allows for summary judgment motions, but prevents the granting of summary judgment if either party opposes it in writing. This bill is a simple remedy to prevent misuse of summary judgment motions by state agencies, and in line with the opinion of the Supreme Court from my case.

HB 1154 prevents another license holder from having to go through what I went through. I spent over \$125,000.00 in pursuit of an opportunity for a hearing. I shouldn't have been required to appeal all the way to the Supreme Court for the chance to have a hearing. This bill should keep that from ever happening to another licensee.

Please vote a DO PASS for HB 1154. The right of license holders to defend their livelihood, their businesses, and their reputations depend on it.

Thank you for your time. I greatly appreciate the opportunity to testify in front of you today. I will welcome any questions you may have.

Maximum blessings,

A handwritten signature in black ink, appearing to read "Dr. Jake Schnitz". The signature is stylized and cursive, with the first letters of each word being significantly larger and more prominent.

Dr. Jake Schnitz



SENATE JUDICIARY COMMITTEE  
MONDAY, MARCH 13, 2023

TESTIMONY OF ALLYSON M. HICKS  
OFFICE OF ATTORNEY GENERAL  
HOUSE BILL NO. 1154

Madam Chair Larson, members of the Committee.

I am Allyson M. Hicks, Assistant Attorney General, General Counsel Division of the Office of Attorney General, and I appear on behalf of the Attorney General to oppose House Bill 1154.

Administrative agencies utilize chapter 28-32 to administer hearings for a variety of purposes. Whether it be licensure or approval of a request, denial of benefits, or addition of a name to a registry, these hearings are held for a variety of reasons throughout state government. Chapter 28-32 was drafted with a degree of flexibility so that, much like the judiciary, it can meet the needs of agencies and citizens of North Dakota. Generally, an administrative hearing begins with a request from a member of the public to an administrative agency. The agency will investigate the matter and, if warranted, try to resolve the matter informally through either settlement agreements or dismissal. A matter will reach a 28-32 hearing either because an action of the agency is appealed and a hearing is requested by the member of the public, or because the parties are unable to resolve an issue and a hearing is requested by the agency. At that point, a Complaint or appeal is filed with the Office of Administrative Hearings (OAH) and generally the administrative rules promulgated by OAH guide the proceeding.

OAH's administrative rules very closely mirror the rules adopted by the court as it relates to both procedure and evidence. If one of the parties is appearing without an attorney, OAH can waive the rules of evidence and proceed in a more informal matter to accommodate the parties. When both parties are represented by attorneys, however, the rules of procedure very closely parallel those rules adopted by the Court. After a complaint is filed, the other party responds to those allegations by filing an answer. At that point, the parties enter what is called the discovery phase of the proceedings. Each party is able to use tools adopted by OAH to gather information, documents, and evidence to support their position. Again, the discovery process adopted by OAH closely mirrors those rules adopted by the Court. Once the discovery process is completed, the parties will begin the dispositive phase of the lawsuit.

A lawsuit can be disposed of in many ways. A party can move to dismiss the lawsuit if certain standards are met. The parties can continually negotiate to resolve the lawsuit by settlement or other consent decree. Lastly, after the parties have done all of the discovery and have a good grasp on what happened, each party can file what's called a "summary judgment motion." This motion tells the administrative law judge (ALJ) that the facts are clear; based on the evidence, the facts that matter to the resolution of the lawsuit cannot be disputed. So, if the facts are clearly established and only questions about the law remain, the parties can avoid a trial and ask a judge to just make a decision about the laws. That's the crux of what a summary judgment motion is—it is a procedural tool to move matters

along when we don't need a trial to determine the facts; we have all the evidence we need.

If an ALJ grants either party's motion for summary judgment, a recommended or final order is issued. If a recommended order is issued, that goes to the agency to be finalized. Any final order is appealable by either party.

Summary judgment is not appropriate in all cases, but it is appropriate in some. When it is appropriate, it can save both parties time, money, and the unnecessary burden of going through a trial. For example, when a regulatory board takes disciplinary action against a licensee because they were convicted of a crime, the only fact that matters is likely whether or not that licensee was convicted of a crime. That is a fact that is easily determined through discovery. Once that fact is determined, there's no need for a trial; summary judgment is appropriate. Courts have upheld the administrative use of summary judgment in cases such as these where the standard is met. See Johnson vs. N. D. Board of Accountancy, Case No. 08-2020-CV-00939.

If summary judgment is inappropriate, and a hearing is needed to resolve issues of fact, the ALJ is the person that the legislature has entrusted to have the legal understanding to make that call. Because of that, it is unnecessary to prohibit the use of a longstanding legal tool in statute. There are checks and balances already in place to guard against misuse.

I understand that this bill was drafted in response to a specific circumstance. Appeals happen in administrative proceedings. If the case had gone to a regular

hearing, it still likely would've been appealed. Those costs wouldn't have been avoided. In fact, arguably it would've just taken longer to have the issue resolved. This bill is a kneejerk reaction to a singular case out of hundreds of cases each year that utilize summary judgment and appeals without issue.

Summary judgment is a vital resource for parties to utilize in administrative proceedings, and the ALJ is the appropriate body to determine whether or not it is appropriate in certain circumstances. There is no reason for the legislature to remove a necessary procedural tool from both parties during administrative hearings because of one single case. For that reason, the Attorney General recommends a **DO NOT PASS** on House Bill 1154.

Thank you for your time, and I would stand for any questions.