

February 14, 2023

PROPOSED AMENDMENTS TO SENATE BILL NO. 2296

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 28-32 of the North Dakota Century Code, relating to judicial deference; to amend and reenact sections 23.1-01-11, 28-32-31, 28-32-38, and 28-32-39, subsection 1 of section 28-32-42, section 38-19-08, subsection 9 of section 50-24.4-01.1, and section 54-23.4-11 of the North Dakota Century Code, relating to appeals, reconsideration of agency orders, duties of administrative hearing officers, separation of functions for hearing officers, and adjudicative proceedings; and to repeal sections 28-32-40 and 38-08-13 of the North Dakota Century Code, relating to reconsideration of a final order by an agency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 23.1-01-11 of the North Dakota Century Code is amended and reenacted as follows:

23.1-01-11. Appeal from permit proceedings.

1. An appeal from the issuance, denial, modification, or revocation of a permit issued under chapter 23.1-03, 23.1-04, 23.1-06, 23.1-08, or 61-28 may be made by the person who filed the permit application, or by any person who is aggrieved by the permit application decision, provided that person participated in or provided comments during the hearing process for the permit application, modification, or revocation. An appeal must be taken within thirty days after the final permit application determination is mailed by first-class mail to the permit applicant and to any interested person who has requested a copy of the final permit determination during the permit hearing process. Except as provided in this section, an appeal of the final permit determination is governed by sections ~~28-32-40, 28-32-42, 28-32-43, 28-32-44, 28-32-46, and 28-32-49~~. The department may substitute final permit conditions and written responses to public comments for findings of fact and conclusions of law. Except for a violation of chapter 23.1-03, 23.1-04, 23.1-06, 23.1-08, or 61-28 which occurs after the permit is issued, or any permit condition, rule, order, limitation, or other applicable requirement implementing those chapters which occurs after the permit is issued, any challenge to the department's issuance, modification, or revocation of the permit or permit conditions must be made in the permit hearing process and may not be raised on any collateral or subsequent legal proceeding, and the applicant and any aggrieved person may raise on appeal only issues that were raised to the department in the permit hearing process.
2. Notwithstanding subsection 1, the department may adopt any procedures governing appeals it determines are necessary and appropriate to develop, implement, or enforce a federally delegated, authorized, or approved program.

SECTION 2. AMENDMENT. Section 28-32-31 of the North Dakota Century Code is amended and reenacted as follows:

28-32-31. Duties of hearing officers.

All hearing officers shall:

1. Assure that proper notice has been given as required by law.
2. Conduct only hearings and related proceedings for which proper notice has been given.
3. Assure that all hearings and related proceedings are conducted in a fair and impartial manner.
4. ~~Make recommended findings of fact and conclusions of law and issue a recommended order, when appropriate.~~
5. Conduct the hearing only and perform such other functions of the proceeding as requested, when an agency requests a hearing officer to preside only as a procedural hearing officer. If the hearing officer is presiding only as a procedural hearing officer, the agency head must be present at the hearing and the agency head shall make findings of fact and conclusions of law and issue a final order. The agency shall give proper notice as required by law. The procedural hearing officer may issue orders in regard to the conduct of the hearing pursuant to statute or rule and to otherwise effect an orderly and prompt disposition of the proceedings.
- ~~6.5.~~ Make findings of fact and conclusions of law and issue a final order, ~~if required by statute or requested by an agency.~~
- ~~7.6.~~ Function only as a procedural hearing officer, when an agency requests a hearing officer to preside for a rulemaking hearing. The agency head need not be present. The agency shall give proper notice as required by law.
- ~~8.7.~~ Perform any and all other functions required by law, assigned by the director of administrative hearings, or delegated to the hearing officer by the agency.

SECTION 3. AMENDMENT. Section 28-32-38 of the North Dakota Century Code is amended and reenacted as follows:

28-32-38. Separation of functions.

1. No person who has served as the agency head, investigator, prosecutor, or advocate in the investigatory or prehearing stage of an adjudicative proceeding may serve as hearing officer.
2. No person who is subject to the direct authority of one who has served as an investigator, prosecutor, or advocate in the investigatory or prehearing stage of an adjudicative proceeding may serve as hearing officer.
3. Any other person may serve as hearing officer in an adjudicative proceeding, unless a party demonstrates grounds for disqualification.

4. Any person may serve as hearing officer at successive stages of the same adjudicative proceeding, unless a party demonstrates grounds for disqualification.

SECTION 4. AMENDMENT. Section 28-32-39 of the North Dakota Century Code is amended and reenacted as follows:

28-32-39. Adjudicative proceedings - Findings of fact, conclusions of law, and order of agency-- Notice.

1. In an adjudicative proceeding ~~an administrative agency~~ hearing officer shall make and state concisely and explicitly its findings of fact and its separate conclusions of law and the order ~~of the agency~~ based upon its findings and conclusions.
2. ~~If the agency head, or another person authorized by the agency head or by law to issue a final order, is presiding, the order issued is the final order. The agency hearing officer shall serve a copy of the final order and the findings of fact and conclusions of law on which it is based upon all the parties to the proceeding within thirty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible, in the manner allowed for service under the North Dakota Rules of Civil Procedure.~~
3. ~~If the agency head, or another person authorized by the agency head or by law to issue a final order, is not presiding, then the person presiding shall issue recommended findings of fact and conclusions of law and a recommended order within thirty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible. The recommended findings of fact and conclusions of law and the recommended order become final unless specifically amended or rejected by the agency head. The agency head may adopt the recommended findings of fact and conclusions of law and the recommended order as final. The agency may allow petitions for review of a recommended order and may allow oral argument pending issuance of a final order. An administrative agency may adopt rules regarding the review of recommended orders and other procedures for issuance of a final order by the agency. If a recommended order is issued, the agency must serve a copy of any final order issued and the findings of fact and conclusions of law on which it is based upon all the parties to the proceeding within sixty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible, in the manner allowed for service under the North Dakota Rules of Civil Procedure.~~

SECTION 5. AMENDMENT. Subsection 1 of section 28-32-42 of the North Dakota Century Code is amended and reenacted as follows:

1. Any party to any proceeding heard by an administrative agency, except when the order of the administrative agency is declared final by any other statute, may appeal from the order within thirty days after notice of the order has been given as required by section 28-32-39. ~~If a reconsideration has been requested as provided in section 28-32-40, the party may appeal within thirty days after notice of the final determination upon reconsideration has been given as required by sections 28-32-39 and~~

~~28-32-40. If an agency does not dispose of a petition for reconsideration within thirty days after the filing of the petition, the agency is deemed to have made a final determination upon which an appeal may be taken.~~

SECTION 6. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Judicial deference.

Notwithstanding any other provision of law, in interpreting or applying a state statute, regulation, or rule, an administrative law judge, judge, or hearing officer may not defer to a governmental entity's interpretation of the statute, regulation, or rule. If a rule is ambiguous, the administrative law judge, judge, or hearing officer shall resolve any ambiguity against the regulatory authority of the governmental entity.

SECTION 7. AMENDMENT. Section 38-19-08 of the North Dakota Century Code is amended and reenacted as follows:

38-19-08. Administrative procedure and judicial review.

Any proceedings under this chapter for the adoption or modification of rules or orders, including emergency orders relating to extraction of geothermal energy and determining compliance with rules of the commission, must be conducted in accordance with sections 38-08-11, 38-08-12, ~~38-08-13~~, and 38-08-14; and chapter 28-32 governs administrative practice when consistent with the provisions of this chapter and the above-referenced sections.

SECTION 8. AMENDMENT. Subsection 9 of section 50-24.4-01.1 of the North Dakota Century Code is amended and reenacted as follows:

9. The appeal determination under subsection 8 is the final administrative decision of the agency. That decision is subject to appeal to the district court, ~~and for that purpose, the decision must be treated as a decision on a petition for rehearing made pursuant to section 28-32-40.~~ Appeal to the district court must be taken in the manner required by section 28-32-42.

SECTION 9. AMENDMENT. Section 54-23.4-11 of the North Dakota Century Code is amended and reenacted as follows:

54-23.4-11. Attorney's fees.

~~The division shall determine and award reasonable attorney's fees, commensurate with services rendered, to be paid by the state to the attorney representing the claimant if the claimant prevails after a petition for reconsideration or rehearing under section 28-32-40 from an order reducing or denying crime victims compensation benefits. A district court may award attorney's fees in an appeal pursuant to section 28-32-42 if the claimant prevails on appeal from an order reducing or denying benefits. Attorney's fees are allowable for settlement of a disputed claim. Attorney's fees are not allowable for assisting a claimant in filing a claim. An award of attorney's fees is in addition to an award of compensation. An award of attorney's fees may not exceed the lesser of twenty percent of the compensation awarded or one thousand dollars. No attorney may contract for or receive any larger sum than the amount allowed.~~

SECTION 10. REPEAL. Sections 28-32-40 and 38-08-13 of the North Dakota Century Code are repealed."

Renumber accordingly