

HOUSE BILL NO. 1158

Introduced by

Judiciary Committee

(At the request of the Office of Administrative Hearings)

1 A BILL for an Act to create and enact a new subsection to section 28-32-01, and two new
2 sections to chapter 28-32 of the North Dakota Century Code, relating to adjudicative
3 proceedings, specific agency statutes and rules, and emergency adjudicative proceedings; and
4 to amend and reenact sections 23-01-23, 28-32-05, 28-32-05.1, 28-32-06, 28-32-07, 23-32-08,
5 28-32-08.2, subsection 1 of section 28-32-08.4, sections 28-32-09, 28-32-12, 28-32-12.1,
6 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
7 the North Dakota Century Code, relating to procedures for adjudicative proceedings.

8 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

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

11 **23-01-23. Permit hearings - Exemption from chapters 28-32 and 54-57.** A permit
12 hearing conducted for purposes of receiving public comment under chapters 23-20.1, 23-20.3,
13 23-25, 23-29, 61-28, and 61-28.1 is not ~~a contested case~~ an adjudicative proceeding under
14 chapter 28-32 and is not subject to the requirements of chapter 54-57.

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

17 **28-32-01. Definitions.** In this chapter, unless the context or subject matter otherwise
18 provides:

19 1. "Adjudicative proceeding" means an administrative matter resulting in an agency
20 issuing an order after an opportunity for hearing is provided or required. An
21 adjudicative proceeding includes administrative matters involving a hearing on a
22 complaint against a specific-named respondent; a hearing on an application
23 seeking a right, privilege, or an authorization from an agency, such as a
24 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 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.

- 1 f. The dairy promotion commission.
- 2 g. The education factfinding commission.
- 3 h. The educational telecommunications council.
- 4 i. The board of equalization.
- 5 j. The board of higher education.
- 6 k. The Indian affairs commission.
- 7 l. The industrial commission with respect to the activities of the Bank of North
8 Dakota, the North Dakota housing finance agency, the North Dakota
9 municipal bond bank, and the North Dakota mill and elevator association.
- 10 m. The department of corrections and rehabilitation except with respect to the
11 activities of the division of adult services under chapter 54-23.4.
- 12 n. The board of pardons.
- 13 o. The parks and recreation department.
- 14 p. The parole board.
- 15 q. The superintendent of public instruction, except with respect to rules
16 prescribed under section 15-21-07 and rules implementing chapter 15-22.
- 17 r. The state fair association.
- 18 s. The state department of health with respect to the state toxicologist.
- 19 t. The board of university and school lands except with respect to activities
20 under chapter 47-30.1.
- 21 u. The administrative committee on veterans' affairs except with respect to rules
22 relating to the supervision and government of the veterans' home and the
23 implementation of programs or services provided by the veterans' home.
- 24 v. The industrial commission with respect to the lignite research fund except as
25 required under section 57-61-01.5.
- 26 w. The secretary of state with respect to rules adopted for the presidential
27 preference contest under section 16.1-11-02.2.
- 28 ~~2.~~ 3. "Agency head" means an individual or body of individuals in whom the ultimate
29 legal authority of the agency is vested by law.

- 1 3. 4. "Complainant" means any person who files a complaint before an administrative
2 agency pursuant to section 28-32-05; and any administrative agency which, when
3 authorized by law, files such a complaint before such agency or any other agency.
- 4 4. ~~"Contested case" means a proceeding, including but not restricted to ratemaking~~
5 ~~and licensing, in which the legal rights, duties, or privileges of a party are required~~
6 ~~by law to be determined by an agency after an opportunity for hearing.~~
- 7 5. "Hearing officer" means any agency head or one or more members of the agency
8 head when presiding in an administrative proceeding, or, unless prohibited by law,
9 one or more other persons designated by the agency head to preside in an
10 administrative proceeding, an administrative law judge from the office of
11 administrative hearings, or any other person duly assigned, appointed, or
12 designated to preside in an administrative proceeding pursuant to statute or rule.
- 13 6. "License" means a franchise, permit, certification, approval, registration, charter, or
14 similar form of authorization required by law.
- 15 7. "Order" means any agency action of particular applicability that determines the
16 legal rights, duties, privileges, immunities, or other legal interests of one or more
17 specific persons, but does not mean an executive order issued by the governor.
- 18 8. "Party" means each person named or admitted as a party or properly seeking and
19 entitled as of right to be admitted as a party. An administrative agency may be a
20 party.
- 21 9. "Person" includes an individual, association, partnership, corporation, limited
22 liability company, state governmental agency or governmental subdivision, or an
23 agency of such governmental subdivision.
- 24 10. "Relevant evidence" means evidence having any tendency to make the existence
25 of any fact that is of consequence to the determination of the administrative action
26 more probable or less probable than it would be without the evidence.
- 27 11. "Rule" means the whole or a part of an agency statement of general applicability
28 that implements or prescribes law or policy, or the organization, procedure, or
29 practice requirements of the agency. The term includes the adoption of new rules
30 and the amendment, repeal, or suspension of an existing rule. The term does not
31 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.

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

3 **~~28-32-05. Rules of practice or procedure--Contested case proceedings--~~**
4 **~~Emergency proceedings--Other proceedings~~ Adjudicative proceedings - Procedures.**

5 ~~The Administrative agencies shall comply with the following rules of procedure shall be~~
6 ~~observed by all administrative agencies~~ procedures in all adjudicative proceedings:

- 7 1. a. For ~~contested cases~~ adjudicative proceedings involving a hearing on a
8 complaint and against a specific-named respondent, a complainant shall
9 prepare and file a clear and concise complaint with the agency having subject
10 matter jurisdiction of ~~a~~ the proceeding. The complaint shall contain a concise
11 statement of the claims or charges upon which the complainant relies
12 including reference to the statute or rule alleged to be violated, and the relief
13 sought.
- 14 b. ~~When~~ After a complaint is filed, the appropriate administrative agency shall
15 serve a copy of the complaint upon the respondent ~~personally or by certified~~
16 ~~mail, as the agency may direct,~~ in the manner allowed for the service of
17 process under the North Dakota Rules of Civil Procedure at least forty-five
18 days before the ~~time specified for a hearing on the complaint.~~
- 19 c. ~~Unless a statute or rule otherwise requires or specifically provides for~~
20 ~~suspension or revocation without a hearing, the~~ The administrative agency
21 shall designate the time and place for the hearing and shall serve a copy of
22 the notice ~~for~~ of hearing upon the respondent ~~personally or by certified mail,~~
23 ~~as the agency may direct~~ in the manner allowed for service under the North
24 Dakota Rules of Civil Procedure, at least twenty days before the ~~time~~
25 ~~specified for the hearing on the complaint.~~ Service of the notice of hearing
26 may be waived in writing by the respondent, or the parties may agree on a
27 definite time and place for hearing with the consent of the agency having
28 jurisdiction.
- 29 d. A complaint may be served less than forty-five days before the time specified
30 for a hearing on the complaint and a notice ~~for~~ of hearing on a complaint may
31 be served less than twenty days before the time specified for hearing if

1 otherwise authorized by statute. However, no administrative hearing
2 regarding the renewal, suspension, or revocation of a license may be held
3 fewer than ten days after the licensee has been served, personally or by
4 certified mail, with a copy of a notice for hearing along with an affidavit,
5 complaint, specification of issues, or other document alleging violations upon
6 which the license hearing is based.

7 e. A complaint may inform the respondent that an answer to the complaint must
8 be served upon the complainant and the agency with which the complaint is
9 filed within twenty days after service of the complaint, or the agency may
10 deem the complaint to be admitted. If the respondent fails to answer ~~as~~
11 ~~requested~~ as required within twenty days after service of the complaint, the
12 agency may enter an order in default as the facts and law may warrant.
13 Answers must be served in the manner allowed for service under the North
14 Dakota Rules of Civil Procedure.

15 f. Service ~~by certified mail~~ is complete ~~as of the date of certification~~ upon
16 compliance with the provisions of the North Dakota Rules of Civil Procedure.
17 Proof of service may be made as provided in the North Dakota Rules of Civil
18 Procedure.

19 g. A respondent may be given less than twenty days to answer the complaint,
20 pursuant to another statute, but no respondent may be required to answer a
21 complaint in less than five days and an answer must be served on the
22 complainant and the agency with which the complaint is filed at least two days
23 before the hearing on the complaint.

24 h. ~~In an emergency, in a contested case, the agency, in its discretion, may serve~~
25 ~~a complaint fewer than forty five days before the hearing and notice the~~
26 ~~hearing on the complaint by giving less than twenty days' notice. But, every~~
27 ~~party to an emergency proceeding shall be given a reasonable time within~~
28 ~~which to serve an answer and to prepare for the hearing, which may be~~
29 ~~extended by the agency upon good cause being shown. Amended and~~
30 supplemental pleadings may be served and filed with the agency in the

1 manner allowed for amended and supplemental pleadings under the North
2 Dakota Rules of Civil Procedure.

- 3 2. At any ~~contested case~~ hearing in an adjudicative proceeding, the ~~respondent,~~
4 ~~applicant, appellant, or other party~~ parties shall be afforded opportunity to present
5 evidence and to examine and cross-examine witnesses as is permitted under
6 sections 28-32-06 and 28-32-11.1.

- 7 3. a. If the ~~administrative action~~ adjudicative proceeding does not involve a hearing
8 on a complaint and against a specific-named respondent, the provisions of
9 subsection 1 of this section do not apply. Rather, the provisions of
10 subdivisions b through d of this subsection apply.

- 11 b. ~~An administrative agency may adopt rules establishing practices or~~
12 ~~procedures for proceedings which do not involve a complaint and a~~
13 ~~specific-named respondent, including agency hearings on applications~~
14 ~~seeking some right, privilege, or authorization from an agency, or appeals to~~
15 ~~the agency of some other agency action. All proceedings which do not~~
16 ~~involve a complaint and a specific-named respondent must comply with~~
17 ~~another statute or rules of practice or procedure adopted pursuant to statute~~
18 ~~by an administrative agency. Notice pursuant to a rule must provide for at~~
19 ~~least twenty days' notice before the hearing except in cases of emergency or~~
20 ~~when a shorter notice period is necessary to comply with the requirements of~~
21 ~~federal statutes, rules, or standards. The administrative agency shall~~
22 designate the time and place for the hearing and shall serve a copy of the
23 notice of hearing upon all the parties in the manner allowed for service under
24 the North Dakota Rules of Civil Procedure at least twenty days before the
25 hearing. Service of the notice of hearing may be waived in writing by the
26 parties, or the parties may agree on a definite time and place for the hearing
27 with the consent of the agency having jurisdiction.

- 28 c. A hearing under this subsection may not be held unless the parties have been
29 properly served with a copy of the notice of hearing as well as a written
30 specification of issues for hearing or other document indicating the issues to
31 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 1. In an emergency, the administrative agency may take action pursuant to a specific
2 statute as is necessary to prevent or avoid imminent peril to the public health,
3 safety, or welfare.
- 4 2. In an emergency, in the absence of a specific statute, an administrative agency
5 may serve a complaint fewer than forty-five days before the hearing and give
6 notice of a hearing on the complaint by giving less than twenty days' notice as is
7 necessary to prevent or avoid imminent peril to the public health, safety, or welfare.
8 But, every party to the emergency adjudicative proceeding must be given a
9 reasonable time within which to serve an answer and to prepare for the hearing,
10 which may be extended by the agency upon good cause being shown.
- 11 3. In an emergency, in the absence of a specific statute, in an adjudicative
12 proceeding that does not involve a complaint against a specific-named respondent,
13 an administrative agency may give notice of a hearing by giving less than twenty
14 days' notice as is necessary to prevent or avoid imminent peril to the public health,
15 safety, or welfare. But, every party to the emergency adjudicative proceeding shall
16 be given a reasonable time to prepare for the hearing, which may be extended by
17 the agency upon good cause being shown.
- 18 4. As a result of the emergency adjudicative proceeding, in the absence of a specific
19 statute requiring other administrative action, the administrative agency shall issue
20 an order. The order must include a brief statement of the reasons justifying the
21 determination of imminent peril to the public health, safety, or welfare and requiring
22 an emergency adjudicative proceeding to prevent or avoid the imminent peril.
- 23 5. After issuing an order pursuant to this section, the administrative agency shall
24 proceed as soon as possible to complete any other proceedings related to the
25 emergency adjudicative proceeding that do not involve imminent peril to the public
26 health, safety, or welfare.

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

29 **28-32-06. Evidence to be considered by agency - Official notice.**

- 30 1. The admissibility of evidence in any adjudicative proceeding before an
31 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

1 itself of competent and relevant information or evidence in its possession or furnished by
2 members of its staff, or secured from any person in the course of an independent investigation
3 conducted by the agency, in addition to the evidence presented at ~~any formal~~ the hearing. It
4 may do so after first transmitting a copy of the information or evidence or an abstract thereof to
5 each party of record in the proceeding. The agency must afford each party, upon written
6 request, an opportunity to examine the information or evidence and to present its own
7 information or evidence and to cross-examine the person furnishing the information or
8 evidence. Any further testimony that is necessary shall be taken at a hearing to be called and
9 held ~~upon, giving~~ at least ten days' notice ~~given by personal service or certified mail.~~ Notice
10 must be served upon the parties in the manner allowed for service under the North Dakota
11 Rules of Civil Procedure. This section also applies to information officially noticed after the
12 hearing when the issuance of any initial or final order is based in whole or in part on the facts or
13 material noticed.

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

16 **28-32-08. ~~Investigations—Hearings—Specifications of any issues to be furnished~~**
17 **~~by agency—~~ Costs of investigation.**

- 18 ~~1. An administrative agency may hold investigatory hearings to which the provisions~~
19 ~~of subsections 1 and 2 of section 28-32-05 and any rules adopted establishing~~
20 ~~practices or procedures for a contested or noncontested case proceeding do not~~
21 ~~apply. An administrative agency may adopt rules of practice or procedure for~~
22 ~~investigatory hearings. No investigatory hearing may be held except pursuant to~~
23 ~~statute or rules of practice or procedure adopted by an agency. No investigatory~~
24 ~~hearing may be held unless the agency gives at least five days' notice to all parties~~
25 ~~involved in the hearing.~~
- 26 ~~2. Whenever an administrative agency, pursuant to authority conferred upon it by law,~~
27 ~~institutes an investigation upon its own motion or upon the claim or request of any~~
28 ~~person, without the filing of a specified complaint, or holds any contested case~~
29 ~~hearing upon its own motion or the claim or request of any person, without the filing~~
30 ~~of a specified complaint, no final order may be issued by the agency until all parties~~
31 ~~in interest have been furnished with a written specification of the issues which are~~

1 ~~to be considered and determined, nor until an opportunity has been afforded to all~~
2 ~~parties to present evidence and to be heard upon the precise issues so specified~~
3 ~~pursuant to notice being issued as required by section 28-32-05, unless the final~~
4 ~~order is issued pursuant to informal disposition in accordance with section~~
5 ~~28-32-05.1. The director of the workers compensation bureau may make initial~~
6 ~~determinations without giving the notice provided by this section, but the director is~~
7 ~~subject to the requirements of section 28-32-13.~~

8 3. An agency may assess the costs of an investigation to a person found to be in
9 violation of a statute or rule as a result of ~~a hearing~~ an adjudicative proceeding or
10 informal disposition. The total costs assessed and any civil penalty that may be
11 imposed as a result of violation may not exceed the statutorily authorized civil
12 penalty for the violation. For the purposes of this ~~subsection~~ section, costs mean
13 reasonable out-of-pocket agency costs, not including any attorney's fees, actually
14 incurred in conducting the investigation for which they may be assessed. Any such
15 costs paid must be paid into the general fund and are hereby appropriated as a
16 refund to the agency for the purposes of defraying the costs of undertaking the
17 investigation.

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

20 **28-32-08.2. Intervention.** An administrative agency may grant intervention in an
21 ~~administrative~~ adjudicative proceeding to promote the ~~interest~~ interests of justice if intervention
22 will not impair the orderly and prompt conduct of the ~~proceedings~~ proceeding and if the
23 petitioning intervenor demonstrates that the petitioner's legal rights, duties, privileges,
24 immunities, or other legal interests may be substantially affected by the proceeding or that the
25 petitioner qualifies as an intervenor under any provision of statute or rule. The agency may
26 impose conditions and limitations upon intervention. The agency shall give reasonable notice
27 of the intervention to all parties. An administrative agency may adopt rules relating to
28 intervention in an ~~administrative~~ adjudicative proceeding.

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

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

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

7 **28-32-09. Adjudicative proceedings - Subpoenas - Discovery - Protective orders.**

- 8 1. ~~Any~~ In an adjudicative proceeding, discovery may be obtained in accordance with
9 the North Dakota Rules of Civil Procedure.
- 10 2. In an adjudicative proceeding, a party must first show good cause, by written
11 petition, and get the written approval of the hearing officer, before obtaining
12 discovery from an administrative agency. Before obtaining discovery from an
13 administrative agency by means of a request for the production of documents that
14 are public records, the requesting party must have first made a diligent and good
15 faith effort to review the documents under existing general law procedures for the
16 inspection of public records and access must have been denied.
- 17 3. In any adjudicative proceeding, upon the request or motion of any party to the
18 proceeding or upon the hearing officer's own motion on behalf of the agency, a
19 hearing officer may issue subpoenas, discovery orders, and protective orders in
20 accordance with the North Dakota Rules of Civil Procedure. A motion to quash or
21 modify, or any other motion relating to subpoenas, discovery, or protective orders
22 must be made to the hearing officer. The hearing officer's rulings on these motions
23 may be appealed under section 28-32-15 after issuance of the final order by the
24 agency.
- 25 2. ~~Any hearing officer may require, upon the request of any party to the proceedings~~
26 ~~conducted by the agency, or upon the agency's or the hearing officer's own motion~~
27 ~~on behalf of the agency, the attendance and testimony of witnesses and the~~
28 ~~production of documents and other objects described in a subpoena at a hearing or~~
29 ~~other part of the proceedings.~~ The cost of issuing and serving a subpoena in any
30 adjudicative proceeding must be paid by the person or agency requesting it. A
31 ~~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

1 allowed to participate in the proceeding, and no person who presided at a previous
2 stage in the proceeding may communicate directly or indirectly in connection with
3 any issue in that proceeding, while the proceeding is pending, with any agency
4 head or hearing officer in the proceeding without notice and opportunity for all
5 parties to participate in the communication.

6 4. If, before being assigned, designated, or appointed to preside in ~~a contested case~~
7 an adjudicative proceeding, a person receives an ex parte communication of a type
8 that could not properly be received while presiding, the person, promptly after
9 being assigned, designated, or appointed, shall disclose the communication in the
10 manner prescribed in subsection 5.

11 5. An agency head or hearing officer in ~~a contested case~~ an adjudicative proceeding
12 who receives an ex parte communication in violation of this section shall place on
13 the record of the pending matter all written communications received, all written
14 responses to the communications, or a memorandum stating the substance of all
15 oral communications received, all responses made, and the identity of each person
16 from whom the person received an ex parte oral communication, and shall advise
17 all parties, interested persons, and other persons allowed to participate that these
18 matters have been placed on the record. Any person desiring to rebut the ex parte
19 communication must be allowed to do so, upon requesting the opportunity for
20 rebuttal. A request for rebuttal must be made within ten days after notice of the
21 communication.

22 6. If necessary to eliminate the effect of an ex parte communication received in
23 violation of this section, an agency head or hearing officer in ~~a contested case~~ an
24 adjudicative proceeding who receives the communication may be disqualified,
25 upon good cause being shown in writing to the hearing officer or to the agency.
26 The portions of the record pertaining to the communication may be sealed by
27 protective order issued by the agency.

28 7. The agency shall, and any party may, report any willful violation of this section to
29 the appropriate authorities for any disciplinary proceedings provided by law. In
30 addition, an administrative agency may, by rule, provide for appropriate sanctions,
31 including default, for any violations of this section.

- 1 8. Nothing in this section prohibits a member of the general public, not acting on
2 behalf or at the request of any party, from communicating with an agency in cases
3 of general interest. The agency shall disclose such written communications in
4 ~~contested cases~~ adjudicative proceedings.

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

7 **28-32-12.2. Separation of functions.**

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

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

21 **28-32-13. Adjudicative proceedings - Findings of fact, conclusions of law, and**
22 **order of agency - Notice.**

- 23 1. ~~Within thirty days after the evidence has been received, briefs filed, and arguments~~
24 ~~closed in a proceeding before~~ In an adjudicative proceeding an administrative
25 agency, ~~or as soon thereafter as possible, the agency~~ shall make and state
26 concisely and explicitly its findings of fact and its separate conclusions of law, and
27 the order of the agency based upon its findings and conclusions.
- 28 2. If the agency head, or another person authorized by the agency head or by law to
29 issue a final order, is presiding, the order issued is the final order. The agency
30 shall serve a copy of the final order and the findings of fact and conclusions of law
31 on which it is based upon all the parties to the proceeding within thirty days after

1 the evidence has been received, briefs filed, and arguments closed, or as soon
2 thereafter as possible, in the manner allowed for service under the North Dakota
3 Rules of Civil Procedure.

- 4 3. If the agency head, or another person authorized by the agency head or by law to
5 issue a final order, is not presiding, then the person presiding shall issue
6 recommended findings of fact and conclusions of law and a recommended order
7 ~~which becomes~~ within thirty days after the evidence has been received, briefs filed,
8 and arguments closed, or as soon thereafter as possible. The recommended
9 findings of fact and conclusions of law and the recommended order become final
10 unless specifically amended or rejected by the agency head. The agency head
11 may adopt ~~a~~ the recommended findings of fact and conclusions of law and the
12 recommended order as the final order. The agency may allow petitions for review
13 of a recommended order and may allow oral argument pending issuance of a final
14 order. An administrative agency may adopt rules regarding the review of
15 recommended orders and other procedures for issuance of a final order by the
16 agency.

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

29 **SECTION 17. AMENDMENT.** Subsection 1 of section 28-32-17 of the 1995

30 Supplement to the North Dakota Century Code is amended and reenacted as follows:

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

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

6 **43-18.2-05. Out-of-state applicants.** An applicant for a sewer and water contractor's
7 license or a sewer and water installer's license from out of state may take the examination upon
8 showing by affidavits that the applicant has experience in the state in which the applicant is
9 licensed. This experience must be the same as is required of applicants from this state. The
10 board shall provide applicants with application forms and affidavit forms necessary to comply
11 with this section. The secretary-treasurer of the board shall investigate the validity of the
12 affidavits. A rejected application must be treated as ~~a contested case~~ an adjudicative
13 proceeding.

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

16 **43-18.2-06. Experience for testing.** An applicant for a sewer and water installer's
17 license shall show evidence of two years' experience as a building sewer and water installer
18 apprentice in this state. Applicants for a sewer and water installation contractor's license must
19 have one year's experience as an installer in this state. All applicants shall show that their work
20 complies with the state plumbing code. Proof of experience must be shown by affidavits which
21 the board may investigate. The board shall provide applicants with application forms. If the
22 application is rejected, the matter must be treated as ~~a contested case~~ an adjudicative
23 proceeding.