

HOUSE JUDICIARY
1/30/2023

TESTIMONY OF MARY KAE KELSCH
OFFICE OF ATTORNEY GENERAL
HOUSE BILL NO. 1344

Mr. Chairman, members of the Committee.

I am Mary Kae Kelsch, Director, General Counsel Division, and I appear on behalf of the Attorney General in opposition to House Bill 1344.

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. In ascertaining the meaning of a statute, we look first to the language of the statute as a whole, and construe the words in their plain, ordinary, and commonly understood sense. If a statute is clear on its face, it is inappropriate to look to legislative history.
- 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 settled case law that it is inappropriate 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. 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.

- 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 rulemaking process strikes 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.
- The Legislature cannot delegate complete discretion to a committee, like the Administrative Rules Committee, to determine whether a rule is “unnecessary” or “unreasonable” without providing any guidelines whatsoever on what these terms mean.
- As we learned in the ND. Legislative Assembly v. Burgum case, the law must set forth reasonably clear guidelines to enable the appropriate body to ascertain the facts. To allow the Administrative Rules Committee to declare a rule void due to it being “unnecessary” or “unreasonable” would create a clear separation of powers issue, similar to the Burgum case.

- The Court in Trinity Medical Center v. North Dakota Board of Nursing also explained that the authority the Legislature has delegated to an administrative agency, it can also retract. Thus, if the Legislature believes an administrative agency has gone outside of its statutory guidelines it may retract the rulemaking authority or clarify the statute, rather than delegating discretionary authority to a subset of the Legislature to override the executive agency's application of the law.

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.