

HB 1322

Rep. Ben Koppelman- Testimony

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to introduce HB 1322 to you today.

I introduced this bill to protect the administrative rules process by ensuring that rules follow legislative intent both in the affirmative and the unfavorable as well as hold rulemaking to a standard of reasonable and necessary. This is safeguarded by allowing the Administrative Rules Committee the tools necessary to void a rule or portion of a rule if it is determined to be too burdensome.

In North Dakota, we have delegated our policy making authority to various agencies, boards, and commissions within the executive branch. However, with that delegation comes oversight by the legislative branch, as it should, through the Administrative Rules Committee. The Administrative rules committee is a standing statutory committee made up of legislators which meets quarterly or as often as is necessary.

Currently the Administrative Rules Committee can void rules if there is:

- 1) An absence of statutory authority
- 2) An emergency relating to public health, safety, and welfare
- 3) A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for the adoption of the rule
- 4) A conflict with state law
- 5) Arbitrariness and Capriciousness
- 6) A failure to make a written record of its consideration of written and oral submissions respecting the rule under section 28-32-11.

Traditionally, I had always thought that Arbitrariness and Capriciousness was the “catch-all” for objections by the committee due to overregulation. However, there has been some disagreement as to whether those terms would truly be able to be used to overturn such regulation. Here are the definitions that I could find for those terms.

According to USLegal.com, ‘A rule is arbitrary if it is not supported by logic or necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational’.

Black's Law Dictionary defines **Arbitrary**: *'Willful and unreasoning action, without consideration and regard for facts or circumstances presented...bad faith or failure to exercise honest judgement'* and defines **Capricious**: *'Subject to whim; impulsive and unpredictable'* and defined **Arbitrary and Capricious**: *'A willful and unreasonable action without consideration or in disregard of facts or law or without determining principle'*.

TheLawDictionary.org defines arbitrary as *'Not supported by fair, solid, or substantial cause, and without reason given'*; it goes on to define capricious as *'Given to sudden and unaccountable changes of mood or behavior'*.

One problem could be that rules may be arbitrary but not capricious. Another could be that the rules have been promulgated using one set of facts without weighing out the consequences of such regulations to figure out if the harm the rule may cause would outweigh the benefit. So, in order to figure out a solution, I worked with legislative council to come up with easily understandable terms that could be used by the Administrative Rules Committee for this purpose or safeguarding the public against overregulation. That is why I am seeking to add the following to the list:

- 1) An absence of necessity
- 2) An absence of reasonableness.

Many of you may have heard of the SCOTUS case *North Carolina State Board of Dental Examiners v. Federal Trade Commission* where the court emphasized the need for the legislative branch to exercise oversight over those it delegated its policy making authority to. In North Dakota, this is the Administrative Rules Committee. In order to properly oversee those activities, the committee needs these tools.

I have also included an amendment for your consideration that may further clarify the authority of the Administrative Rules Committee to void a rule based on it being contrary to legislative intent based on past legislative action.

Mr. Chairman and members of the committee, I request that you give the amendment fair consideration and give this bill a Do-Pass recommendation. I would be happy to answer any questions that you may have.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1322

Page 3, line 6, overstrike "or" and insert immediately thereafter ". For purposes of this subdivision, a failure to comply with express legislative intent includes the proposal of a rule by an administrative agency after the legislative assembly has failed to pass a bill that is substantially similar, in whole or in part, to the proposed rule.

d. A failure"

Page 3, line 8, overstrike "d." and insert immediately thereafter "e."

Page 3, line 9, overstrike "e." and insert immediately thereafter "f."

Page 3, line 10, overstrike "f." and insert immediately thereafter "g."

Page 3, line 12, replace "g." with "h."

Page 3, line 13, replace "h." with "i."

Renumber accordingly

