

JUDICIARY COMMITTEE  
FEBRUARY 1, 2023

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

Chair Larson, 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 takes away the authority for administrative agencies to make final decisions in adjudicated proceedings under the Administrative Agencies Practice Act (28-32) and instead requires the final decision be made by an administrative law judge (ALJ). This is a big change affecting the entire chapter of 28-32, which recognizes 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."

Medical cases hinge on the specialty area involved in the case and applicable standards of care, which ALJs may miss or lack the ability to provide. Allowing the Board to receive the recommended findings and orders and review the evidence and testimony from their expert point of view, permits the Board to work out many of the cases at the administrative level. Without this ability, the Board's only avenue would be to appeal the case to the District/Supreme Court – clogging up the court system. This avenue would also have a fiscal impact on the Board. Expert reviews of medical cases are very expensive to obtain, and medical cases are very technical, resulting in increased cost to the Board to bring an appeal through the court system. Generally, just a regular case going to the District and Supreme Court costs around \$50,000 – that would not include fees for expert testimony. Depending on the experts and specialty area – we have had quotes provided ranging from \$650/hour to just review medical records to do an initial expert opinion, to a live court testimony costing \$2,910/hour with a \$4,000 "appearance fee."

Finally, it is also unclear what the intent of Section 2 is. Administrative agencies work with their laws, statutes, and regulations each day and are arguably in the best position to shed light on their interpretations – an important piece of evidence for the ALJ to consider. The ALJ may decide to not give deference to the interpretation but that is left to his/her discretion. The bill takes away the ALJ's discretion.

Also problematic is taking away the ALJ's ability to review evidence as presented as a neutral third party under the requirements of North Dakota Rules of Evidence, and instead to mandate the ALJ to "exercise doubt in favor of a reasonable interpretation that limits agency power and maximizes individual liberty." The Board of Medicine brings cases due to substandard care or other discipline pursuant to the grounds set forth by law. This is not an exercise of "power" – but a duty of the Board to fulfill its mandate of protecting the public by verifying only competent and qualified health care providers are providing services to the citizens of North Dakota. The Board is already tasked with meeting the burden of proof – and licensees are afforded all opportunity to defend themselves. The language appears to take away the ALJ's ability to review the evidence and testimony in an unbiased and impartial manner and instead asks for all evidence presented by the Boards to be viewed as the Board engaging in a power trip.

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.