

HOUSE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE
MARCH 16, 2023

TESTIMONY OF
NORTH DAKOTA BOARD OF MEDICINE
SENATE BILL NO. 2296

Chair Schauer, members of the Committee. I'm Sandra DePountis, Executive Director of the North Dakota Board of Medicine, appearing on behalf of the Board in opposition to Senate Bill 2296.

The bill amends a core tenant of the Administrative Agencies Practice Act (28-32) and subsequent review of courts by implementing a new "judicial deference" standard in North Dakota. The proposed law would remove deference to an administrative agency's interpretation of its statute or rule. However, administrative agencies work with their laws, rules, and regulations each day and are in the best position to shed light on their interpretations which provides continuity in administration, an important consideration to be recognized by a reviewing court.

It is also unclear what the second sentence is requiring. Administrative agencies may only act in accordance with authority provided by the Legislature in law and cannot increase this authority through the court.

Before administering a change to the current deference standard, it is important to recognize why courts provide deference to an administrative agency's final determination and order.

The Administrative Agencies Practice Act and reviewing courts have long recognized that administrative agencies are in the best position to make the final determination on a matter due to their specialized knowledge and experience,

especially with an agency like the Board of Medicine. As recognized by the Supreme Court, members of the Board provide the expertise and experience that is necessary to make decisions due to the “technical” nature of its disciplinary cases. In the most recent example, NDBOM v. Hsu, 2007 ND 9, the Supreme Court ultimately found the ALJ’s recommendations to be “unworkable” and affirmed the Board’s departure from the recommendations based on the evidence. To support such a decision, the Court provides:

¶42 **“In technical matters involving agency expertise, an agency decision is entitled to appreciable deference.** The determination of a physician’s standard of care and the requirements for appropriate document of that care involve technical matters. The Board is comprised mostly of practicing physicians, and the Board’s determination is entitled to appreciable deference. Moreover, it is not the court’s function to act as a super board when reviewing decisions by an administrative agency, and courts do not reweigh the evidence or substitute their judgment for a duly authorized agency.” (emphasis added)

Medical cases hinge on the specialty area involved in the case and applicable standards of care, which a court may miss or lack the ability to provide. This is the reason for deference to be provided to the Board.

This change would also have a fiscal impact on the Board. If a reviewing court could not rely on the Board’s expertise, the Board would need to instead employ outside experts to provide opinions, which are very expensive. Currently, if the Board does not have a member with expertise in the specialty area at issue in a case before it, the Board obtains an independent expert to provide such a review and opinion. Depending on the expert and specialty area – we have had quotes of \$650/hour to just review medical records for an initial expert opinion, to a live court testimony costing \$2,910/hour with a \$4,000 “appearance fee.” If the Board would need to employ an

outside expert for each case before it, the increased fees would need to be born on the whole medical community with an increased licensing fee. As a reference, last year the Board reviewed over 175 complaints, the year before that, over 200.

Finally, it's important to remember why cases are brought through the Administrative Agencies Practice Act by the Board of Medicine. It is due to concerns of substandard care or harm to the public. It is the Board's duty to fulfill its legislative mandate of protecting the public by verifying only competent and qualified health care providers are providing services to the citizens of North Dakota. This is done in part by removing any "bad actors" by meeting its burden of proof before taking away or conditioning a license through the disciplinary process.

It is due to the above reasoning that the Board of Medicine opposes this bill. Thank you for your time and attention and I would be happy to answer any questions.