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- Licensed Chiropractor in ND (and previously NC)
- Owner of Freedom Chiropractic Health Center in Fargo
- Founder and president of the Association of Wellness Chiropractors
- Business co-owner of several entities in ND involving land, minerals, water, and real estate
- Associates degree at Williston State College, BS in Chemistry at Dickinson State University, Doctor of Chiropractic at Northwestern Health Sciences University, Master's degree in Human Nutrition and Functional Medicine at University of Western States, and finishing Doctorate in Clinical Nutrition at University of Western States
- Married with 4 children

Chairman Schauer, Representatives of the Government and Veterans Affairs Committee,

My name is Dr. Jake Schmitz, and I am testifying on behalf of myself as a licensed chiropractor in the state of North Dakota (ND). My testimony is in support of SB 2296.

SB 2296 serves an extremely important function for ND as it pertains to administrative proceedings. As it currently stands, administrative agencies are granted deference during adjudicative proceedings. Deference shouldn't be granted for any part of the proceeding, as there are in most cases, disputes to both facts and law in question.

In the criminal system, a person is innocent until proven guilty beyond reasonable doubt. The burden, the entire burden, on any material issue of law or fact is on the prosecutor to prove guilt. Unfortunately, in ND, licensees are just the opposite--guilty unless they can prove themselves innocent. Even when licensees can prove themselves innocent, agencies can simply ignore or overrule the ALJ. This disparity is largely due to boards being granted deference.

Agencies first get to create their own rules, second get to interpret them however they see fit at that moment in time, and finally get deference at the legal level, because the current presumption is that they are the "experts". The idea that this system "works great as it is" stems from agencies liking the fact they get to tip the scales towards their position. I liken this to my children really enjoying playing card games with their grandmother, who always allows them to win.

SB 2296 prevents judges from granting deference, instead, allowing them to listen to the evidence presented by both sides and come to their own neutral conclusion. Why would anyone oppose that idea? This potentially could also save money for all parties, because if the playing field is leveled both parties have equal reason for wanting to settle out of court. In the case of most agencies (especially occupational licensing boards), if they prevail, they get reimbursed for the costs of proceeding (NDCC 43-06-15.8(f)(2), 43-12.1-13, 43-15-45, 43-17-31.1, 43-26.2-01, 43-28-18.2.7, to name a few). This means there should be minimal to no increased cost or any additional hearings for the state, and in fact there might be fewer. In fact, occupational boards are funded with license holder dues, and not state money.

Judges/Justices have been granting deference to agencies for a long time in ND (Hsu 2007 ND 9; Jones 2005 ND 22; Huff 2004 ND 225; Elshaug 2003 ND 117; and many others). The ND courts have continuously granted a long leash for agencies when they are acting in their quasi-judicial capacity and/or interpreting their own rules. If you start from Schmitz v. ND State Chiropractic Board 2022 ND 113 and work backwards, there are 23 different Supreme Court cases that use this justification for granting deference to agencies. This has been an issue and will continue being an issue unless you, as legislators, fix it. It is impossible to believe justice is being delivered where one party always has their hand on the scales of justice by virtue of being given deference for their arguments.

The Deference Doctrine (sometimes called Chevron Deference) has morphed from the original intent. After Chevron (Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)), judges attempted to refrain from making decisions regarding highly technical matters outside of their scope of expertise (i.e. brain surgery) where the law in question is ambiguous. However, in ND it has come to be interpreted as a policy of allowing agencies to run their own shows without recourse. The deference agencies are currently granted further tips the scales because the only avenue available to a license holder after a process heavily weighted in favor of the board is a costly appeal to a higher court. If all judges grant deference to the facts or legal arguments of the agency, there is no justice for the people, and no fairness for individuals through administrative hearings.

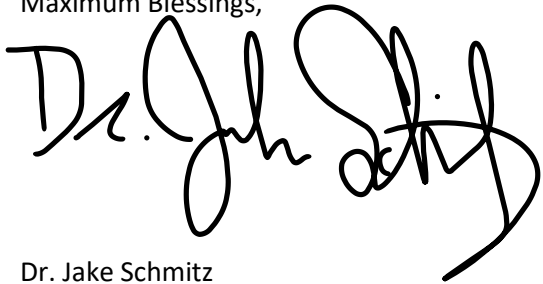
If the ALJ agrees with the licensee, the board/agency can appeal to District Court. The appeals process isn't an additional burden for the agency, but a leveling of the playing field. On one hand, agencies make the claim that a licensee can simply appeal decisions they don't agree with, using their own resources. On the other hand, they assert it is onerous when they must do the same.

The most important question to consider with this bill is why any state agency would not want a truly neutral and fair party (judge) to listen to the facts presented, make recommendations, and to decide the case, as they are trained to do. What are they afraid to lose with this bill? Agencies are claiming this bill reduces their administrative authority, but is that true? This bill only reduces their QUASI-JUDICIAL authority, not their administrative authority. I submit that would be a good thing, because if the agency is in front of an ALJ/judge/Justice, that means the licensee/citizen disagrees with their determination, asking for a third party to adjudicate and come to a neutral decision. If either party makes a compelling case, the judge will side with that party. Agencies shouldn't be given an advantage no matter the circumstances. The judicial branch, not agencies, should get to interpret the laws, as is done in all other cases heard before them. Agencies are part of the executive branch, and they need to stay in their lane.

I think it is important for me to close with a reminder. You, as individual legislators, aren't experts in every area or for every bill you hear. You listen to expert testimony, weigh the evidence, and come to a conclusion or judgment on whether you will vote for or against a bill. The court system should be no different, where judges are allowed to do their jobs with their primary function as adjudicators of each case. Agencies shouldn't be granted deference.

Please vote DO PASS on SB 2296. Thank you for your time and I will answer any questions you might have for me.

Maximum Blessings,

A handwritten signature in black ink, appearing to read "Dr. Jake Schmitz". The signature is stylized and cursive, with a large, sweeping flourish at the end.

Dr. Jake Schmitz