

## **ADMINISTRATIVE RULES COMMITTEE**

The Administrative Rules Committee is a statutory committee deriving its authority from North Dakota Century Code (NDCC) Sections 54-35-02.5, 54-35-02.6, and 28-32-03.3. The committee is required to review administrative agency rules to determine whether:

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

The committee may recommend rule changes to an agency, formally object to a rule, or recommend to the Legislative Council the amendment or repeal of the statutory authority for the rule. The committee also can find a rule void or agree with an agency to amend an administrative rule to address committee concerns, without requiring the agency to begin a new rulemaking proceeding.

Fee schedules for medical and hospital services proposed for adoption as administrative rules by the Workers Compensation Bureau must be approved by the committee under NDCC Section 65-02-08.

The Legislative Council delegated to the committee its authority under NDCC Section 28-32-02 to distribute administrative agency notices of proposed rulemaking and to approve extensions of time for administrative agencies to adopt rules and its responsibility under NDCC Section 28-32-15 to receive notice of appeal of an administrative agency's rulemaking action.

Committee members were Representatives LeRoy G. Bernstein (Chairman), Charles Axtman, Chris Christopherson, William R. Devlin, Scot Kelsh, Keith Kempenich, Kim Koppelman, Stacey L. Mickelson, Jon O. Nelson, Darrell D. Nottestad, Bob Skarphol, and Rich Wardner and Senators John M. Andrist, Bob Stenehjelm, and Steven W. Tomac. Representative Tom D. Freier was a member of the committee until his resignation from the Legislative Assembly on April 6, 1998. Representative Bill Oban was a member of the committee until his death on July 10, 1998.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 1998. The Council accepted the report for submission to the 56th Legislative Assembly.

## **ADMINISTRATIVE AGENCY RULES REVIEW**

Administrative agencies are those state agencies authorized to adopt rules under the Administrative Agencies Practice Act (NDCC Chapter 28-32). By statute, a rule is an agency's statement of general applicability that implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency. Properly adopted rules have the force and effect of law. A copy of each rule adopted by an administrative agency must be filed with the office of the Legislative Council for publication in the North Dakota Administrative Code (NDAC).

Under NDCC Section 54-35-02.6, it is the standing duty of the committee to review administrative rules adopted under NDCC Chapter 28-32. This continues the rules review process initiated in 1979.

For rules scheduled for review, each adopting agency is requested to provide the committee with information on:

1. Whether the rules resulted from statutory changes made by the most recent regular session of the Legislative Assembly.
2. Whether the rules are related to any federal statute or regulation.
3. The rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.
4. Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. Each agency is asked to describe the concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint and to summarize the comments of any person who offered comments at the public hearings on these rules.
5. Whether a written request for a regulatory analysis was filed by the Governor or an agency, whether the rule is expected to have an impact on the regulated community in excess of \$50,000, and whether a regulatory analysis was issued.
6. The approximate cost of giving public notice and holding any hearing on the rules and the approximate cost of staff time used in developing the rules.
7. The subject matter of the rules and the reasons for adopting the rules.
8. Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-02.5.

During committee review of the rules, agency testimony is required and any interested party may submit oral or written comments.

## Current Rulemaking Statistics

The committee reviewed 2,789 rule sections that were changed from November 1996 through October 1998. Table A shows the number of rules amended, created, superseded, repealed, reserved, or redesignated for each administrative agency that appeared before the committee.

For many years, committee members have expressed concern about the volume of administrative rulemaking. The trend of increased rulemaking activity appears to have reversed since 1995.

Although rules differ in length and complexity, comparison of the number of administrative rules sections affected during biennial periods is one method of comparing the volume of administrative rules reviewed by the committee. The following table shows the number of NDAC sections amended, repealed, created, superseded, reserved, or redesignated during each designated time period:

Time Period	Number of Sections
July 1979 - October 1980	1,440
November 1980 - August 1982	916
September 1982 - November 1984	1,856
December 1984 - October 1986	1,280
November 1986 - October 1988	2,681
November 1988 - October 1990	2,325
November 1990 - October 1992	3,079
November 1992 - October 1994	3,235
November 1994 - October 1996	2,762
November 1996 - October 1998	2,789

For committee review of rules, the Legislative Council staff prepares an administrative rules supplement containing all rules changes submitted since the previous committee meeting. The supplement is prepared in a style similar to bill drafts, e.g., changes are indicated by overstrike and underscore. The administrative rules supplements for the period November 1996 through October 1998 consisted of 4,123 pages of rules changes. This compares with 3,809 of rules changes during the November 1992-October 1994 biennial period and 3,140 pages of rules changes considered by the committee during the November 1994-October 1996 biennial period.

## Extending Time to Adopt Rules

Many rules changes are mandated by changes to federal laws or rules. Most rules changes result from recent statutory changes made by the Legislative Assembly. Any rule change made to implement a statutory change must be adopted within nine months after the effective date of the statutory change unless an extension is granted. The committee considered and granted requests from three agencies for extensions of time to adopt administrative rules. An extension of time was approved for the Secretary of State to adopt rules to govern methods for signing, subscribing, or verifying documents filed by electronic means. Because of the scope and importance of these rules, additional time was required to allow involvement of affected state agencies and the public. An extension was approved to accommodate a change of personnel in the board office for the Board of Animal Health to adopt rules relative to primates, wolves, and wolf hybrids under 1997 legislation. An extension was approved for the Tax Commissioner to adopt rules implementing statutory revision in 1997 to financial institutions tax laws. The extension was requested due to the complexity of implementing the new financial institutions tax and developing appropriate tax forms and instructions.

## Objecting to Rules

The committee may file an objection to any portion of a rule the committee determines to be unreasonable, arbitrary, capricious, or beyond the authority delegated to the adopting agency. The objection must contain a concise statement of the committee's reasons for its action. Within 14 days after the filing, the adopting agency is to respond to the objection. After receiving the response, the committee may withdraw or modify its objection. An objection shifts the burden of persuasion to the agency in any judicial action regarding the rule to establish that the rule objected to is within the statutory authority delegated to the agency.

If the agency fails to meet this burden, the court must declare the portion of the rule objected to invalid and judgment against the agency must include court costs.

### **Tax Commissioner**

The Tax Commissioner requested the committee to remove an objection to NDAC Section 81-03-09-38 filed on November 4, 1992. The rule in question relates to apportionment of income of broadcasters for income tax purposes and representatives of broadcasters had expressed concern to the Administrative Rules Committee in 1992 that the rule would impact determination of income tax liability for broadcasters. Since the filing of the objection, the rule in question has been amended and during the hearings on the amendment to the rule, no comments were received from representatives of broadcasters. The committee approved a motion to remove the objection to the rule.

### **Voiding of Rules**

Under NDCC Section 28-32-03.3, the Administrative Rules Committee may void all or part of a rule within 90 days after the date of the Administrative Code supplement in which the rule change appears or at the first committee meeting after a regular legislative session, for rules appearing in the Administrative Code supplement from November 1 through May 1 encompassing a regular legislative session. The committee may carry over, for one additional meeting, consideration of voiding administrative rules. This allows the committee to act more deliberately in rules decisions and allows agencies additional time to work with affected groups to develop mutually satisfactory rules. The committee may void all or part of a rule if the committee makes the specific finding that with regard to the rule there is:

1. An absence of statutory authority;
2. An emergency relating to public health, safety, or welfare;
3. A failure to comply with express legislative intent or to substantially meet the procedural requirements of NDCC Chapter 28-32 for adoption of the rule;
4. A conflict with state law;
5. Arbitrariness and capriciousness; or
6. A failure to make a written record of its consideration of written and oral submissions respecting the rule under NDCC Section 28-32-02(3).

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

### **Game and Fish Department**

The Game and Fish Department adopted rules to govern activities and licensing of hunting and fishing guides and outfitters. Committee members recognized that several issues covered in the rules had been the subject of proposed 1995 legislation that failed. The committee approved a motion to void the rules on licensing guides and outfitters. Committee members were concerned that the rules as adopted required a guide or outfitter to maintain proof of general liability insurance coverage and certification in adult cardiopulmonary resuscitation and that a guide or outfitter must enter a written contract with each client. These subjects were the topic of the failed legislation, created policy that should be the subject of legislation for consideration by the Legislative Assembly, and appeared to be a fence-building effort of the Guides and Outfitters Association. Game and Fish Department representatives countered that they were advised by individual legislators during the 1995 legislative session that these issues should be addressed through administrative rules and that the department tried to accommodate that suggestion in working on these rules amendments through 1995 and 1996. Department representatives agreed with the Administrative Rules Committee to further amend the rules to eliminate requirements for proof of liability insurance coverage, certification in adult cardiopulmonary resuscitation, and written contracts with clients. Upon agreement with the department on the additional amendments, the committee withdrew its motion to void the rules.

### **Public Service Commission**

The Public Service Commission adopted a rule at the request of telecommunications industry representatives to give local telecommunications service providers the right to deny a customer access to long-distance services if the customer is delinquent in payment for long-distance services. Committee members were concerned that customers may have legitimate reasons for nonpayment of billed long-distance call charges and that the rule would place the Public Service Commission in the position of a bill collector for long-distance service providers. A Public Service Commission representative said the rule was adopted by the commission on a trial basis. The committee approved a motion to void the rule change, and the commission did not seek review

so the rule change became void.

### **Department of Health**

The State Department of Health adopted rules to govern the state trauma system. Committee members had numerous questions about operation of the trauma system and its effect on facilities in the state, particularly in small communities. The committee approved a motion to void the trauma system rules. At the subsequent meeting, the committee received a thorough briefing from representatives of the department, medical facilities, the North Dakota Health Care Association, and ambulance services. The committee withdrew its motion to void the rules and agreed with the department on a minor amendment to the rules to resolve concerns about interpretation of terminology relating to activation of trauma codes for major trauma patients.

### **Industrial Commission**

The Industrial Commission adopted rules relating to oil production report filing and seismic or geographical exploration requirements. Among the rules was a requirement that production report signatures must be witnessed. House Bill No. 1194 (1997) eliminated the requirement of notarizing signatures on production reports and had not imposed a requirement that signatures must be witnessed. The committee carried consideration of the rule over for a subsequent meeting to receive further information. A motion to void the rule failed.

### **Department of Human Services**

The Department of Human Services adopted extensive rules governing licensure of child care facilities. A number of individuals affected by the rules disagreed with several aspects of the rules. The committee approved a motion to carry over consideration of the rules to a subsequent meeting and requested that the department work with interested parties to try to reach agreement on issues on which misunderstanding or disagreement existed. The department undertook a mediation process with regard to 39 issues identified as areas for discussion. The mediation process resolved 27 issues, and the department recommended rules amendments to accomplish changes necessary to reflect those agreements. The committee approved a motion to agree with the department on the proposed changes to the rules. Another 10 issues were determined to deal with areas outside the coverage of the pending rules. On the remaining two issues considered in the mediation process, no agreement was reached with regard to requirements for provisional licensing and fire safety. Child care providers withdrew their opposition to the provisional licensing rule and the committee took no action regarding the fire safety requirement rule, so both rules were left as adopted by the department.

### **Committee Considerations**

Committee members expressed appreciation for 1995 legislative changes to the rulemaking process which gave the committee authority to void rules and allowed rules amendments by agreement of the adopting agency. Committee members also expressed appreciation for the cooperative attitude of agencies affected by this authority. Committee members indicated this addition to the rulemaking process makes the process more responsive to public input, improves the final product of the process, and greatly reduces occasions when legislative intervention would be required to settle differences of opinion.

Several committee members raised concerns during discussions of the administrative rules process and statutes. Concern was expressed that the Administrative Code is not being reviewed and kept current by administrative agencies. Concern was expressed that when a problem is pointed out with existing rules, the Administrative Rules Committee lacks authority to address the problem. The committee's authority applies to only rules being reviewed upon creation or amendment and not to rules that have been in existence for an extended period. Concern was expressed that rulemaking authority is too broad and that rules are used to create policy in areas in which legislative consideration should apply. It was suggested that review is required of statutory authority for rulemaking and that the Legislative Assembly must carefully define rulemaking authority in the future to limit agencies to the appropriate use of rules. Several discussions were held about how to better inform the public about pending rulemaking activity.

### **Department of Public Instruction**

The committee requested several briefings from the Department of Public Instruction regarding rulemaking plans of the department. Under 1997 legislation, the department was made an administrative agency for all purposes under the Administrative Agencies Practice Act (NDCC Chapter 28-32). This change becomes effective November 1999, and requires the department to replace all of its informal rules with formally adopted administrative rules to be published in the North Dakota Administrative Code. The committee expressed its concern to the department that this is an important process that will take time and requires substantial opportunities for public input. Department representatives briefed the committee on four occasions about proposed rulemaking plans and expressed confidence that the department can complete rulemaking activity before November 1999.

## Recommendations

The committee recommends [House Bill No. 1023](#) to provide that administrative rules will be effective only until August 1 after the next regular legislative session following the effective date of the rule unless they are designated by the Administrative Rules Committee as procedural or interpretive rules. The bill is intended to force issues of policy to be removed from administrative rules and brought to the consideration of the Legislative Assembly. The committee considered extending sunset to all existing rules but decided against it because of the burden for review of rules which would have been placed on agencies and the committee. Under the recommended bill the only rules created or amended after July 31, 1999, which will remain in effect indefinitely will be rules the committee has designated as procedural or interpretive.

The committee recommends [House Bill No. 1024](#) to allow the Administrative Rules Committee to call up administrative rules for review. Rules called up for review would be subject to the authority of the Administrative Rules Committee to file an objection or to void the rule. Calling a rule up for review requires 30 days' written notice to the adopting agency and a description of concerns with the rule to which the agency is to respond. The committee believes authority to review existing rules is important and will be used only when problems are pointed out, which could be initiated by the adopting agency if minor changes or corrections are needed that do not merit the time and expense of a full rulemaking proceeding. The bill also repeals a provision of law allowing interested parties to file a petition with an agency for reconsideration of a rule. The committee found that the law gives an agency no authority to act in response to a petition for reconsideration, other than the statutory right of agencies to begin a new rulemaking proceeding.

The committee recommends [House Bill No. 1025](#) to provide that an agency may not adopt rules from federal guidelines which are not relevant to state regulatory programs and to require an agency to repeal or amend any existing rule adopted from federal guidelines which is not relevant to state regulatory programs. This bill is an expansion of current law providing that environmental rules are not to incorporate federal guidelines not relevant to North Dakota.

The committee recommends [House Bill No. 1026](#) to provide that an agency may adopt an administrative rule only when the rule falls within an area in which the agency has been specifically required or authorized to adopt rules by state or federal law or federal rules. The bill also requires the Administrative Rules Committee to review the statutory rulemaking authority of each administrative agency to seek to limit administrative rulemaking to areas in which specific requirement or authorization of rulemaking exists. The bill is intended to initiate refining of the distinction between rules and statutes and provide guidance for the Legislative Assembly and administrative agencies on which matters should be governed by statute or rule.

The committee recommends [Senate Bill No. 2027](#) to require administrative rulemaking notices to be published in each official county newspaper rather than in each daily newspaper. The bill requires publication of a more abbreviated notice than present law but requires a headline showing the general topic, a statement that rules on the topic will be considered, a telephone number to obtain a copy of the proposed rules, and the time and place of the public hearing. Because the bill requires publication in 52 county newspapers rather than nine daily newspapers, it was estimated that notices would be available to 47 percent more newspaper subscribers but the average cost of newspaper publication of notice would increase from approximately \$800 to approximately \$2,200.

## TABLE A

STATISTICAL SUMMARY OF RULEMAKING						
November 1996 Through October 1998 Supplements 209 Through 232						
Agency	Amend	Create	Supersede	Repeal	Special	Reserved
Board of Accountancy	9	1				
Office of Management and Budget	68	36	13	14		
Aeronautics Commission	1					
Commissioner of Agriculture	4					
Department of Banking and Financial Institutions	8	2		1		
Board of Barber Examiners		1				
Credit Review Board	5			1		
Board of Dental Examiners	7					

State Board of Funeral Service	28	25		8		
Game and Fish Department	4	1		4		
Board of Cosmetology	32	1	2			
State Department of Health	420	142		12	24	64
Department of Transportation		1				
Industrial Commission	7	10		2		
Commissioner of Insurance	16	49	2	60	3	
Commissioner of Labor	8					
Board of Animal Health	14	5				
Board of Medical Examiners	3					
Milk Marketing Board	19	8			1	
Board of Nursing	45	73		72		
Board of Optometry	1	4				
State Personnel Board	3	3		3		
Pesticide Control Board	4	4	1			
Board of Pharmacy	2	7		1		
Board of Podiatric Medicine	3					
Committee on Protection and Advocacy	4	4				
Education Standards and Practices Board	18					
Public Service Commission	59	49		1		
Retirement Board	25	4		7		
Secretary of State	3	44		15		3
Securities Commissioner	4			3		
Seed Commission	12					
Department of Human Services	311	187		53	35	22
Board of Social Work Examiners	8	7		22		
Tax Commissioner	17	4		8		
Board of Trustees of the Teachers' Fund for Retirement	18			2		
Water Commission	9	13		60		
Workers Compensation Bureau	66	10		10		
Private Investigative and Security Board	13					
Board of Counselor Examiners	5	3		1		
Office of Administrative Hearings	6	2				1
State Gaming Commission		112		147		
Real Estate Appraiser Qualifications and Ethics Board	9			1		
Sections affected	1,298	812	18	508	63	90
Grand total all sections	2,789					