

SB 2296
Senate Judiciary Committee
Testimony of
ND Board of Nursing

Chair Larson and members of the Committee. I am Dr. Stacey Pfenning, Executive Director of the North Dakota Board of Nursing (“Board”).

I am here to provide testimony opposing **SB 2296** as this bill removes authority for administrative agencies to make final decisions in adjudicated proceedings under the Administrative Agencies Practice Act (28-32). Such action would greatly disrupt and impede the Board’s compliance and disciplinary processes.

The administrative agencies practices act, which is codified in Chapter 28-32 of the North Dakota Century Code, is based upon an understanding that administrative agencies are in the best position to make determinations about the professions they govern, and that members of a profession are best able to govern their own profession.

The North Dakota Supreme Court has confirmed on numerous occasions that the boards of administrative agencies, such as the Board of Nursing, generally consist of members of the profession being governed, and therefore have specific knowledge and experience regarding the matters that come before the board, specifically including issues raised in disciplinary proceedings before the Board.

SB 2296 seeks to detract from the fundamental basis underlying the administrative agencies’ practices act, and to take decision making away from members of the profession. Upon review by staff and legal counsel the following are the concerns of the Board within the proposed two new sections of NDCC Chapter 28-32.

Section 1. Administrative hearings: Agency adjudications. Subsection 4.

The proposed language on Page 1, lines 16 and 17, would require findings of fact, conclusions of law, and orders of an administrative law judge to be final. In other words, a board would not be able to modify or reject any findings, conclusions or orders that may ultimately be contrary to the profession governed by the board.

- Currently, a board can request an administrative law judge to handle a disciplinary hearing and to then make recommended findings, conclusions, and orders. Although it could conduct its own hearings, the Board of Nursing in particular utilizes the provisions of the administrative agency’s practices act allowing it to have an administrative law judge conduct hearings. This allows the hearing to be conducted by an impartial third party, but further allows the Board of Nursing to make sure that the recommended findings, conclusions and order of the administrative law judge are consistent with the laws, rules and standards applicable to the practice of nursing.
- Importantly, Chapter 28-32 already allows participants in the hearing to appeal a board’s final decision to the District Court. As a result, under its current provisions, Chapter 28-32 allows the members of a profession to govern themselves and to apply their specialized knowledge and experience to make sure that findings, conclusions, and orders issued in disciplinary matters are consistent with all standards applicable to the profession, while at the same time preserving the right of hearing participants to appeal such findings, conclusions

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and orders to the District Court. There is no need to change Chapter 28-32 as proposed in lines 16 and 17.

Section 2. Judicial deference. Subsection 1.

The proposed language on Page 1, Lines 21 through 24, would also be a change to the current process established by the administrative agencies practices act, and confirmed by the North Dakota Supreme Court.

- The Board of Nursing, which is made up of eight nurses and one non-nursing public member, is entrusted by the Nurse Practices Act to regulate the profession of nursing in North Dakota. Given the backgrounds of the members of the Board of Nursing, which includes advanced practice registered nurses, registered nurses and licensed practical nurses, the Board should be regarded as an expert in nursing matters, and its interpretations and application of nursing laws, regulations and standards should be given deference, particularly by administrative law judges and other persons who do not have similar education, training and experience in nursing matters.
- The proposed language in lines 21 through 24 seeks to minimize the knowledge and expertise of boards which are made up of members of the profession at issue and are already entrusted to regulate that profession.
- In order to preserve the use of a board's knowledge and expertise, Chapter 28-32 should not be changed as proposed in lines 21 through 24.

Section 2. Judicial deference. Subsection 2.

Finally, the proposed language on Page 2, Lines 1 through 3, would require an administrative law judge to resolve any doubt regarding a nursing issue in a manner that maximizes the individual liberty of the nurse and that limits the Board of Nursing's power.

- Such interpretation would be contrary to the basic premise of the Nurse Practice Act, and that of the practice acts of most other professions, which is to protect the public.
- The decision-making of the Board of Nursing, and that of any administrative law judge conducting a hearing on behalf of the Board, should be to resolve doubt in a manner that best protects the safety of the public.
- It would be in the public's best interest not to change Chapter 28-32 as proposed in lines 16 and 17.

Historically, the Board of Nursing has worked diligently to negotiate settlements that are agreeable to both the Board and the nurse facing disciplinary action. A hearing is pursued as a last resort, when all efforts to negotiate a settlement have been exhausted.

With the proposed changes to **SB 2296**, if the Board of Nursing elects to have an administrative law judge conduct a disciplinary hearing, the Board will need to hope that the administrative law judge, without any nursing education, training and experience, is able to apply all of the laws, regulations and standards of practice to the issue at hand, because the **SB 2296** seeks to take

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away the Board's ability to make sure that such laws, regulations and standards are correctly applied.

Thank you for the opportunity to share the Board's concerns. I am happy to answer any questions the committee may have.

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(Committee members: Chairwoman Sen. Diane Larson, Vice Chairman, Sen. Bob Paulson, Vice Chairman, Sen. Jonathan Sickler, Sen. Ryan Braunberger, Sen. Judy Estenson, Sen. Larry Luick, and Sen. Janne Myrdal)

Bill introduced by **Sen. Bob Paulson**, (Vice Chair Judiciary Committee), **Rep. Cole Christensen** (Member Judiciary & Transportation Committees), **Sen. Doug Larsen** (Chair Industry & Business Committee), **Rep. Bernie Satrom** (Vice Chair Government & Veterans Affairs Committee), **Rep. Steve Vetter** (Member Judiciary & Government & Veterans Affairs Committees) and **Sen. Kent Weston** (Member Human Services & Agriculture & Veterans Affairs Committees)