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Senate Judiciary Committee

SENATE BILL NO. 2296

Concerns with amended version

“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. After applying all customary tools of interpretation, the Court shall resolve any remaining ambiguity against increased agency authority.”

Industrial Commission Cases Information

- a. Since November 2021, NDIC has served 10 Complaints that initiated OAH proceedings.
 - i. Of those 10 Complaints:
 - 5 were settled prior to going to hearing. (1 settled even before we sent out an OAH request)
 - 1 was issued a default judgment.
 - 4 are ongoing.
 - Only one case went to an OAH hearing during this time.
 - b. Proposed language is expected to increase the number of cases going to OAH.
 1. Fewer complaints would be settled before going to hearing.
 2. Fewer Complaints would be manageable at any given time.
 3. Bad actors may be less likely to be pursued due to resource constraints.
 4. Fewer resources can be allocated to pursuing other claims like reclamation costs and other major cases.
 - c. Administrative Law Judge may not defer to agency's interpretation of statute, regulation, or regulatory document.
 1. Agency has subject matter expertise and provides better consistency across all cases.
 2. Defeats purpose of having the agency providing expertise and knowledge through sworn testimony in its determinations.
 3. OAH would no longer be useful for agency determinations. Cases might as well be adjudicated through agency examiner hearings and commission orders with appeals going straight to a District Court. District Courts would not have the sworn expert testimony of agency subject matter experts as a part of the order.

- d. Proving any ambiguity in any statute, regulation, or rule would likely result in a presumption against the agency.
 - i. The last line appears to be an attempt to codify the “major questions doctrine”, but instead of being limited to circumstances that would cause significant expansion of agency authority, this would apply to every single ambiguity, and always cuts against the agency as a matter of law, even for minor issues.
- e. Enables bad actors to win cases by finding an ambiguity.
 - i. Blue Appaloosa example:
 - What happens if an individual violates a rule, but just argues the circumstances are ambiguous?
 - In Blue Appaloosa, the Commission sought penalties from an individual who commenced construction of a treating plant in North Dakota without obtaining a permit.
 - That case hinged on whether dirt work being done could be considered to have been beginning construction of a treating plant.
 - The Commission had Mark Bohrer testify regarding the agency interpretation of N.D. Admin. Code § 43-02-03-15(6) and §43-02-03-51.3(1) to explain what the Commission considers to be “commencement of operations”.
 - Under this bill, the ALJ would be required to find that any ambiguity must be determined against “increased” Commission authority.
 - i. Even though there was evidence that the dirt work was for the purpose of constructing a treating plant, this bill would almost certainly result in a decision that the dirt work without a permit did not fall under Commission jurisdiction due to ambiguity.
 - The NDIC issued an order that simply reformatted the OAH order.
 - The NDIC order was appealed and affirmed in District Court.
 - The District Court’s affirmation was then appealed and upheld by the Supreme Court.