

JUDICIAL PROCEDURE, CIVIL

CHAPTER 272

SENATE BILL NO. 2217

(Senator W. Stenehjem)

MEDICAL MALPRACTICE EXPERT WITNESSES

AN ACT to amend and reenact section 28-01-46 of the North Dakota Century Code, relating to expert witnesses in medical malpractice actions.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 28-01-46 of the North Dakota Century Code is amended and reenacted as follows:

28-01-46. Expert opinion required to maintain an action based upon alleged medical negligence except in obvious cases. Any action for injury or death against a physician, nurse, or hospital licensed by this state based upon professional negligence ~~is dismissable~~ must be dismissed without prejudice on motion unless the claimant has obtained an admissible expert opinion to support the allegation of professional negligence within three months of the commencement of the action or at such later date as set by the court for good cause shown by the plaintiff. The expert's affidavit must identify the name and business address of the expert, indicate the expert's field of expertise, and contain a brief summary of the basis for the expert's opinion. This section does not apply to alleged lack of informed consent, unintentional failure to remove a foreign substance from within the body of a patient, or performance of a medical procedure upon the wrong patient, organ, limb, or other part of the patient's body, or other obvious occurrence.

Approved March 25, 1997

Filed March 26, 1997

CHAPTER 273

HOUSE BILL NO. 1351

(Representative Svedjan)

(Senator Traynor)

HEALTH CARE PROVIDER PRIVILEGE WAIVER

AN ACT to provide for a waiver of privilege for health care providers and informal discussions.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Waiver of privilege for health care providers and informal discussion. A party who commences an action for malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider, as defined in section 32-42-01, or a health care facility, on the person's own behalf or in a representative capacity, waives in that action any privilege existing under rule 503 of the North Dakota Rules of Evidence, as to any medical records, opinions, or other information in the possession of any other health care provider who has examined or cared for the party or other person whose health or medical condition has been placed in controversy in the action. The waiver must permit all defendants to the action, and their attorneys or authorized representatives, to examine the medical records, opinions, or other information and informally participate in a discussion with the health care provider, if the provider consents, regarding the medical records, opinions, or other information that appear reasonably calculated to lead to the discovery of admissible evidence as to any element of the action or the defense of the action. Any statements made by a health care provider during an informal discussion are not admissible, directly or by reference in direct or cross-examination of any witness, in any administrative, civil, or criminal proceeding. However, this section does not render inadmissible any statements obtained from the health care provider in discovery or any legal proceedings independent of the informal discussion which are otherwise admissible in the administrative, civil, or criminal proceeding.

The plaintiff's attorney or authorized representative must have the opportunity to be present at any informal discussion. This requirement is satisfied if the defendant's attorney serves a written notice on the plaintiff's attorney at least fifteen days prior to the informal discussion stating the time, date, and location of the informal discussion. If the plaintiff's attorney, after consultation with the defendant's attorney, is unable to attend the discussion at the time or on the date specified in the notice or at some other agreed upon date and time, the court in which the action is pending shall, upon motion of any party before the date specified in the notice, hold a scheduling conference to set a date and time for the informal discussion that will best serve the convenience of the parties and the health care provider and the interests of justice. Appropriate medical authorizations permitting access to the written medical record, informal discussion, and testimony at a deposition or trial, must be provided by the party commencing the action upon request from any other party to the action.

Approved April 4, 1997

Filed April 4, 1997

CHAPTER 274

HOUSE BILL NO. 1063

(Legislative Council)

(Judiciary Committee)

(Representatives Nottestad, Delmore, Christenson)

(Senators C. Nelson, W. Stenehjem)

TRIAL LOCATION CHANGES

AN ACT to create and enact two new sections to chapter 28-04 and a new section to chapter 29-01 of the North Dakota Century Code, relating to civil and criminal proceedings; to amend and reenact sections 28-04-02, 28-04-03, 28-04-04, 28-04-05, 29-03-07, 29-03-08, and 54-18-12 of the North Dakota Century Code, relating to the location of civil and criminal proceedings; and to repeal section 28-04-06 of the North Dakota Century Code, relating to the proper location of civil trials.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 28-04 of the North Dakota Century Code is created and enacted as follows:

Change of place of pretrial proceedings - Expenses. Notwithstanding any other provision of law, in any pretrial hearing or proceeding, except a hearing for a motion to suppress evidence, the court may change the place of the hearing or proceeding from the location in which the matter was originally to be heard.

SECTION 2. A new section to chapter 28-04 of the North Dakota Century Code is created and enacted as follows:

Change of place of trial - Jury - Expenses. Notwithstanding any other provision of law, in any civil trial the court may change the place of the trial from the location in which the matter was originally to be heard. If any party files an objection to the change of trial no later than ten days after the date of notice of assignment or reassignment of a judge for trial of the case, the trial must be held where originally venued. In the case of a jury trial, the jury panel must be composed of residents of the original county of venue or residents of the judicial district as provided by section 1 of House Bill No. 1064, as approved by the fifty-fifth legislative assembly.

SECTION 3. AMENDMENT. Section 28-04-02 of the North Dakota Century Code is amended and reenacted as follows:

28-04-02. Personal actions having venue where subject matter is located. An action for any of the following causes must be tried in the county in which the subject of the action, or some part of the subject, is situated, subject to the power of the court to change the place of trial in the cases provided by statute sections 1 and 2 of this Act:

1. For the recovery of personal property distrained for any cause; and

2. For recovery on an insurance policy for loss or damage to the property insured, and such property at the time of its loss or damage is deemed the subject matter of the action.

SECTION 4. AMENDMENT. Section 28-04-03 of the North Dakota Century Code is amended and reenacted as follows:

28-04-03. Actions having venue where the cause arose. An action for any one of the following causes must be tried in the county where the cause or some part thereof arose, subject to the power of the court to change the place of trial as provided in sections 1 and 2 of this Act:

1. For the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake or river or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite the place where the offense was committed; and
2. Against a public officer, or person specially appointed to execute ~~his~~ the officer's duties, for an act done by ~~him~~ that individual by virtue of ~~his~~ office, or against a person who by ~~his~~ that person's command or ~~his~~ aid shall do anything touching the duties of such officer.

SECTION 5. AMENDMENT. Section 28-04-04 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-04-04. Venue of actions against domestic corporations and limited liability companies. An action against a domestic corporation or limited liability company must be ~~tried~~ brought in the county designated in plaintiff's complaint if such corporation or limited liability company transacts business in that county.

SECTION 6. AMENDMENT. Section 28-04-05 of the North Dakota Century Code is amended and reenacted as follows:

28-04-05. Actions having venue where defendant resides. In all other cases, except as provided in section 28-04-03.1, and subject to the power of the court to change the place of trial as provided by ~~statute~~ sections 1 and 2 of this Act, the action must be ~~tried~~ brought in the county in which the defendant or one of the defendants resides at the time of the commencement of the action. If ~~such~~ that county is attached to another county for judicial purposes, the action must be ~~tried~~ brought in the latter county. If none of the defendants reside in the state, the action must be ~~tried~~ brought in the county which the plaintiff shall designate in the summons.

SECTION 7. A new section to chapter 29-01 of the North Dakota Century Code is created and enacted as follows:

Change of place of criminal proceedings - Jury. Notwithstanding any other provision of law, in any initial appearance, arraignment, hearing, proceeding, or trial the court may change the place of the initial appearance, arraignment, hearing, proceeding, or trial from the location in which the matter was originally to be heard. If any party files an objection to the change of trial no later than ten days after the date of notice of assignment or reassignment of a judge for trial of the case, the trial must be held where originally venued. In the case of a jury trial, the jury panel must be composed of residents of the original county of venue or residents of the judicial

district as provided by section 1 of House Bill No. 1064, as approved by the fifty-fifth legislative assembly.

SECTION 8. AMENDMENT. Section 29-03-07 of the North Dakota Century Code is amended and reenacted as follows:

29-03-07. Venue of offense in or against aircraft. ~~Any~~ Subject to section 7 of this Act, any person who commits an offense in or against any aircraft while it is in flight over this state may be tried in any county in this state.

SECTION 9. AMENDMENT. Section 29-03-08 of the North Dakota Century Code is amended and reenacted as follows:

29-03-08. Venue of offenses committed on railroad train or other vehicle. ~~Where~~ Subject to section 7 of this Act, where an offense is committed on a railroad train or other vehicle while in the course of a trip, the trial may be in any county through which ~~such~~ the train or other public vehicle passed during ~~such~~ the trip.

SECTION 10. AMENDMENT. Section 54-18-12 of the North Dakota Century Code is amended and reenacted as follows:

54-18-12. Civil actions on association transactions - Names of parties - Service - Venue - Statement filing provisions inapplicable. Civil actions may be brought against the state of North Dakota on account of claims for relief claimed to have arisen out of transactions connected with the operation of the association upon ~~condition that the provisions of~~ compliance with this section ~~are complied with~~. In such actions the state must be designated as the state of North Dakota, doing business as North Dakota mill and elevator association, and the service of process therein must be made upon the manager of the association. Such actions must be brought in the county where the association has its principal place of business, except as provided in sections 28-04-01 through 28-04-04, ~~28-04-06~~, and 28-04-07. Section 54-14-04 does not apply to claims against the state affected by this section.

SECTION 11. REPEAL. Section 28-04-06 of the North Dakota Century Code is repealed.

Approved April 2, 1997
Filed April 3, 1997

CHAPTER 275

HOUSE BILL NO. 1323

(Representatives R. Kelsch, Carlisle, Kretschmar, Mahoney)

REAL PROPERTY JUDGMENT REQUIREMENTS

AN ACT to amend and reenact section 28-20-08 of the North Dakota Century Code, relating to real property judgments.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 28-20-08 of the North Dakota Century Code is amended and reenacted as follows:

28-20-08. Judgment may order delivery of possession - Enforcement. Every judgment ~~which~~ that contains a direction for the sale of ~~any~~ specific real property also may direct the delivery of the possession of ~~such~~ the property to the purchaser, and the officer receiving the execution or order of sale may enforce ~~such~~ the judgment by putting the purchaser in possession of the premises as if special execution had been directed to ~~him~~ the purchaser for that purpose. The judgment creditor must show that the debtor has an interest in the real property that is the subject of the judgment.

Approved March 25, 1997
Filed March 26, 1997

CHAPTER 276

HOUSE BILL NO. 1324

(Representatives R. Kelsch, Carlisle, Kretschmar, Mahoney)

WRIT OF EXECUTION CONTENTS

AN ACT to amend and reenact section 28-21-06 of the North Dakota Century Code, relating to the contents of writs of execution.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 28-21-06 of the North Dakota Century Code is amended and reenacted as follows:

28-21-06. Issuance and contents of execution. The writ of execution must be issued in the name of the state of North Dakota, attested in the name of the judge of the court that entered the judgment, sealed with the seal of the court, subscribed by the clerk of that court, and directed and delivered to a sheriff as provided in section 28-21-05. It must refer intelligibly to the judgment, stating the date and time the judgment was filed with the clerk, the courts and counties to which the judgment has been transcribed, ~~and~~ the names of the parties, the last known address of the judgment debtor, the approximate age of the judgment debtor, and the date of birth of the judgment debtor if known. If the execution is against the property of a judgment debtor, the execution must also state the amount of money the judgment ordered the debtor to pay to the judgment creditor, the date and time the judgment was docketed by the clerk, the rate of interest to be used in calculating interest due on the judgment pursuant to section 28-20-34, the amount of the costs accruing on the judgment as of the date of issuance of the execution, and if the execution is being issued to a sheriff of a county other than that of the county of the issuing writ, the date and time the judgment was docketed in the county of the sheriff to whom the execution is being issued. If the execution is for the delivery of the possession of real or personal property, the execution must also particularly describe the property to be delivered, specify the value of the property, identify the party entitled to possession of the property, and, if the same judgment orders the party against whom the judgment was rendered to pay any costs, damages, or rents or profits to the party entitled to possession of the property, list the amounts of the costs, damages, or rents or profits payable as of the date of issuance of the execution. Upon receipt of an execution the sheriff shall:

1. If the execution is against the property of the judgment debtor, satisfy the judgment with interest and accruing costs, which include sheriff and county costs, out of the personal property of the debtor, and, if sufficient personal property cannot be found, out of the real property belonging to the debtor on the day when the judgment was docketed in the county or at any time thereafter. If real or personal property of the debtor is in the hands of a personal representative, heir, devisee, legatee, tenant of real property, or trustee, the sheriff may satisfy the judgment out of that property; or

2. If the execution is for the delivery of the possession of real or personal property, deliver the possession of the property to the party entitled thereto, and satisfy any costs, damages, or rents or profits recovered by the same judgment out of the personal property of the party against whom it was rendered and, if sufficient personal property cannot be found, out of the real property belonging to the party on the day when the judgment was docketed in the county or at any time thereafter. If delivery of the property cannot be had, the sheriff may satisfy the judgment in the amount of the value of the property out of the real and personal property of the party as if an execution against the property of the party had been issued.

Approved April 3, 1997
Filed April 3, 1997

CHAPTER 277

HOUSE BILL NO. 1158

(Judiciary Committee)

(At the request of the Office of Administrative Hearings)

ADJUDICATIVE PROCEEDING PROCEDURES

AN ACT to create and enact two new sections to chapter 28-32 of the North Dakota Century Code, relating to specific agency statutes and rules and emergency adjudicative proceedings; and to amend and reenact sections 23-01-23, 28-32-01, 28-32-05, 28-32-05.1, 28-32-06, 28-32-07, 28-32-08, 28-32-08.2, subsection 1 of section 28-32-08.4, sections 28-32-09, 28-32-12, 28-32-12.1, 28-32-12.2, 28-32-13, subsection 1 of section 28-32-17, sections 43-18.2-05, and 43-18.2-06 of the North Dakota Century Code, relating to procedures for adjudicative proceedings.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 23-01-23 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

23-01-23. Permit hearings - Exemption from chapters 28-32 and 54-57. A permit hearing conducted for purposes of receiving public comment under chapters 23-20.1, 23-20.3, 23-25, 23-29, 61-28, and 61-28.1 is not a ~~contested case~~ an adjudicative proceeding under chapter 28-32 and is not subject to the requirements of chapter 54-57.

¹ **SECTION 2. AMENDMENT.** Section 28-32-01 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-01. Definitions. In this chapter, unless the context or subject matter otherwise provides:

1. "Adjudicative proceeding" means an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required. An adjudicative proceeding includes administrative matters involving a hearing on a complaint against a specific-named respondent; a hearing on an application seeking a right, privilege, or an authorization from an agency, such as a ratemaking or licensing hearing; or a hearing on an appeal to an agency. An adjudicative proceeding includes reconsideration, rehearing, or reopening. Once an adjudicative proceeding has begun, the adjudicative proceeding includes any informal disposition of the administrative matter under section 28-32-05.1 or another specific statute or rule, unless the matter has been specifically

¹ Section 28-32-01 was also amended by section 1 of Senate Bill No. 2398, chapter 449; section 7 of Senate Bill No. 2033, chapter 182; section 8 of Senate Bill No. 2336, chapter 157; section 1 of House Bill No. 1042, chapter 278; section 6 of Senate Bill No. 2045, chapter 115; section 1 of House Bill No. 1183, chapter 451; and section 24 of Senate Bill No. 2046, chapter 51.

converted to another type or proceeding under section 28-32-05.1. An adjudicative proceeding does not include a decision or order to file or not to file a complaint, or to initiate an investigation, an adjudicative proceeding, or any other proceeding before the agency, or another agency, or a court. An adjudicative proceeding does not include a decision or order to issue, reconsider, or reopen an order that precedes an opportunity for hearing or that under another section of this code is not subject to review in an adjudicative proceeding. An adjudicative proceeding does not include rulemaking under this chapter.

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

 - a. The office of management and budget except with respect to rules relating to the state building code as authorized or required under section 54-21.3-03, rules relating to the Model Energy Code as required under section 54-21.2-03, rules relating to the central personnel system as authorized under section 54-44.3-07, rules relating to state purchasing practices as required under section 54-44.4-04, rules relating to records management as authorized or required under chapter 54-46, and rules relating to the central microfilm unit as authorized under chapter 54-46.1.
 - b. The adjutant general with respect to the division of emergency management.
 - c. The council on the arts.
 - d. The state auditor.
 - e. The department of economic development and finance.
 - f. The dairy promotion commission.
 - g. The education factfinding commission.
 - h. The educational telecommunications council.
 - i. The board of equalization.
 - j. The board of higher education.
 - k. The Indian affairs commission.
 - l. The industrial commission with respect to the activities of the Bank of North Dakota, the North Dakota housing finance agency, the North Dakota municipal bond bank, and the North Dakota mill and elevator association.

- m. The department of corrections and rehabilitation except with respect to the activities of the division of adult services under chapter 54-23.4.
 - n. ~~The board of pardons.~~
 - o. ~~The parks and recreation department.~~
 - p. ~~The parole board.~~
 - q. ~~The superintendent of public instruction, except with respect to rules prescribed under section 15-21-07 and rules implementing chapter 15-22.~~
 - r. ~~The state fair association.~~
 - s. ~~The state department of health with respect to the state toxicologist.~~
 - t. ~~The board of university and school lands except with respect to activities under chapter 47-30.1.~~
 - u. ~~The administrative committee on veterans' affairs except with respect to rules relating to the supervision and government of the veterans' home and the implementation of programs or services provided by the veterans' home.~~
 - v. ~~The industrial commission with respect to the lignite research fund except as required under section 57-61-01.5.~~
 - w. ~~The secretary of state with respect to rules adopted for the presidential preference contest under section 16.1-11-02.2.~~
2. 3. "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by law.
3. 4. "Complainant" means any person who files a complaint before an administrative agency pursuant to section 28-32-05; and any administrative agency which, when authorized by law, files such a complaint before such agency or any other agency.
4. ~~"Contested case" means a proceeding, including but not restricted to ratemaking and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.~~
5. "Hearing officer" means any agency head or one or more members of the agency head when presiding in an administrative proceeding, or, unless prohibited by law, one or more other persons designated by the agency head to preside in an administrative proceeding, an administrative law judge from the office of administrative hearings, or any other person duly assigned, appointed, or designated to preside in an administrative proceeding pursuant to statute or rule.
6. "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.

7. "Order" means any agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons, but does not mean an executive order issued by the governor.
8. "Party" means each person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party. An administrative agency may be a party.
9. "Person" includes an individual, association, partnership, corporation, limited liability company, state governmental agency or governmental subdivision, or an agency of such governmental subdivision.
10. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the administrative action more probable or less probable than it would be without the evidence.
11. "Rule" means the whole or a part of an agency statement of general applicability that implements or prescribes law or policy, or the organization, procedure, or practice requirements of the agency. The term includes the adoption of new rules and the amendment, repeal, or suspension of an existing rule. The term does not include:
 - a. A rule concerning only the internal management of an agency which does not directly or substantially affect the substantive or procedural rights or duties of any segment of the public.
 - b. A rule that sets forth criteria or guidelines to be used by the staff of an agency in the performance of audits, investigations, inspections, and settling commercial disputes or negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if the disclosure of the statement would:
 - (1) Enable law violators to avoid detection;
 - (2) Facilitate disregard of requirements imposed by law; or
 - (3) Give a clearly improper advantage to persons who are in an adverse position to the state.
 - c. A rule establishing specific prices to be charged for particular goods or services sold by an agency.
 - d. A rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property.
 - e. A rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property.
 - f. A rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients

admitted to a hospital, if adopted by that facility, institution, or hospital.

- g. A form whose contents or substantive requirements are prescribed by rule or statute or are instructions for the execution or use of the form.
- h. An agency budget.
- i. An opinion of the attorney general.
- j. A rule adopted by an agency selection committee under section 54-44.7-03.
- k. Any material, including a guideline, interpretive statement, statement of general policy, manual, brochure, or pamphlet, that is explanatory and not intended to have the force and effect of law.

SECTION 3. AMENDMENT. Section 28-32-05 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-05. Rules of practice or procedure - Contested case proceedings - Emergency proceedings - Other proceedings Adjudicative proceedings - Procedures.
The Administrative agencies shall comply with the following rules of procedure shall be observed by all administrative agencies procedures in all adjudicative proceedings:

1. a. ~~For contested cases~~ adjudicative proceedings involving a hearing on a complaint and against a specific-named respondent, a complainant shall prepare and file a clear and concise complaint with the agency having subject matter jurisdiction of ~~a the~~ the proceeding. The complaint shall contain a concise statement of the claims or charges upon which the complainant relies including reference to the statute or rule alleged to be violated, and the relief sought.
- b. ~~When~~ After a complaint is filed, the appropriate administrative agency shall serve a copy of the complaint upon the respondent ~~personally or by certified mail, as the agency may direct, in the manner allowed for the service of process under the North Dakota Rules of Civil Procedure~~ at least forty-five days before the time specified for a hearing on the complaint.
- c. ~~Unless a statute or rule otherwise requires or specifically provides for suspension or revocation without a hearing, the~~ The administrative agency shall designate the time and place for the hearing and shall serve a copy of the notice ~~for of~~ of hearing upon the respondent ~~personally or by certified mail, as the agency may direct in the manner allowed for service under the North Dakota Rules of Civil Procedure,~~ at least twenty days before the time specified for the hearing on the complaint. Service of the notice of hearing may be waived in writing by the respondent, or the parties may agree on a definite time and place for hearing with the consent of the agency having jurisdiction.

- d. A complaint may be served less than forty-five days before the time specified for a hearing on the complaint and a notice ~~for~~ of hearing on a complaint may be served less than twenty days before the time specified for hearing if otherwise authorized by statute. However, no administrative hearing regarding the renewal, suspension, or revocation of a license may be held fewer than ten days after the licensee has been served, personally or by certified mail, with a copy of a notice for hearing along with an affidavit, complaint, specification of issues, or other document alleging violations upon which the license hearing is based.
 - e. A complaint may inform the respondent that an answer to the complaint must be served upon the complainant and the agency with which the complaint is filed within twenty days after service of the complaint, or the agency may deem the complaint to be admitted. If the respondent fails to answer ~~as requested~~ as required within twenty days after service of the complaint, the agency may enter an order in default as the facts and law may warrant. Answers must be served in the manner allowed for service under the North Dakota Rules of Civil Procedure.
 - f. Service by certified mail is complete as of the date of certification upon compliance with the provisions of the North Dakota Rules of Civil Procedure. Proof of service may be made as provided in the North Dakota Rules of Civil Procedure.
 - g. A respondent may be given less than twenty days to answer the complaint, pursuant to another statute, but no respondent may be required to answer a complaint in less than five days and an answer must be served on the complainant and the agency with which the complaint is filed at least two days before the hearing on the complaint.
 - h. ~~In an emergency, in a contested case, the agency, in its discretion, may serve a complaint fewer than forty-five days before the hearing and notice the hearing on the complaint by giving less than twenty days' notice. But, every party to an emergency proceeding shall be given a reasonable time within which to serve an answer and to prepare for the hearing, which may be extended by the agency upon good cause being shown.~~ Amended and supplemental pleadings may be served and filed with the agency in the manner allowed for amended and supplemental pleadings under the North Dakota Rules of Civil Procedure.
2. At any ~~contested case~~ hearing in an adjudicative proceeding, the ~~respondent, applicant, appellant, or other party~~ parties shall be afforded opportunity to present evidence and to examine and cross-examine witnesses as is permitted under sections 28-32-06 and 28-32-11.1.
3. a. If the ~~administrative action~~ adjudicative proceeding does not involve a hearing on a complaint and against a specific-named respondent, the provisions of subsection 1 of this section do not apply. Unless otherwise provided by law, the provisions of subdivisions b through d of this subsection apply.

- b. An administrative agency may adopt rules establishing practices or procedures for proceedings which do not involve a complaint and a specific-named respondent, including agency hearings on applications seeking some right, privilege, or authorization from an agency, or appeals to the agency of some other agency action. All proceedings which do not involve a complaint and a specific-named respondent must comply with another statute or rules of practice or procedure adopted pursuant to statute by an administrative agency. Notice pursuant to a rule must provide for at least twenty days' notice before the hearing except in cases of emergency or when a shorter notice period is necessary to comply with the requirements of federal statutes, rules, or standards. The administrative agency shall designate the time and place for the hearing and shall serve a copy of the notice of hearing upon all the parties in the manner allowed for service under the North Dakota Rules of Civil Procedure at least twenty days before the hearing. Service of the notice of hearing may be waived in writing by the parties, or the parties may agree on a definite time and place for the hearing with the consent of the agency having jurisdiction.
- c. A hearing under this subsection may not be held unless the parties have been properly served with a copy of the notice of hearing as well as a written specification of issues for hearing or other document indicating the issues to be considered and determined at the hearing. In lieu of, or in addition to, a specification of issues or other document, an explanation about the nature of the hearing and the issues to be considered and determined at the hearing may be contained in the notice.
- d. Service is complete upon compliance with the provisions of the North Dakota Rules of Civil Procedure. Proof of service may be made as provided in the North Dakota Rules of Civil Procedure.

SECTION 4. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Adjudicative proceedings - Exceptions - Rules of procedure. Notwithstanding the requirements for standardization of procedures in adjudicative proceedings under this chapter, an administrative agency may adopt specific agency rules of procedure not inconsistent with this chapter. An administrative agency may also adopt specific agency rules of procedure when necessary to comply with requirements found elsewhere in this code or when necessary to comply with the requirements of federal statutes, rules, or standards.

SECTION 5. AMENDMENT. Section 28-32-05.1 of the North Dakota Century Code is amended and reenacted as follows:

28-32-05.1. Informal disposition. Unless otherwise prohibited by specific statute or rule, informal disposition may be made of any ~~contested case, noncontested case, or other administrative~~ adjudicative proceeding, or any part or issue thereof, by stipulation, settlement, waiver of hearing, consent order, default, alternative dispute resolution, or other informal disposition, subject to agency approval. Any administrative agency may adopt rules of practice or procedure for informal disposition if such rules do not substantially prejudice the rights of any party. Such rules may establish procedures for converting an administrative ~~hearing matter~~ from one type of proceeding to another type of proceeding.

SECTION 6. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Emergency adjudicative proceedings. An administrative agency may use an emergency adjudicative proceeding, in its discretion, in an emergency situation involving imminent peril to the public health, safety, or welfare.

1. In an emergency, the administrative agency may take action pursuant to a specific statute as is necessary to prevent or avoid imminent peril to the public health, safety, or welfare.
2. In an emergency, in the absence of a specific statute, an administrative agency may serve a complaint fewer than forty-five days before the hearing and give notice of a hearing on the complaint by giving less than twenty days' notice as is necessary to prevent or avoid imminent peril to the public health, safety, or welfare. But, every party to the emergency adjudicative proceeding must be given a reasonable time within which to serve an answer and to prepare for the hearing, which may be extended by the agency upon good cause being shown.
3. In an emergency, in the absence of a specific statute, in an adjudicative proceeding that does not involve a complaint against a specific-named respondent, an administrative agency may give notice of a hearing by giving less than twenty days' notice as is necessary to prevent or avoid imminent peril to the public health, safety, or welfare. But, every party to the emergency adjudicative proceeding shall be given a reasonable time to prepare for the hearing, which may be extended by the agency upon good cause being shown.
4. As a result of the emergency adjudicative proceeding, in the absence of a specific statute requiring other administrative action, the administrative agency shall issue an order. The order must include a brief statement of the reasons justifying the determination of imminent peril to the public health, safety, or welfare and requiring an emergency adjudicative proceeding to prevent or avoid the imminent peril.
5. After issuing an order pursuant to this section, the administrative agency shall proceed as soon as possible to complete any other proceedings related to the emergency adjudicative proceeding that do not involve imminent peril to the public health, safety, or welfare.

SECTION 7. AMENDMENT. Section 28-32-06 of the North Dakota Century Code is amended and reenacted as follows:

28-32-06. Evidence to be considered by agency - Official notice.

1. The admissibility of evidence in any adjudicative proceeding before an administrative agency shall be determined in accordance with the North Dakota Rules of Evidence. An administrative agency, or any person conducting proceedings for it, may waive application of the North Dakota Rules of Evidence if a waiver is necessary to ascertain the substantial rights of a party to the proceeding, but only relevant evidence shall be admitted. The waiver must be specifically stated, orally or in writing, either prior to or at a hearing or other proceeding.

2. All objections offered to evidence shall be noted in the record of the proceeding. No information or evidence except that which has been offered, admitted, and made a part of the official record of the proceeding shall be considered by the administrative agency, except as otherwise provided in this chapter.
- 2- 3. Upon proper objection, evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of evidentiary privilege recognized in the courts of this state, may be excluded. In the absence of proper objection, the agency, or any person conducting an investigation or a proceeding for it, may exclude objectionable evidence.
4. The North Dakota Rules of Evidence in regard to privileges apply at all stages of an administrative proceeding under this chapter.
- 3- 5. All testimony must be made under oath or affirmation. Relevant statements presented by nonparties may be received as evidence if all parties are given an opportunity to cross-examine the nonparty witness or to otherwise challenge or rebut the statements. Nonparties may not examine or cross-examine witnesses except pursuant to a grant of intervention.
- 4- 6. Evidence may be received in written form if doing so will expedite the proceeding without substantial prejudice to the interests of any party.
- 5- 7. Official notice may be taken of any facts that could be judicially noticed in the courts of this state. Additionally, official notice may be taken of any facts as authorized in agency rules.

SECTION 8. AMENDMENT. Section 28-32-07 of the North Dakota Century Code is amended and reenacted as follows:

28-32-07. Adjudicative proceedings - Consideration of information not presented at a formal hearing. ~~An~~ In any adjudicative proceeding, an administrative agency may avail itself of competent and relevant information or evidence in its possession or furnished by members of its staff, or secured from any person in the course of an independent investigation conducted by the agency, in addition to the evidence presented at ~~any formal~~ the hearing. It may do so after first transmitting a copy of the information or evidence or an abstract thereof to each party of record in the proceeding. The agency must afford each party, upon written request, an opportunity to examine the information or evidence and to present its own information or evidence and to cross-examine the person furnishing the information or evidence. Any further testimony that is necessary shall be taken at a hearing to be called and held ~~upon~~, giving at least ten days' notice ~~given by personal service or certified mail.~~ Notice must be served upon the parties in the manner allowed for service under the North Dakota Rules of Civil Procedure. This section also applies to information officially noticed after the hearing when the issuance of any initial or final order is based in whole or in part on the facts or material noticed.

SECTION 9. AMENDMENT. Section 28-32-08 of the North Dakota Century Code is amended and reenacted as follows:

28-32-08. Investigations - Hearings - Specifications of any issues to be furnished by agency - Costs of investigation.

1. An administrative agency may hold investigatory hearings to which the provisions of subsections 1 and 2 of section 28-32-05 and any rules adopted establishing practices or procedures for a contested or noncontested case proceeding do not apply. An administrative agency may adopt rules of practice or procedure for investigatory hearings. No investigatory hearing may be held except pursuant to statute or rules of practice or procedure adopted by an agency. No investigatory hearing may be held unless the agency gives at least five days' notice to all parties involved in the hearing.
2. Whenever an administrative agency, pursuant to authority conferred upon it by law, institutes an investigation upon its own motion or upon the claim or request of any person, without the filing of a specified complaint, or holds any contested case hearing upon its own motion or the claim or request of any person, without the filing of a specified complaint, no final order may be issued by the agency until all parties in interest have been furnished with a written specification of the issues which are to be considered and determined, nor until an opportunity has been afforded to all parties to present evidence and to be heard upon the precise issues so specified pursuant to notice being issued as required by section 28-32-05, unless the final order is issued pursuant to informal disposition in accordance with section 28-32-05.1. The director of the workers compensation bureau may make initial determinations without giving the notice provided by this section, but the director is subject to the requirements of section 28-32-13.
3. An agency may assess the costs of an investigation to a person found to be in violation of a statute or rule as a result of a hearing an adjudicative proceeding or informal disposition. The total costs assessed and any civil penalty that may be imposed as a result of violation may not exceed the statutorily authorized civil penalty for the violation. For the purposes of this ~~subsection~~ section, costs mean reasonable out-of-pocket agency costs, not including any attorney's fees, actually incurred in conducting the investigation for which they may be assessed. Any such costs paid must be paid into the general fund and are hereby appropriated as a refund to the agency for the purposes of defraying the costs of undertaking the investigation.

SECTION 10. AMENDMENT. Section 28-32-08.2 of the North Dakota Century Code is amended and reenacted as follows:

28-32-08.2. Intervention. An administrative agency may grant intervention in an ~~administrative~~ adjudicative proceeding to promote the ~~interest~~ interests of justice if intervention will not impair the orderly and prompt conduct of the ~~proceedings~~ proceeding and if the petitioning intervenor demonstrates that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of statute or rule. The agency may impose conditions and limitations upon intervention. The agency shall give reasonable notice of the intervention to all parties. An administrative agency may adopt rules relating to intervention in an ~~administrative~~ adjudicative proceeding.

SECTION 11. AMENDMENT. Subsection 1 of section 28-32-08.4 of the North Dakota Century Code is amended and reenacted as follows:

1. If a party fails to attend or participate in a prehearing conference, hearing, or other stage of a ~~contested case administrative~~ an adjudicative proceeding, the agency may enter and serve upon all parties written notice of default and a default order, including a statement of the grounds for default.

SECTION 12. AMENDMENT. Section 28-32-09 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-09. Adjudicative proceedings - Subpoenas - Discovery - Protective orders.

1. ~~Any~~ In an adjudicative proceeding, discovery may be obtained in accordance with the North Dakota Rules of Civil Procedure.
2. In an adjudicative proceeding, a party must first show good cause, by written petition, and get the written approval of the hearing officer, before obtaining discovery from an administrative agency. Before obtaining discovery from an administrative agency by means of a request for the production of documents that are public records, the requesting party must have first made a diligent and good faith effort to review the documents under existing general law procedures for the inspection of public records and access must have been denied.
3. In any adjudicative proceeding, upon the request or motion of any party to the proceeding or upon the hearing officer's own motion on behalf of the agency, a hearing officer may issue subpoenas, discovery orders, and protective orders in accordance with the North Dakota Rules of Civil Procedure. A motion to quash or modify, or any other motion relating to subpoenas, discovery, or protective orders must be made to the hearing officer. The hearing officer's rulings on these motions may be appealed under section 28-32-15 after issuance of the final order by the agency.
2. ~~Any hearing officer may require, upon the request of any party to the proceedings conducted by the agency, or upon the agency's or the hearing officer's own motion on behalf of the agency, the attendance and testimony of witnesses and the production of documents and other objects described in a subpoena at a hearing or other part of the proceedings. The cost of issuing and serving a subpoena in any adjudicative proceeding must be paid by the person or agency requesting it. A party, except an administrative agency, must first show general relevance and reasonable scope of the evidence sought, by written petition, and obtain the written approval of the agency or the person presiding, before a subpoena to compel a witness to produce documentary evidence will be issued for the party.~~
3. ~~The deposition of a witness or any party in proceedings before an agency may be taken in accordance with the North Dakota Rules of Civil Procedure.~~
4. ~~Interrogatories and requests for production of documents may be sent to any witness or party in proceedings before an agency in accordance with the North Dakota Rules of Civil Procedure.~~

5. ~~A party, except an administrative agency, must first show good cause, by written petition, and obtain the written approval of the agency or the presiding hearing officer, before undertaking discovery proceedings, including depositions and interrogatories.~~
6. 4. Any witness who is subpoenaed under the provisions of this section and who appears at a hearing or other part of an adjudicative proceeding, or whose deposition is taken, shall receive the same fees and mileage as a witness in a civil case in the district court. Witness fees and mileage shall be paid by the party or agency at whose instance the witness appears. Any hearing officer may order the payment of witness fees or mileage by the appropriate party or agency.
7. 5. Subpoenas, discovery orders, protective orders, and other orders issued under this section may be enforced by applying to any judge of the district court for an order requiring the attendance of a witness, the production of all documents and objects described in the subpoena, or otherwise enforcing an order. Failure of a witness or other person to comply with the order of the district court is contempt of court which is punishable by the district court, upon application. The judge may award attorney's fees to the ~~parties seeking enforcement of a subpoena~~ prevailing party in an application under this subsection.

SECTION 13. AMENDMENT. Section 28-32-12 of the North Dakota Century Code is amended and reenacted as follows:

28-32-12. Agency to make record. An administrative agency shall make a record of all testimony, written statements, documents, exhibits, and other evidence presented at any ~~contested case proceeding, noncontested case proceeding,~~ adjudicative proceeding or other administrative proceeding heard by it. Oral testimony may be taken by a court reporter, by a stenographer, or by use of an electronic recording device. All evidence presented at any proceeding before the administrative agency shall be filed with the agency. A copy of the record of any proceeding before an administrative agency, or a part thereof, must be furnished to any party to the proceeding and to any other person allowed to participate in the proceeding, upon written request submitted to the agency and upon payment of a uniform charge to be set by the agency. Any fee paid to an administrative agency for the record, or a part thereof, shall be paid into the general fund and is hereby appropriated as a refund to the agency for the purposes of defraying the costs of preparing the record. An agency may contract with any person or another agency to prepare a record, or a part thereof, of any proceeding before the agency.

SECTION 14. AMENDMENT. Section 28-32-12.1 of the North Dakota Century Code is amended and reenacted as follows:

28-32-12.1. Ex parte communications.

1. Except as provided in subsection 2 or unless required for the disposition of ex parte matters specifically authorized by another statute, an agency head or hearing officer in ~~a contested case~~ an adjudicative proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding, with any other person allowed to participate in the proceeding, or with any person who presided at a previous stage of the

proceeding, without notice and opportunity for all parties to participate in the communication.

2. When more than one person is the hearing officer in ~~a contested case~~ an adjudicative proceeding, those persons may communicate with each other regarding a matter pending before the panel. An agency head or hearing officer may communicate with or receive aid from staff assistants if the assistants do not furnish, augment, diminish, or modify the evidence in the record.
3. Unless required for the disposition of ex parte matters specifically authorized by statute, no party to ~~a contested case~~ an adjudicative proceeding, no person who has a direct or indirect interest in the outcome of the proceeding, no person allowed to participate in the proceeding, and no person who presided at a previous stage in the proceeding may communicate directly or indirectly in connection with any issue in that proceeding, while the proceeding is pending, with any agency head or hearing officer in the proceeding without notice and opportunity for all parties to participate in the communication.
4. If, before being assigned, designated, or appointed to preside in a ~~contested case~~ an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while presiding, the person, promptly after being assigned, designated, or appointed, shall disclose the communication in the manner prescribed in subsection 5.
5. An agency head or hearing officer in ~~a contested case~~ an adjudicative proceeding who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, or a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the person received an ex parte oral communication, and shall advise all parties, interested persons, and other persons allowed to participate that these matters have been placed on the record. Any person desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal. A request for rebuttal must be made within ten days after notice of the communication.
6. If necessary to eliminate the effect of an ex parte communication received in violation of this section, an agency head or hearing officer in ~~a contested case~~ an adjudicative proceeding who receives the communication may be disqualified, upon good cause being shown in writing to the hearing officer or to the agency. The portions of the record pertaining to the communication may be sealed by protective order issued by the agency.
7. The agency shall, and any party may, report any willful violation of this section to the appropriate authorities for any disciplinary proceedings provided by law. In addition, an administrative agency may, by rule, provide for appropriate sanctions, including default, for any violations of this section.
8. Nothing in this section prohibits a member of the general public, not acting on behalf or at the request of any party, from communicating

with an agency in cases of general interest. The agency shall disclose such written communications in ~~contested cases~~ adjudicative proceedings.

SECTION 15. AMENDMENT. Section 28-32-12.2 of the North Dakota Century Code is amended and reenacted as follows:

28-32-12.2. Separation of functions.

1. No person who has served as investigator, prosecutor, or advocate in the investigatory or prehearing stage of a ~~contested case~~ an adjudicative proceeding may serve as hearing officer.
2. No person who is subject to the direct authority of one who has served as an investigator, prosecutor, or advocate in the investigatory or prehearing stage of a ~~contested case~~ an adjudicative proceeding may serve as hearing officer.
3. Any other person may serve as hearing officer in a ~~contested case hearing~~ an adjudicative proceeding, unless a party demonstrates grounds for disqualification.
4. Any person may serve as hearing officer at successive stages of the same ~~contested case~~ adjudicative proceeding, unless a party demonstrates grounds for disqualification.

SECTION 16. AMENDMENT. Section 28-32-13 of the North Dakota Century Code is amended and reenacted as follows:

28-32-13. Adjudicative proceedings - Findings of fact, conclusions of law, and order of agency - Notice.

1. ~~Within thirty days after the evidence has been received, briefs filed, and arguments closed in a proceeding before~~ In an adjudicative proceeding an administrative agency; or as soon thereafter as possible, the agency shall make and state concisely and explicitly its findings of fact and its separate conclusions of law, and the order of the agency based upon its findings and conclusions.
2. If the agency head, or another person authorized by the agency head or by law to issue a final order, is presiding, the order issued is the final order. The agency shall serve a copy of the final order and the findings of fact and conclusions of law on which it is based upon all the parties to the proceeding within thirty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible, in the manner allowed for service under the North Dakota Rules of Civil Procedure.
3. If the agency head, or another person authorized by the agency head or by law to issue a final order, is not presiding, then the person presiding shall issue recommended findings of fact and conclusions of law and a recommended order which becomes within thirty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible. The recommended findings of fact and conclusions of law and the recommended order become final unless specifically amended or rejected by the agency head. The agency head

may adopt ~~a~~ the recommended findings of fact and conclusions of law and the recommended order as the final order. The agency may allow petitions for review of a recommended order and may allow oral argument pending issuance of a final order. An administrative agency may adopt rules regarding the review of recommended orders and other procedures for issuance of a final order by the agency.

4. ~~The~~ If a recommended order is issued, the agency must give notice of an serve a copy of any final order issued in any proceeding heard by it by delivering a copy of the order, and the findings of fact and conclusions upon of law on which it is based; to upon all the parties to the proceeding either personally or by certified mail. If notice is given by certified mail, the notice shall be deemed given as of the date of certification. Pursuant to agency rule, in circumstances requiring it, an agency may give notice of an order by mailing the order, and the findings and conclusions upon which it is based, to all the parties by regular mail, provided it files an affidavit of service by mail indicating upon whom the order was served within sixty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible, in the manner allowed for service under the North Dakota Rules of Civil Procedure.

SECTION 17. AMENDMENT. Subsection 1 of section 28-32-17 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. An administrative agency shall maintain an official record of each ~~contested case proceeding, noncontested case proceeding, adjudicative proceeding~~ or other administrative proceeding heard by it.

SECTION 18. AMENDMENT. Section 43-18.2-05 of the North Dakota Century Code is amended and reenacted as follows:

43-18.2-05. Out-of-state applicants. An applicant for a sewer and water contractor's license or a sewer and water installer's license from out of state may take the examination upon showing by affidavits that the applicant has experience in the state in which the applicant is licensed. This experience must be the same as is required of applicants from this state. The board shall provide applicants with application forms and affidavit forms necessary to comply with this section. The secretary-treasurer of the board shall investigate the validity of the affidavits. A rejected application must be treated as ~~a contested case~~ an adjudicative proceeding.

SECTION 19. AMENDMENT. Section 43-18.2-06 of the North Dakota Century Code is amended and reenacted as follows:

43-18.2-06. Experience for testing. An applicant for a sewer and water installer's license shall show evidence of two years' experience as a building sewer and water installer apprentice in this state. Applicants for a sewer and water installation contractor's license must have one year's experience as an installer in this state. All applicants shall show that their work complies with the state plumbing code. Proof of experience must be shown by affidavits which the board may

investigate. The board shall provide applicants with application forms. If the application is rejected, the matter must be treated as ~~a contested case~~ an adjudicative proceeding.

Approved April 2, 1997
Filed April 3, 1997

CHAPTER 278

HOUSE BILL NO. 1042

(Legislative Council)

(Criminal Justice Committee)

(Representatives Kretschmar, Brown, Mahoney, R. Kelsch, Bernstein)

(Senator Nalewaja)

ADMINISTRATIVE PROCEEDING PARTY DEFINITION

AN ACT to amend and reenact subsection 8 of section 28-32-01 of the North Dakota Century Code, relating to the definition of a party to an administrative proceeding.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

² **SECTION 1. AMENDMENT.** Subsection 8 of section 28-32-01 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

8. "Party" means each person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party. An administrative agency may be a party. In a hearing for the suspension, revocation, or disqualification of an operator's license under title 39, the term may include each city and each county in which the alleged conduct occurred, but the city or county may not appeal the decision of the hearing officer.

Approved March 23, 1997

Filed March 24, 1997

² Section 28-32-01 was also amended by section 1 of Senate Bill No. 2398, chapter 449; section 7 of Senate Bill No. 2033, chapter 182; section 8 of Senate Bill No. 2336, chapter 157; section 6 of Senate Bill No. 2045, chapter 115; section 1 of House Bill No. 1183, chapter 451; section 2 of House Bill No. 1158, chapter 277; and section 24 of Senate Bill No. 2046, chapter 51.

CHAPTER 279

HOUSE BILL NO. 1030

(Legislative Council)
(Administrative Rules Committee)

ADMINISTRATIVE RULES COMMITTEE VOIDING RULES

AN ACT to amend and reenact section 28-32-03.3 of the North Dakota Century Code, relating to consideration of administrative rules by the administrative rules committee; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

³ **SECTION 1. AMENDMENT.** Section 28-32-03.3 of the 1995 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-03.3. Committee on administrative rules - Finding that rules are void - Objection to rules - Effects of objection.

1. The legislative council's committee on administrative rules may find that all or any portion of a rule is void if that ~~finding is made~~ rule is initially considered by the committee within ninety days after the date of the administrative code supplement in which the rule change appears or, for rule changes appearing in the administrative code supplement from November first immediately preceding a regular session of the legislative assembly through the following May first, if that ~~finding is made~~ rule is initially considered by the committee at the first meeting of the administrative rules committee following the regular session of the legislative assembly. The committee on administrative rules may find a rule or portion of a rule void if the committee makes the specific finding that, with regard to that rule or portion of a rule, there is:
 - a. An absence of statutory authority.
 - b. An emergency relating to public health, safety, or welfare.
 - c. A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for adoption of the rule.
 - d. A conflict with state law.
 - e. Arbitrariness and capriciousness.

³ Section 28-32-03.3 was also amended by section 2 of House Bill No. 1030, chapter 279, and section 1 of House Bill No. 1191, chapter 554, which was vetoed.

- f. A failure to make a written record of its consideration of written and oral submissions respecting the rule under subsection 3 of section 28-32-02.
2. The committee on administrative rules may find a rule void at the meeting at which the rule is initially considered by the committee or may hold consideration of that rule for one subsequent meeting. Within three business days after the committee on administrative rules finds that a rule is void, the office of the legislative council shall provide written notice of that finding and the committee's specific finding under subdivisions a through f of subsection 1 to the adopting agency and to the chairman of the legislative council. Within fourteen days after receipt of the notice, the adopting agency may file a petition with the chairman of the legislative council for review by the legislative council of the decision of the committee on administrative rules. If the adopting agency does not file a petition for review, the rule becomes void on the fifteenth day after the notice from the office of the legislative council to the adopting agency. If within sixty days after receipt of the petition from the adopting agency the legislative council has not disapproved by motion the finding of the committee on administrative rules, the rule is void.
3. If the legislative council's committee on administrative rules objects to all or any portion of a rule because the committee deems it to be unreasonable, arbitrary, capricious, or beyond the authority delegated to the adopting agency, the committee may file that objection in certified form in the office of the legislative council. The filed objection must contain a concise statement of the committee's reasons for its action.
 - a. The office of the legislative council shall attach to each objection a certification of the time and date of its filing and, as soon as possible, shall transmit a copy of the objection and the certification to the agency adopting the rule in question. The office of the legislative council shall also maintain a permanent register of all committee objections.
 - b. The office of the legislative council shall publish an objection filed pursuant to this section in the next issue of the code supplement. In case of a filed committee objection to a rule subject to the exceptions of the definition of rule in section 28-32-01, the agency shall indicate the existence of that objection adjacent to the rule in any compilation containing that rule.
 - c. Within fourteen days after the filing of a committee objection to a rule, the adopting agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.
 - d. After the filing of a committee objection, the burden of persuasion is upon the agency in any action for judicial review or for enforcement of the rule to establish that the whole or portion thereof objected to is within the procedural and substantive authority delegated to the agency. If the agency fails to meet its burden of persuasion, the court shall declare the whole or portion of the rule objected to invalid and judgment must be rendered against the agency for court costs. These court costs must include a

reasonable attorney's fee and must be payable from the appropriation of the agency which adopted the rule in question.

4. An agency may amend or repeal a rule or create a related rule if, after consideration of rules by the committee on administrative rules, the agency and committee agree that the rule amendment, repeal, or creation is necessary to address any of the considerations under subsection 1. A rule amended, repealed, or created under this subsection is not subject to the other requirements of this chapter relating to adoption of administrative rules and may be resubmitted by the agency to the legislative council for publication as amended, repealed, or created and reconsidered by the committee on administrative rules at a subsequent meeting at which public comment on the agreed rule change must be allowed.

⁴ **SECTION 2. AMENDMENT.** Section 4 of chapter 310 of the 1995 Session Laws is amended and reenacted as follows:

SECTION 4. AMENDMENT. Section 28-32-03.3 of the North Dakota Century Code is amended and reenacted as follows:

28-32-03.3. Committee on administrative rules - Suspension of rules - Objection to rules - Effects of objection.

1. The legislative council's committee on administrative rules may find, for any reason under this subsection, that all or any portion of a rule should be reviewed by the legislative assembly, and the committee may suspend the rule or portion of a rule under this subsection if the ~~suspension is made~~ rule is initially considered by the committee within ninety days after the date of the administrative code supplement in which the rule change appears or, for rule changes appearing in the administrative code supplement from November first immediately preceding a regular session of the legislative assembly through the following May first, if that ~~suspension is made~~ rule is initially considered by the committee at the first meeting of the administrative rules committee following the regular session of the legislative assembly. A rule or a portion of a rule suspended under this subsection becomes permanently ineffective unless it is ratified by both houses of the legislative assembly during the next session of the legislative assembly, in which case it is effective as of the date of ratification by the second house of the legislative assembly. An agency seeking ratification of its rule shall introduce a bill for that purpose. The committee on administrative rules may suspend a rule or portion of a rule if the committee specifically finds that, with regard to the rule, there is:
 - a. An absence of statutory authority.
 - b. An emergency relating to public health, safety, or welfare.

⁴ Section 28-32-03.3 was also amended by section 1 of House Bill No. 1030, chapter 279, and section 1 of House Bill No. 1191, chapter 554, which was vetoed.

- c. A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for adoption of the rule.
 - d. A conflict with state law.
 - e. Arbitrariness and capriciousness.
 - f. A failure to make a written record of its consideration of written and oral submissions respecting the rule under subsection 3 of section 28-32-02.
- 2. The committee on administrative rules may suspend a rule at the meeting at which the rule is initially considered by the committee or may hold consideration of that rule for one subsequent meeting. Within three business days after the committee on administrative rules suspends a rule, the office of the legislative council shall provide written notice of that suspension and the committee's specific finding under subdivisions a through f of subsection 1 to the adopting agency and to the chairman of the legislative council. Within fourteen days after receipt of the notice, the adopting agency may file a petition with the chairman of the legislative council for review by the legislative council of the decision of the committee on administrative rules. After receipt of the petition and before the next session of the legislative assembly, the legislative council by motion may lift the suspension and reinstate the rule's effectiveness.
- 3. If the legislative council's committee on administrative rules objects to all or any portion of a rule because the committee deems it to be unreasonable, arbitrary, capricious, or beyond the authority delegated to the adopting agency, the committee may file that objection in certified form in the office of the legislative council. The filed objection must contain a concise statement of the committee's reasons for its action.
 - a. The office of the legislative council shall attach to each objection a certification of the time and date of its filing and, as soon as possible, shall transmit a copy of the objection and the certification to the agency adopting the rule in question. The office of the legislative council shall also maintain a permanent register of all committee objections.
 - b. The office of the legislative council shall publish an objection filed pursuant to this section in the next issue of the code supplement. In case of a filed committee objection to a rule subject to the exceptions of the definition of rule in section 28-32-01, the agency shall indicate the existence of that objection adjacent to the rule in any compilation containing that rule.
 - c. Within fourteen days after the filing of a committee objection to a rule, the adopting agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.
 - d. After the filing of a committee objection, the burden of persuasion is upon the agency in any action for judicial review or for enforcement of the rule to establish that the whole or portion thereof objected to is within the procedural and substantive

authority delegated to the agency. If the agency fails to meet its burden of persuasion, the court shall declare the whole or portion of the rule objected to invalid and judgment must be rendered against the agency for court costs. These court costs must include a reasonable attorney's fee and must be payable from the appropriation of the agency which adopted the rule in question.

4. An agency may amend or repeal a rule or create a related rule if, after consideration of rules by the committee on administrative rules, the agency and committee agree that the rule amendment, repeal, or creation is necessary to address any of the considerations under subsection 1. A rule amended, repealed, or created under this subsection is not subject to the other requirements of this chapter relating to adoption of administrative rules and may be resubmitted by the agency to the legislative council for publication as amended, repealed, or created and reconsidered by the committee on administrative rules at a subsequent meeting at which public comment on the agreed rule change must be allowed.

SECTION 3. EFFECTIVE DATE. Section 1 of this Act is effective for administrative rules taking effect after July 31, 1997. Section 2 of this Act is suspended from operation, but becomes effective retroactive to August 1, 1997, upon a ruling by the North Dakota supreme court that any portion of subsection 1 of section 28-32-03.3 as created by section 3 of chapter 310 of the 1995 Session Laws and amended by section 1 of this Act is unconstitutional.

Approved April 2, 1997
Filed April 3, 1997