

HOUSE JUDICIARY COMMITTEE  
1/26/2021

TESTIMONY OF MARY KAE KELSCH  
OFFICE OF ATTORNEY GENERAL  
HOUSE BILL NO. 1322

Mr. Chairman, members of the House Judiciary Committee.

I am Mary Kae Kelsch, Director of the Attorney General's State and Local Division. I appear on behalf of the Attorney General in opposition to House Bill 1322.

By law, agencies must submit proposed rules to the Attorney General's office for review before final adoption. Section 1 of the bill proposes that a rule is not legal if it is contrary to legislative intent, including the defeat of a legislative measure.

This proposed language is contrary to the principles of statutory construction. N.D.C.C. § 1-02-05. In ascertaining the meaning of a statute, we look first to the language of the statute as a whole, construing the words in their plain, ordinary, and commonly understood sense. Zueger v. North Dakota Workers Comp. Bureau, 584 N.W.2d 530. When a statute is clear and unambiguous, we look only to the face of the statute to determine legislative intent, and when the statute is clear and unambiguous, we cannot disregard it under the pretext of pursuing legislative intent. The late U.S. Supreme Court Justice Anthony Scalia argued that the temptation to use legislative history should be avoided because of the tendency to manufacture statements for favorable interpretations.

It is also contrary to settled case law to require a review of a defeated legislative measure to ascertain legislative intent. The fact that a bill or measure was defeated does not indicate any intent on the part of the legislature. James v. Young, 77 N.D. 451 (1950); Warner v. Solberg, 634 N.W.2d 65 (2001). A failed bill has no statutory power or authority. Public policy is declared by the action of the legislature not by its failure to act. Id.

The rulemaking process is one that must strike a careful balance between the branches of government. The standard of review is whether an administrative agency's rulemaking decision is arbitrary and capricious. This is a recognizable legal standard backed by case law. Little v. Traynor, 565 N.W.2d 766 (1997).

The Attorney General objects to the addition of the words "unnecessary" and "unreasonable" to Sections 2 and 3 because they are discretionary terms without any legal meaning and without any guidance on their application to proposed rules. The Legislature cannot delegate complete discretion to a committee, in this case, to the Administrative Rules Committee to determine whether a rule is "unnecessary" or "unreasonable" without any guidelines whatsoever on what the terms mean. To do so would lead to a clear separation of powers issue as found in the recent case of N.D. Legislative Assembly v. Burgum, 916 N.W.2d 83. The Court in the Burgum case stated that the law must set forth reasonably clear guidelines to enable the appropriate body to ascertain the facts.

This language also creates an additional separation of powers issue between the legislative and executive branches of government. While the legislature makes

the law, the executive branch is tasked with administering the laws pursuant to the parameters set forth in the statutes. One of those administrative tasks is the drafting of administrative rules to effectuate the law. While chapter 28-32 of the Century Code provides necessary standards and safeguards to ensure that there is not uncontrolled discretion with the agency, the addition of discretionary language for the Administrative Rules Committee is indicative of the Legislature drifting from a safeguard, ensuring that the administrative rules are within the parameters set by law, to infringing upon the execution of a law, which is an inherently executive branch function.

This relationship was explored in depth in a 1987 North Dakota Supreme Court case called Trinity Medical Center v. North Dakota Bd. Of Nursing, 399 N.W.2d 835. This case discusses that the Legislature sets standards for rule-making in the statute, in this specific case rulemaking authority for the board of nursing to set eligibility requirements for nursing schools. The court goes on to hold: “It is acceptable for the Legislature to allow plaintiff to promulgate reasonable eligibility requirements by rule, rather than fixing them by statutory provision. These requirements are the kind of ‘details’ which are properly delegated to an administrative agency . . .” Id. at 845. The case further goes on to say that the appropriate way for the Legislature to retract or reduce an agency’s rule-making authority is for the Legislature itself to make the statute more specific, not by delegating discretionary authority to the Administrative Rules Committee to override the executive agency’s application of the law. The determination of

whether or not a rule is necessary is a determination made by the executive agency in its execution of the laws; it is not a legislative function.

Due to the significant legal and constitutional issues facing this bill, the Attorney General's office recommends a do not pass. Thank you for your time and consideration.