

North Dakota Ethics Commission
House Bill 1485
Testimony presented by
Rebecca Binstock, Executive Director
Before the House Industry, Business, and Labor Committee
February 1, 2023

AGENCY HISTORY

Good morning, Mr. Chairman and Committee members, my name is Rebecca Binstock. I serve as the Executive Director of the North Dakota Ethics Commission and I am here today to testify in opposition to HB 1485.

The Commission consists of five Commissioners who were appointed September 1, 2019:

- Chair Paul Richard (Fargo)
- Vice-Chair David Anderson (Bismarck)
- Ron Goodman (Oakes)
- Ward Koeser (Williston)
- Dr. Cynthia Lindquist (St. Michael)

The North Dakota Ethics Commission was created in 2018 by passage of an initiated measure which created Article XIV of the North Dakota Constitution. The Commission is governed by Article XIV of the North Dakota Constitution and North Dakota Century Code Chapter 54-66.

Since its inception, the Commission has adopted complaint rules, gift rules, quasi-judicial proceeding rules, and conflict of interest rules within the timelines outlined by Article XIV of the Constitution. The Commission continues to adopt rules to address transparency, corruption, elections, and lobbying as authorized by the Article XIV of the Constitution.

HB 1485

SECTION 1 amends N.D.C.C. § 28-32-08.1(5). Currently, subsection (5) states section 28-32-08.1 does not apply to the ethics commission. Section 1 of HB 1485 removes the language that states section 28-32-08.1 does not apply to the ethics commission. The ethics commission believes the intent of the amendment is to make the ethics commission subject to the subsection (5) of 28-32-08.1 and require the ethics commission to complete an economic impact statement prior to adopting rules.

Historically, the ethics commission has not been included as an agency required to complete economic impact statements because its rules do not affect small entities (small businesses, small organizations, and small political subdivisions). Rules adopted pursuant to the ethics commission's constitutional authority over transparency, corruption, elections, and lobbying do not impact small entities; therefore, the ethics commission was specifically excluded from completing economic impact statements.

While the ethics commission would be amenable to complete an economic impact statement prior to adopting rules, the commission believes the law as currently enacted is reasonable given the scope of the ethics commission's authority. Consequently, the ethics commission opposes Section 1 of HB 1485.

SECTION 2 amends N.D.C.C. § 54-66-11 to make the ethics commission "subject to" the administrative agencies practice act. Currently, section 54-66-11 requires the ethics commission to follow the portions of the administrative agencies practice act which specifically apply to the ethics commission. For instance, the ethics commission is subject to the regulatory analysis requirement; fiscal impact statement requirement; takings assessment requirement; and hearing, notice, comment, and publication requirements when adopting rules. The portions of the administrative agencies practice act which specifically apply to the ethics commission include language referencing the ethics commission – typically a rule that applies to administrative agencies and the commission includes both the terms "agency" and "commission."

The ethics commission believes the intent of HB 1485 is to require the ethics commission to comply with the entirety of the administrative agencies practice act, instead of the sections which are specifically applicable to the ethics commission.

In 2019, a similar proposition was considered and rejected because the ethics commission is not an administrative agency. The ethics commission's rulemaking and oversight

authority are constitutional and are derived from Article XIV of the North Dakota Constitution. This is distinctly different from the source of authority for administrative agencies, which is delegated to agencies by the legislative assembly.

Under current law, the portions of the administrative agencies practice act which are not applicable to the ethics commission, including review of its proposed rules by the attorney general and the legislative management's administrative rules committee before final adoption, is because the legislature does not delegate rule-making authority to ethics commission in the way it delegates authority to administrative agencies. Application of these rules to the ethics commission would create an inherent conflict of interest as the ethics commission has constitutional oversight authority over the attorney general and members of the legislative assembly. Therefore, the ethics commission opposes Section 2 of HB 1485.

SECTION 3 adds a new section to chapter 54-66 of the North Dakota Century Code. This section creates a limitation on the ethics commission's constitutional authority.

The ethics commission has no concerns as to subsection 1 (pg. 2, lines 13-19), as this subsection summarizes language of Article XIV of the Constitution of North Dakota. However, the ethics commission opposes subsections 2 and 3, specifically inclusion of the sentence which states: "This section does not include the authority to adopt rules imposing regulations related to conflicts of interest."

The ethics commission opposes the language because Article XIV of the Constitution instructs that the legislature may not be enact laws "to hamper, restrict, or impair" Article XIV. See N.D. Const. Art. XIV, § 4(1). HB 1485 directly restricts Article XIV as it carves out conflicts of interest rules from the scope of Article XIV.

Additionally, the last sentence of subsection 2 as well as subsection 3 are in direct conflict with the ethics commission's adoption of conflict of interest rules. The ethics commission has determined rules which provide guidance on how to address conflicts of interest inherently relate to transparency and corruption. In 2022, after a notice, hearing, and comment period, the ethics commission adopted conflict of interest rules for public officials. Subsections 2 and 3 of HB 1485 conflict with the conflict of interest rules promulgated by the ethics commission. Both the Attorney General and the North Dakota Supreme Court have determined that rules promulgated pursuant to constitutional authority prevail when in conflict with a legislatively-enacted rule. See Letter Opinion 2020-L-09, pp. (December 23, 2020) and City of Fargo v. Ruether, 490 N.W.2d 481, 483 (N.D. 1992). Thus, the ethics commission opposes Section 3 of HB 1485.

The North Dakota Ethics Commission urges this Committee reject HB 1485 with a do not pass recommendation.

Mr. Chairman, that concludes my testimony and I will gladly stand for any questions you may have.