JUDICIAL PROCEDURE, CIVIL

CHAPTER 305

HOUSE BILL NO. 1369

(Representatives Payne, Berg)
(Senators Goetz, Tallackson)

PRODUCTS LIABILITY ACTIONS AND DAMAGES

AN ACT to create and enact three new sections to chapter 28-01.3 of the North Dakota Century Code, relating to limitations, rebuttable presumptions against defects, and exemplary damages in products liability actions; and to amend and reenact section 32-03.2-11 of the North Dakota Century Code, relating to exemplary damages.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Three new sections to chapter 28-01.3 of the 1993 Supplement to the North Dakota Century Code are created and enacted as follows:

Declaration of legislative findings and intent.

1. The legislative assembly finds that products liability reforms enacted in 1979, 1987, and 1993 have provided a needed degree of certainty in the laws governing civil actions against product manufacturers and sellers.

2. In recent years it has become increasingly evident that there are still serious problems with the current civil justice system. As a result, there is an urgent need for additional legislation to establish clear and predictable rules with respect to certain matters relating to products liability actions.

3. The purpose of the following sections is to clarify and improve the method of determining responsibility for the payment of damages in products liability litigation; to restore balance and predictability between the consumer and the manufacturer or seller in product liability litigation; to bring about a more fair and equitable resolution of controversies in products liability litigation; to reenact a statute of repose to provide a reasonable period of time for the commencement of products liability litigation after a manufacturer or seller has parted with possession of its product; to address problems that have been created by judicial interpretation of our previous enactments; to enact, with minor changes, several provisions of former chapter 28-01.1; and to simplify and provide an increased degree of certainty and predictability to our products liability laws.

Statute of limitation and repose.

1. Except as provided in subsections 4 and 5, there may be no recovery of damages in a products liability action unless the injury, death, or property damage occurs within ten years of the date of initial purchase

for use or consumption, or within eleven years of the date of manufacture of a product.

2. This section applies to all persons, regardless of minority or other legal disability.

3. If a manufacturer, wholesaler, or retailer issues a recall of a product in any state or becomes aware of any defect in a product at any time and fails to take reasonable steps to warn users of the product defect, the provisions of subsection 1 do not bar a products liability action against the manufacturer or seller by a user of the product who is subsequently injured or damaged as a result of the defect.

4. An action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthrophyllite, actinolite, or any combination thereof, must be commenced within three years after the injured person has been informed of discovery of the injury by competent medical authority and that the injury was caused by exposure to asbestos as described in this subsection, or within three years after the discovery of facts that would reasonably lead to the discovery, whichever is earlier. No action commenced under this subsection based on the doctrine of strict liability in tort may be commenced or maintained against any seller of a product that is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless the seller is also the manufacturer of the product or the manufacturer of the part of the product claimed to be defective.

5. An action to recover damages based on injury to property allegedly resulting from the presence of products containing asbestos fibers of any type must be commenced within six years of the date upon which the owner of that property knew or should have known of facts giving rise to the cause of action.

Rebuttable presumption against defects. There is a rebuttable presumption that a product is free from any defect or defective condition where the plans, designs, warnings, or instructions for the product or the methods and techniques of manufacturing, inspecting, and testing the product were in conformity with government standards established for that industry or where no government standards exist then with applicable industry standards, which were in existence at the time the plans, designs, warnings, or instructions for the product or the methods and techniques of manufacturing, inspecting, and testing the product were adopted.

SECTION 2. AMENDMENT. Section 32-03.2-11 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

32-03.2-11. When court or jury may give exemplary damages.

1. In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, ~~actual or presumed,~~ the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant. Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages. The motion must allege an

applicable legal basis for awarding exemplary damages and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim exemplary damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

2. If either party so elects, the trier of fact shall first determine whether compensatory damages are to be awarded before addressing any issues related to exemplary damages. Evidence relevant only to the claim for exemplary damages is not admissible in the proceeding on liability for compensatory damages. If an award of compensatory damages has been made, the trier of fact shall determine whether exemplary damages are to be awarded.

3. Evidence of a defendant's financial condition or net worth is not admissible in the proceeding on exemplary damages.

4. If the trier of fact determines that exemplary damages are to be awarded, the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater; provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. In a jury trial, the jury may not be informed of the limit on damages contained in this subsection. Any jury award in excess of this limit must be reduced by the court.

5. In order for a party to recover exemplary damages, the finder of fact shall find by clear and convincing evidence that the amount of exemplary damages awarded is consistent with the following principles and factors:

   a. Whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;

   b. The degree of reprehensibility of the defendant's conduct and the duration of that conduct; and

   c. Any of the following factors as to which evidence is presented:

      (1) The defendant's awareness of and any concealment of the conduct;

      (2) The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; and

      (3) Criminal sanctions imposed on the defendant for the same conduct that is the basis for the exemplary damage claim, these to be taken into account if offered in mitigation of the exemplary damage award.

6. Exemplary damages may not be awarded against a manufacturer or seller if the product's manufacture, design, formulation, inspection, testing, packaging, labeling, and warning complied with:

   a. Federal statutes existing at the time the product was produced;

   b. Administrative regulations existing at the time the product was produced that were adopted by an agency of the federal government which had responsibility to regulate the safety of the product or to establish safety standards for the product pursuant to a federal statute; or

   c. Premarket approval or certification by an agency of the federal government.

7. The defense in subsection 6 does not apply if the plaintiff proves by clear and convincing evidence that the product manufacturer or product seller:

   a. Knowingly and in violation of applicable agency regulations withheld on misrepresented information required to be submitted to the agency, which information was material and relevant to the harm in question; or

   b. Made an illegal payment to an official of the federal agency for the purpose of securing approval of the product.

8. Exemplary damages may be awarded against a prinicipal because of an act by an agent only if at least one of the following is proved by clear and convincing evidence to be true:

   a. The principal or a managerial agent authorized the doing and manner of the act;

   b. The agent was unfit and the principal or a managerial agent was reckless in employing or retaining the agent;

   c. The agent was employed in a managerial capacity and was acting in the scope of employment; or

   d. The principal or managerial agent ratified or approved the doing and manner of the act.

Approved April 6, 1995
Filed April 6, 1995

CHAPTER 306

HOUSE BILL NO. 1051

(Legislative Council)
(Interim Jobs Development Commission)
(Representatives Grumbo, Tollefson, Nichols, Nicholas)
(Senators Krauter, St. Aubyn)

AIRCRAFT PRODUCT LIABILITY

AN ACT relating to product liability actions against manufacturers of general aviation light aircraft.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Definitions. As used in this Act:

1. "Aircraft" means general aviation light craft that is powered and intended to fly above the ground; is designed to carry one person or more, but with a maximum seating capacity of fewer than twenty passengers; and weighs less than twelve thousand five hundred pounds [5669.9 kilograms].

2. "Aircraft component" means a manufactured part or assembly intended for use in the construction, replacement, or repair of an aircraft. The term includes any complete aircraft subsystem, including the aircraft engine, that carries its own manufacturer's warranty or services provided separately from the warranty of the manufacturer of the aircraft.

3. "Aviation manufacturer" means a manufacturer of aircraft or aircraft components who has its place of manufacture and place of production of aircraft or aircraft components located within this state. The term includes a manufacturer located in this state who imports raw materials, components, and aircraft subassemblies from outside the state for manufacturing purposes. The term also includes a person who modifies, maintains, alters, repairs, or installs aircraft components in aircraft in accordance with federal aviation administration regulations and holds a repair station certificate issued by the federal aviation administration.

4. "State-of-the-art product" means an aircraft or aircraft component manufactured by utilizing the most recent scientific, mechanical, and technological developments at the time of manufacture.

SECTION 2. Compliance with federal standards - Presumptions and defenses.

1. There is a disputable presumption that a product is free from any defect or defective condition if the product was in compliance with:

   a. Government standards established for that product; or

   b. If no government standards exist, applicable industry standards that were in existence at the time of manufacture.

2. An aviation manufacturer or a seller of aircraft or aircraft components may utilize the presumption provided by subsection 1 if the manufacture, design, formulation, inspection, testing, packaging, labeling, or warning complied with:

   a. Federal aviation administration or department of transportation regulations that relate to the safety or establish safety standards for the aircraft or aircraft component and which existed at the time the aircraft or aircraft component was produced;

   b. Any premarket approval or certification by the federal aviation administration or any other federal agency; and

   c. Applicable industry standards that were in existence at the time the plans, designs, warnings, or instructions for the aircraft or aircraft component or the methods and techniques of manufacturing, inspecting, and testing the product were adopted.

3. The presumption under subsection 1 is not available if the plaintiff proves by clear and convincing evidence that the aviation manufacturer or product seller knowingly and in violation of applicable agency regulations made misrepresentations, made illegal payments to an official for the purpose of securing approval, committed fraud, or concealed evidence.

4. There is an absolute defense to any product liability action brought against an aviation manufacturer when a claimant, in violation of federal aviation administration regulations, has used alcohol or illicit drugs while operating or using an aircraft or aircraft component.

5. This Act does not affect the authority of the federal aviation administration or any other federal agency with regard to the regulation of aircraft and aircraft components.

SECTION 3. State-of-the-art defense. An aviation manufacturer or seller of aircraft or aircraft components may not be held liable for any personal injury, death, or damage to property sustained as a result of an alleged defect in a state-of-the-art product. An aircraft or aircraft component is presumed to be a state-of-the-art product if the plaintiff cannot show by a preponderance of the evidence that a safer aircraft or aircraft component was on the market at the time of manufacture. No evidence of subsequent design or modification of an aircraft or aircraft component is admissible to prove that an aircraft or aircraft component is not a state-of-the-art product. The state-of-the-art comparisons must be made to products with similar-intended utility. The trier of the fact shall consider the defense that the designer's choice averted greater peril for a large subclass of intended users and shall consider the economic viability of the component or product.

SECTION 4. Useful safe life - Statute of repose - Statute of limitation.

1. An aviation manufacturer may not be held liable in a product liability action if the defendant establishes that the harm was caused after the period of useful safe life of the aircraft or aircraft component had expired. The useful safe life of an aircraft or aircraft component may be measured in units of time or in other units that accurately gauge the useful safe life of a product.

2. In a claim for relief that involves injury more than ten years after the date of first delivery of the aircraft or aircraft component to the first user, purchaser, or lessee, a disputable presumption arises that the harm was caused after the useful safe life had expired. The presumption may only be rebutted by clear and convincing evidence. If the aviation manufacturer or seller expressly warrants that its product can be utilized safely for a period longer than ten years, the period of repose is extended according to the warranty or promise.

3. With respect to any aircraft component that replaced another product originally in, or which was added to, the aircraft, and which is alleged to have caused the claimant's damages, no claim for damages may be made after the useful safe life of the component, the period stated in the warranty, or ten years after manufacture of the component, whichever is later.

4. A product liability action may not be brought more than two years after the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm and cause of the action.

Approved April 4, 1995
Filed April 4, 1995

CHAPTER 307

HOUSE BILL NO. 1286

(Representatives Kelsch, Austin, Mahoney)
(Senator Krebsbach)

PROFESSIONAL LICENSE SUSPENSION FOR STUDENT LOAN DEFAULT

AN ACT to amend and reenact section 28-25-11 of the North Dakota Century Code, relating to the suspension of an occupational or professional license for nonpayment of a defaulted state guaranteed student loan.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 28-25-11 of the North Dakota Century Code is amended and reenacted as follows:

28-25-11. Property applied - Wages exempt - Suspension of occupational or professional license for nonpayment of defaulted state guaranteed student loans.

1. The judge may order any property of the judgment debtor not exempt from execution in the hands either of ~~himself~~ the judgment debtor or of any other person or due the judgment debtor to be applied towards the satisfaction of the judgment, except that the earnings of the debtor for ~~his~~ the debtor's personal services at any time within sixty days next preceding the order cannot be so applied when it is made to appear, by the debtor's affidavit or otherwise, that ~~such~~ the earnings are necessary for the use of a family supported wholly or partly by ~~his~~ the debtor's labor.

2. If the debt for which a judgment is entered is for a guaranteed student loan, the court, after considering the factors in subsection 1, shall address and make specific findings on the issue of whether the judgment debtor has an occupational or a professional certificate license or permit issued by or on behalf of the state or any occupational or professional boards, which the judgment debtor is required to obtain before engaging in the judgment debtor's occupation or profession. The court, based on principles of fairness, including consideration of whether the judgment debtor has been unjustly enriched, may suspend a judgment debtor's certificate, license, or permit. Following a decision to suspend a judgment debtor's certificate, license, or permit, the court shall notify the judgment debtor that the decision becomes final thirty days after the notification unless the judgment debtor satisfies the entire outstanding payment due or makes regular payment on the judgment in a manner and at times satisfactory to the court. The court shall notify the proper licensing authority of the court's decision to suspend a judgment debtor's certificate, license, or permit. A certificate, license, or permit suspended by an order issued under this section may be reissued only by order of the court. An appeal by a judgment debtor who has had a certificate,

license, or permit suspended under this section is an appeal from the court's order and may not be appealed to the licensing authority.

Approved March 31, 1995
Filed April 3, 1995

CHAPTER 308

SENATE BILL NO. 2429

(Senators Krebsbach, Kinnoin, Tomac, Traynor)
(Representatives Kretschmar, Timm)

ADMINISTRATIVE RULE NOTICE AND ADOPTION

AN ACT to amend and reenact subsection 11 of section 28-32-01 and subsections 4 and 5 of section 28-32-02 of the North Dakota Century Code, relating to the adoption of administrative rules.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

[165] **SECTION 1. AMENDMENT.** Subsection 11 of section 28-32-01 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

11. "Rule" means the whole or a part of an agency statement of general applicability that implements~~,~~ ~~interprets,~~ or prescribes law or policy, or the organization, procedure, or practice requirements of the agency. The term includes the adoption of new rules and the amendment, repeal, or suspension of an existing rule. The term does not include:

    a. A rule concerning only the internal management of an agency which does not directly or substantially affect the substantive or procedural rights or duties of any segment of the public.

    b. A rule that sets forth criteria or guidelines to be used by the staff of an agency in the performance of audits, investigations, inspections, and settling commercial disputes or negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if the disclosure of the statement would:

        (1) Enable law violators to avoid detection;

        (2) Facilitate disregard of requirements imposed by law; or

        (3) Give a clearly improper advantage to persons who are in an adverse position to the state.

    c. A rule establishing specific prices to be charged for particular goods or services sold by an agency.

    d. A rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property.

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[165] Section 28-32-01 was also amended by section 1 of Senate Bill No. 2405, chapter 309; section 10 of House Bill No. 1432, chapter 209; and section 4 of House Bill No. 1089, chapter 313.

e. A rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property.

f. A rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital.

g. A form whose contents or substantive requirements are prescribed by rule or statute or are instructions for the execution or use of the form.

h. An agency budget.

i. An opinion of the attorney general.

j. A rule adopted by an agency selection committee under section 54-44.7-03.

k. Any material, including a guideline, interpretive statement, statement of general policy, manual, brochure, or pamphlet, that is merely explanatory and not intended to have the force and effect of law.

[166] **SECTION 2. AMENDMENT.** Subsections 4 and 5 of section 28-32-02 of the 1993 Supplement to the North Dakota Century Code are amended and reenacted as follows:

4. The agency's notice of the proposed adoption, amendment, or repeal of a rule must include a short, specific explanation of the proposed rule and the purpose of the proposed rule, a determination of whether the proposed rulemaking is expected to have an impact on the regulated community in excess of fifty thousand dollars, identify at least one location where interested persons may review the text of the proposed rule, provide the address to which written data, views, or arguments concerning the proposed rule may be sent, provide a phone number at which a copy of the rules and regulatory analysis may be requested, and, in the case of a substantive rule, provide the time and place set for each oral hearing. The notice must be filed with the office of the legislative council and published at least twice in each daily newspaper of general circulation published in this state. The agency shall mail a copy of the notice to each person who has made a timely request to the agency for a mailed copy of the notice. The agency may mail or otherwise provide a copy of the notice to any person who is likely to be an interested person. The agency shall mail or deliver a copy of the rules to any person requesting a copy. The agency may charge for the actual cost of providing copies of the proposed rule. At least thirty days must elapse

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[166] Section 28-32-02 was also amended by section 2 of Senate Bill No. 2405, chapter 309, and section 1 of House Bill No. 1284, chapter 310.

between the later of the date of the second publication of the notice or the date the legislative council mails copies of an agency's notice and the date of the hearing. The thirty-day period begins on the first business day of the month in which the notices must be mailed or on the date of the second publication, whichever is later. Subject to subsection 5, notices filed on or before the last calendar day of the preceding month must be mailed by the legislative council on the first business day of the following month to any person making a request. The agency shall allow, after the conclusion of any rulemaking hearing, a comment period of not less than thirty days during which data, views, or arguments concerning the proposed rulemaking will be received by the agency and made a part of the rulemaking record to be considered by the agency.

5. The legislative council shall establish standard procedures for all agencies to follow in complying with the provisions of subsection 4 and a procedure whereby any person may request and receive mailed copies of all filings made by agencies pursuant to subsection 4. The legislative council may charge for providing copies of the filings.

Approved March 17, 1995
Filed March 20, 1995

CHAPTER 309

SENATE BILL NO. 2405

(Senator W. Stenehjem)
(Representative Svedjan)

ADMINISTRATIVE RULES ADOPTION

AN ACT to amend and reenact subsection 11 of section 28-32-01 and subsections 6 and 7 of section 28-32-02 of the North Dakota Century Code, relating to adoption of administrative rules.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

[167] **SECTION 1. AMENDMENT.** Subsection 11 of section 28-32-01 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

11. "Rule" means the whole or a part of an agency statement of general applicability that implements~~,~~ ~~interprets,~~ or prescribes law or policy, or the organization, procedure, or practice requirements of the agency. The term includes the amendment, repeal, or suspension of an existing rule. The term does not include:

    a. A rule concerning only the internal management of an agency which does not directly or substantially affect the substantive or procedural rights or duties of any segment of the public.

    b. A rule that sets forth criteria or guidelines to be used by the staff of an agency in the performance of audits, investigations, inspections, and settling commercial disputes or negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if the disclosure of the statement would:

        (1) Enable law violators to avoid detection;

        (2) Facilitate disregard of requirements imposed by law; or

        (3) Give a clearly improper advantage to persons who are in an adverse position to the state.

    c. A rule establishing specific prices to be charged for particular goods or services sold by an agency.

    d. A rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property.

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[167] Section 28-32-01 was also amended by section 1 of Senate Bill No. 2429, chapter 308; section 10 of House Bill No. 1432, chapter 209; and section 4 of House Bill No. 1089, chapter 313.

e. A rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property.

f. A rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital.

g. A form whose contents or substantive requirements are prescribed by rule or statute or are instructions for the execution or use of the form.

h. An agency budget.

i. An opinion of the attorney general.

j. A rule adopted by an agency selection committee under section 54-44.7-03.

k. Any material, including a guideline, interpretive statement, statement of general policy, manual, brochure, or pamphlet, that is ~~merely~~ explanatory and not intended to have the force and effect of law.

[168] **SECTION 2. AMENDMENT.** Subsections 6 and 7 of section 28-32-02 of the 1993 Supplement to the North Dakota Century Code are amended and reenacted as follows:

6. If the agency finds that emergency rulemaking is necessary because of imminent peril to the public health, safety, or welfare, ~~or~~ because a delay in rulemaking is likely to cause a loss of revenues appropriated to support a duty imposed by law upon the agency, or because reasonably necessary to avoid a delay in implementing an appropriations measure, the agency may declare the proposed rule to be an interim final rule effective on a date no earlier than the date of filing with the legislative council of the notice required by subsection 4. A final rule adopted after consideration of all written and oral submissions respecting the interim final rule, which is substantially similar to the interim final rule, is effective as of the declared effective date of the interim final rule. The agency's finding, and a brief statement of the reasons therefor, must be filed with the office of the legislative council, along with any final rule adopted. The agency shall take appropriate measures to make interim final rules known to every person who may be affected by them. An interim final rule is ineffective one hundred eighty days after its declared effective date unless first adopted as a final rule.

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[168] Section 28-32-02 was also amended by section 2 of Senate Bill No. 2429, chapter 308, and section 1 of House Bill No. 1284, chapter 310.

7. Every rule proposed by any administrative agency must be submitted to the attorney general for an opinion as to its legality before final adoption, and the attorney general shall promptly furnish each such opinion. The attorney general may not approve any rule as to legality when the rule exceeds the statutory authority of the agency or is written in a manner that is not concise or easily understandable, or when the procedural requirements for adoption of the rule in this chapter are not substantially met. The attorney general shall advise an agency of any revision or rewording of a rule necessary to correct objections as to legality.

Approved April 3, 1995
Filed April 3, 1995

CHAPTER 310

HOUSE BILL NO. 1284

(Representatives Koppelman, Gorman, Kretschmar)
(Senator Mutch)

ADMINISTRATIVE RULES COMMITTEE AUTHORITY

AN ACT to amend and reenact subsection 1 of section 28-32-02 and sections 28-32-03 and 28-32-03.3 of the North Dakota Century Code, relating to the authority of the administrative rules committee over the effectiveness of administrative rules; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

[169] **SECTION 1. AMENDMENT.** Subsection 1 of section 28-32-02 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. The authority of an administrative agency to adopt administrative rules is authority delegated by the legislative assembly. As part of that delegation, the legislative assembly reserves to itself the authority to determine when and if rules of administrative agencies are effective. Every administrative agency may adopt, ~~and from time to time to~~ amend, or repeal~~,~~ reasonable rules in conformity with the provisions of this chapter and any statute administered or enforced by the agency.

SECTION 2. AMENDMENT. Section 28-32-03 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-03. Filing of rules - Force and effect of rules - Form and style of rules - Rules invalid unless in compliance with chapter.

1. A copy of each rule adopted by an administrative agency, and the attorney general's opinion thereon, must be filed by the adopting agency with the office of the legislative council for publication in the North Dakota Administrative Code.

2. Nonemergency rules approved by the attorney general as to legality, adopted by an administrative agency, and filed with the office of the legislative council become effective the first day of the month after the month of publication as provided for in section 28-32-03.1, except that if a later date is required by statute ~~or~~, specified in the rule, or provided under section 28-32-03.3, the later date is the effective date. A rule found to be void by the committee on administrative rules is void from the time provided under section 28-32-03.3. If publication is delayed due to technological problems or lack of funds, nonemergency rules,

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[169] Section 28-32-02 was also amended by section 2 of Senate Bill No. 2429, chapter 308, and section 2 of Senate Bill No. 2405, chapter 309.

unless otherwise provided, become effective on the first day of the month after the month publication would have occurred but for the delay.

3. Upon becoming effective, rules have the force and effect of law until amended or repealed by the agency, declared invalid by a final court decision, suspended or found to be void by the committee on administrative rules, or determined repealed by the office of the legislative council because the authority for adoption of the rules is repealed or transferred to another agency.

4. The office of the legislative council may prescribe a format, style, and arrangement for rules which are to be published in the code, and may refuse to accept the filing of any rule that is not in substantial compliance therewith. In arranging rules for publication, the office of the legislative council may make such corrections in spelling, grammatical construction, format, and punctuation of the rules as deemed proper. The office of the legislative council shall keep and maintain a permanent code of all rules filed, including superseded and repealed rules, which must be open to public inspection during office hours.

5. A rule is invalid unless adopted in substantial compliance with this chapter. However, inadvertent failure to supply any person with a notice required by section 28-32-02 does not invalidate a rule. Notwithstanding subsection 2 of section 28-32-15, an action to contest the validity of a rule on the grounds of noncompliance with this chapter may not be commenced more than two years after the effective date of the rule.

SECTION 3. AMENDMENT. Section 28-32-03.3 of the North Dakota Century Code is amended and reenacted as follows:

28-32-03.3. Committee on administrative rules - Finding that rules are void - Objection to rules - Effects of objection.

1. The legislative council's committee on administrative rules may find that all or any portion of a rule is void if that finding is made within ninety days after the date of the administrative code supplement in which the rule change appears or, for rule changes appearing in the administrative code supplement from November first immediately preceding a regular session of the legislative assembly through the following May first, if that finding is made at the first meeting of the administrative rules committee following the regular session of the legislative assembly. The committee on administrative rules may find a rule or portion of a rule void if the committee makes the specific finding that, with regard to that rule or portion of a rule, there is:

   a. An absence of statutory authority.

   b. An emergency relating to public health, safety, or welfare.

   c. A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for adoption of the rule.

   d. A conflict with state law.

e. Arbitrariness and capriciousness.

f. A failure to make a written record of its consideration of written and oral submissions respecting the rule under subsection 3 of section 28-32-02.

2. Within three business days after the committee on administrative rules finds that a rule is void, the office of the legislative council shall provide written notice of that finding and the committee's specific finding under subdivisions a through f of subsection 1 to the adopting agency and to the chairman of the legislative council. Within fourteen days after receipt of the notice, the adopting agency may file a petition with the chairman of the legislative council for review by the legislative council of the decision of the committee on administrative rules. If the adopting agency does not file a petition for review, the rule becomes void on the fifteenth day after the notice from the office of the legislative council to the adopting agency. If within sixty days after receipt of the petition from the adopting agency the legislative council has not disapproved by motion the finding of the committee on administrative rules, the rule is void.

3. If the legislative council's committee on administrative rules objects to all or any portion of a rule because the committee deems it to be unreasonable, arbitrary, capricious, or beyond the authority delegated to the adopting agency, the committee may file that objection in certified form in the office of the legislative council. The filed objection must contain a concise statement of the committee's reasons for its action.

~~2.~~ a. The office of the legislative council shall attach to each objection a certification of the time and date of its filing and, as soon as possible, shall transmit a copy of the objection and the certification to the agency adopting the rule in question. The office of the legislative council shall also maintain a permanent register of all committee objections.

~~3.~~ b. The office of the legislative council shall publish an objection filed pursuant to this section in the next issue of the code supplement. In case of a filed committee objection to a rule subject to the exceptions of the definition of rule in section 28-32-01, the agency shall indicate the existence of that objection adjacent to the rule in any compilation containing that rule.

~~4.~~ c. Within fourteen days after the filing of a committee objection to a rule, the adopting agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

~~5.~~ d. After the filing of a committee objection, the burden of persuasion is upon the agency in any action for judicial review or for enforcement of the rule to establish that the whole or portion thereof objected to is within the procedural and substantive authority delegated to the agency. If the agency fails to meet its burden of persuasion, the court shall declare the whole or portion of the rule objected to invalid and judgment must be rendered against the agency for court costs. These court costs must include a

reasonable attorney's fee and must be payable from the appropriation of the agency which adopted the rule in question.

4. An agency may amend or repeal a rule or create a related rule if, after consideration of rules by the committee on administrative rules, the agency and committee agree that the rule amendment, repeal, or creation is necessary to address any of the considerations under subsection 1. A rule amended, repealed, or created under this subsection is not subject to the other requirements of this chapter relating to adoption of administrative rules and may be resubmitted by the agency to the legislative council for publication as amended, repealed, or created and reconsidered by the committee on administrative rules at a subsequent meeting at which public comment on the agreed rule change must be allowed.

SECTION 4. AMENDMENT. Section 28-32-03.3 of the North Dakota Century Code is amended and reenacted as follows:

28-32-03.3. Committee on administrative rules - Suspension of rules - Objection to rules - Effects of objection.

1. The legislative council's committee on administrative rules may find, for any reason under this subsection, that all or any portion of a rule should be reviewed by the legislative assembly, and the committee may suspend the rule or portion of a rule under this subsection if the suspension is made within ninety days after the date of the administrative code supplement in which the rule change appears or, for rule changes appearing in the administrative code supplement from November first immediately preceding a regular session of the legislative assembly through the following May first, if that suspension is made at the first meeting of the administrative rules committee following the regular session of the legislative assembly. A rule or a portion of a rule suspended under this subsection becomes permanently ineffective unless it is ratified by both houses of the legislative assembly during the next session of the legislative assembly, in which case it is effective as of the date of ratification by the second house of the legislative assembly. An agency seeking ratification of its rule shall introduce a bill for that purpose. The committee on administrative rules may suspend a rule or portion of a rule if the committee specifically finds that, with regard to the rule, there is:

   a. An absence of statutory authority.

   b. An emergency relating to public health, safety, or welfare.

   c. A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for adoption of the rule.

   d. A conflict with state law.

   e. Arbitrariness and capriciousness.

   f. A failure to make a written record of its consideration of written and oral submissions respecting the rule under subsection 3 of section 28-32-02.

2. Within three business days after the committee on administrative rules suspends a rule, the office of the legislative council shall provide written notice of that suspension and the committee's specific finding under subdivisions a through f of subsection 1 to the adopting agency and to the chairman of the legislative council. Within fourteen days after receipt of the notice, the adopting agency may file a petition with the chairman of the legislative council for review by the legislative council of the decision of the committee on administrative rules. After receipt of the petition and before the next session of the legislative assembly, the legislative council by motion may lift the suspension and reinstate the rule's effectiveness.

3. If the legislative council's committee on administrative rules objects to all or any portion of a rule because the committee deems it to be unreasonable, arbitrary, capricious, or beyond the authority delegated to the adopting agency, the committee may file that objection in certified form in the office of the legislative council. The filed objection must contain a concise statement of the committee's reasons for its action.

~~2.~~ a. The office of the legislative council shall attach to each objection a certification of the time and date of its filing and, as soon as possible, shall transmit a copy of the objection and the certification to the agency adopting the rule in question. The office of the legislative council shall also maintain a permanent register of all committee objections.

~~3.~~ b. The office of the legislative council shall publish an objection filed pursuant to this section in the next issue of the code supplement. In case of a filed committee objection to a rule subject to the exceptions of the definition of rule in section 28-32-01, the agency shall indicate the existence of that objection adjacent to the rule in any compilation containing that rule.

~~4.~~ c. Within fourteen days after the filing of a committee objection to a rule, the adopting agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

~~5.~~ d. After the filing of a committee objection, the burden of persuasion is upon the agency in any action for judicial review or for enforcement of the rule to establish that the whole or portion thereof objected to is within the procedural and substantive authority delegated to the agency. If the agency fails to meet its burden of persuasion, the court shall declare the whole or portion of the rule objected to invalid and judgment must be rendered against the agency for court costs. These court costs must include a reasonable attorney's fee and must be payable from the appropriation of the agency which adopted the rule in question.

4. An agency may amend or repeal a rule or create a related rule if, after consideration of rules by the committee on administrative rules, the agency and committee agree that the rule amendment, repeal, or creation is necessary to address any of the considerations under subsection 1. A rule amended, repealed, or created under this subsection is not subject to the other requirements of this chapter relating to adoption of administrative rules and may be resubmitted by

the agency to the legislative council for publication as amended, repealed, or created and reconsidered by the committee on administrative rules at a subsequent meeting at which public comment on the agreed rule change must be allowed.

SECTION 5. EFFECTIVE DATE - SUSPENSION. This Act is effective for any rule adopted by an administrative agency after July 30, 1995. Section 4 of this Act is suspended from operation and becomes effective retroactive to August 1, 1995, upon a ruling by the North Dakota supreme court that any portion of subsection 1 of section 28-32-03.3 as created by section 3 of this Act is unconstitutional.

Approved April 21, 1995
Filed April 21, 1995

CHAPTER 311

HOUSE BILL NO. 1024

(Legislative Council)
(Interim Administrative Rules Committee)
(Representatives Freier, Gorman, Wilkie, Kretschmar)
(Senators Tennefos, Nalewaja)

ENVIRONMENTAL RULES FROM FEDERAL GUIDELINES

AN ACT to create and enact two new sections to chapter 28-32 of the North Dakota Century Code, relating to environmental rules adopted from federal guidelines.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Repeal or waiver of certain environmental rules.

1. An agency shall repeal or amend any existing rule that was adopted from federal environmental guidelines and which is not relevant to state regulatory programs.

2. An agency may not adopt rules from federal guidelines which are not relevant to state regulatory programs when developing or modifying programs.

3. An agency shall seek a waiver from the United States environmental protection agency when the environmental protection agency is evaluating current programs or delegating or modifying programs to relieve the agency from complying with or adopting rules that are not relevant to state regulatory programs.

SECTION 2. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Permit and procedural rules adopted by reference in appropriate circumstances.

1. When adopting rules, an agency shall adopt by reference any applicable existing permit or procedural rules that may be adapted for use in a new or existing program.

2. An agency shall seek authorization from the United States environmental protection agency to adopt by reference applicable existing permit or procedural rules that may be adapted for use in a new or existing program when the environmental protection agency is delegating or modifying a program.

Approved March 6, 1995
Filed March 6, 1995

CHAPTER 312

SENATE BILL NO. 2388

(Senators Bowman, Kinnoin, G. Nelson, Tomac)
(Representatives Grosz, Nichols)

GOVERNMENTAL TAKINGS ASSESSMENTS

AN ACT to create and enact a new section to chapter 28-32 of the North Dakota Century Code, relating to the preparation of taking assessments in an administrative rulemaking procedure and reconsideration of administrative rules.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Takings assessment of government agency appeal.

1. An agency shall prepare a written assessment of the constitutional takings implications of a proposed rule that may limit the use of private real property. The agency's assessment must:

   a. Assess the likelihood that the proposed rule may result in a taking or regulatory taking.

   b. Clearly and specifically identify the purpose of the proposed rule.

   c. Explain why the proposed rule is necessary to substantially advance that purpose and why no alternative action is available that would achieve the agency's goals while reducing the impact on private property owners.

   d. Estimate the potential cost to the government if a court determines that the proposed rule constitutes a taking or regulatory taking.

   e. Identify the source of payment within the agency's budget for any compensation that may be ordered.

   f. Certify that the benefits of the proposed rule exceed the estimated compensation costs.

2. Any private landowner who is or may be affected by a rule that limits the use of the landowner's private real property may request in writing that the agency reconsider the application or need for the rule. Within thirty days of receiving the request, the agency shall consider the request and shall in writing inform the landowner whether the agency intends to keep the rule in place, modify application of the rule, or repeal the rule.

3. In an agency's analysis of the takings implications of a proposed rule, "taking" means the taking of private real property, as defined in section 47-01-03, by government action which requires compensation to the owner of that property by the fifth or fourteenth amendment to the Constitution of the United States or section 16 of article I of the Constitution of North Dakota. "Regulatory taking" means a taking of real property through the exercise of the police and regulatory powers of the state which reduces the value of the real property by more than fifty percent. However, the exercise of a police or regulatory power does not effect a taking if it substantially advances legitimate state interests, does not deny an owner economically viable use of the owner's land, or is in accordance with applicable state or federal law.

Approved April 4, 1995
Filed April 4, 1995

CHAPTER 313

HOUSE BILL NO. 1089

(Judiciary Committee)
(At the request of the Office of Administrative Hearings)

ADMINISTRATIVE HEARINGS JUDGES AND OFFICERS

AN ACT to create and enact a new section to chapter 28-32, a new subdivision to subsection 2 of section 51-19-09, and a new subsection to section 51-23-20 of the North Dakota Century Code, relating to duties of administrative law judges and hearings held by the securities commissioner; to amend and reenact section 10-14-12, subsection 1 of section 10-04-16, subsection 5 of section 28-32-01, subsection 1 of section 28-32-08.1, subsections 3 and 5 of section 54-57-01, sections 54-57-02, 54-57-03, 54-57-04, 54-57-05, and 54-57-07 of the North Dakota Century Code, relating to administrative hearings and the duties of administrative law judges; to repeal sections 10-04-13 and 54-57-06 of the North Dakota Century Code, relating to appeals from orders of the securities commissioner and to transfer and transition provisions for the office of administrative hearings; and to provide for a legislative council study.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 10-04-12 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

10-04-12. Hearings. Before entering an order revoking the registration of any securities as provided in section 10-04-09, the commissioner shall send to the issuer of ~~such~~ the securities, and if the application for registration of ~~such~~ the securities was filed by a registered dealer, to ~~such~~ the registered dealer, a notice of opportunity for hearing. Before entering an order refusing to register any person as a dealer, salesman, investment adviser, or investment adviser representative, as provided in section 10-04-10, or revoking the registration of any person as a registered dealer, salesman, investment adviser, or investment adviser representative as provided in section 10-04-11, the commissioner shall send to ~~such~~ that person, and if ~~such~~ that person is a salesman or investment adviser representative or an applicant for registration as a salesman or investment adviser representative, to the registered dealer or investment adviser who employs or proposes to employ ~~such~~ that salesman or investment adviser representative, a notice of opportunity for hearing.

1. Notices of opportunity for hearing must be sent by registered ~~or certified~~ mail, returned receipt requested, to the addressee's business address, and ~~such~~ the notice ~~shall~~ must state:

   a. The order ~~which~~ the commissioner proposes to issue.

   b. The grounds for issuing ~~such~~ the proposed order.

   c. That the person to whom ~~such~~ the notice is sent ~~will~~ may be afforded a hearing upon request to the commissioner if ~~such~~ the request is made within ten days after receipt of the notice.

2. Whenever a person requests a hearing in accordance with ~~the provisions of~~ this section, the commissioner shall immediately set a date, time, and place for ~~such~~ the hearing and shall forthwith notify the person requesting ~~such~~ the hearing ~~thereof~~. The date set for ~~such~~ the hearing must be within fifteen days, but not earlier than five days, after the request for hearing has been made, unless otherwise agreed to by both the commissioner and the person requesting ~~such~~ the hearing.

3. ~~For the purpose of conducting any hearing as provided in this section, the commissioner shall have the power to call any party to testify under oath at such hearings, to require the attendance of witnesses, the production of books, records, and papers, and to take the depositions of witnesses; and for that purpose the commissioner is authorized, at the request of the person requesting such hearing or upon his own initiative, to issue a subpoena for any witness or a subpoena duces tecum to compel the production of any books, records, or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned. The fees and mileage of the sheriff and witnesses must be paid from the fund in the state treasury for the use of the commissioner in the same manner that other expenses of the commissioner are paid.~~

4. ~~At any~~ Any hearing conducted under this section~~, a party or an affected person may appear in his own behalf or may be represented by an attorney. A stenographic record of the testimony and other evidence submitted must be taken unless the commissioner and the person requesting such hearing shall agree that such a stenographic record of the testimony shall not be taken. The commissioner shall pass upon the admissibility of evidence, but a party may at any time make objections to the rulings of the commissioner thereon, and if the commissioner refuses to admit evidence the party offering the same shall make a proffer thereof and such proffer must be made a part of the record of such hearing.~~

5. ~~In any hearing under this section, the commissioner may conduct such hearing or he may appoint a referee who shall have the same powers and authority in conducting such hearings as are in this section granted to the commissioner. Such referee shall have been admitted to the practice of law in this state and be possessed of such additional qualifications as the commissioner may require. If a hearing is conducted by a referee such referee shall submit to the commissioner a written report setting forth his findings of fact and conclusions of law and a recommendation of the action to be taken by the commissioner. A copy of such written report and recommendations must within five days of the time of filing thereof be served upon the person who requested the hearing, or his attorney or other representative of record, by registered or certified mail. That person or his attorney may, within ten days of receipt of the copy of such written report and recommendations, file with the commissioner written objections to the report and recommendations which must be considered by the commissioner before entering an order. No recommendations of the referee may be approved, modified, or disapproved by the commissioner until after ten days after service of such report and recommendations as herein provided. The recommendations of the referee may be approved, modified, or disapproved by the commissioner. The commissioner may order additional testimony to be taken or permit the introduction of~~

~~further documentary evidence. A transcript of testimony and evidence, objections, if any, of the parties, and additional testimony and evidence, if any, shall have the same force and effect as if such hearing or hearings had been conducted by the commissioner. All recommendations of the referee to the commissioner are advisory only and do not have the effect of an order of the commissioner~~ must be conducted in accordance with chapter 28-32.

~~6.~~ 4. If the commissioner does not receive a request for a hearing within the prescribed time, ~~he~~ the commissioner may enter ~~the proposed~~ a final order. ~~If a hearing is requested and conducted with respect to a proposed order, the commissioner shall issue a written order~~ which must set forth ~~his~~ the findings with respect to the matters involved ~~and enter an order in accordance with his findings~~.

[170] **SECTION 2. AMENDMENT.** Subsection 1 of section 10-04-16 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. Issue any order including~~, but not limited to,~~ cease and desist, stop, and suspension orders, which the commissioner deems necessary or appropriate in the public interest or for the protection of investors. The commissioner may, in addition to any other remedy authorized by this chapter, impose by order and collect a civil penalty against any person found in an administrative action to have violated any provision of this chapter, or any ~~regulation,~~ rule~~,~~ or order adopted or issued under this chapter, in an amount not to exceed ten thousand dollars for each violation. The attorney general, upon the commissioner's request, may bring actions to recover penalties pursuant to this section in district court. However, any person aggrieved by an order issued pursuant to this subsection may request a hearing before the commissioner if ~~such~~ the request is made within ten days after receipt of the order. The provisions of subsections 2, 3, and 4~~, and 5~~ of section 10-04-12 apply to any hearing conducted ~~hereunder~~ under this subsection. If, after a hearing, the commissioner ~~shall sustain~~ sustains an order previously issued, the sustaining order is subject to appeal to the district court of Burleigh County by serving on the commissioner within twenty days after the date of entry of the sustaining order a written notice of appeal signed by the appellant stating:

   a. The order of the commissioner from which the appeal is taken.

   b. The grounds upon which a reversal or modification of ~~such~~ the order is sought.

   c. A demand for a certified transcript of the record of ~~such~~ the order.

   ~~The provisions of subdivisions a and b of subsection 3 of section 10-04-13 apply to an appeal hereunder.~~

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[170] Section 10-04-16 was also amended by section 5 of House Bill No. 1165, chapter 100.

SECTION 3. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Duties of hearing officers. It is the duty of all hearing officers to:

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. Make findings of fact and conclusions of law and issue a final order, if required by statute or requested by an agency.

7. 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. 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.

[171] **SECTION 4. AMENDMENT.** Subsection 5 of section 28-32-01 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

5. "Hearing officer" means any agency head or one or more members of the agency head when presiding in an administrative proceeding, or, unless prohibited by law, one or more other persons designated by the agency head to preside in an administrative proceeding, an administrative law judge from the office of administrative hearings, or

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[171] Section 28-32-01 was also amended by section 1 of Senate Bill No. 2429, chapter 308; section 1 of Senate Bill No. 2405, chapter 309; and section 10 of House Bill No. 1432, chapter 209.

any other person duly assigned, appointed, or designated to preside in an administrative proceeding pursuant to statute or rule.

SECTION 5. AMENDMENT. Subsection 1 of section 28-32-08.1 of the North Dakota Century Code is amended and reenacted as follows:

1. Any person or persons presiding for the agency in an administrative proceeding must be referred to individually or collectively as hearing officer. Any person from the office of administrative hearings presiding for the agency as a hearing officer in an administrative proceeding must be referred to as an administrative law judge.

[172] **SECTION 6.** A new subdivision to subsection 2 of section 51-19-09 of the North Dakota Century Code is created and enacted as follows:

If a hearing is requested or ordered under this section, it must be conducted in accordance with chapter 28-32.

[173] **SECTION 7.** A new subsection to section 51-23-20 of the North Dakota Century Code is created and enacted as follows:

If a hearing is requested or ordered under this section, it must be conducted in accordance with chapter 28-32.

SECTION 8. AMENDMENT. Subsections 3 and 5 of section 54-57-01 of the 1993 Supplement to the North Dakota Century Code are amended and reenacted as follows:

3. The director of administrative hearings may preside as an administrative law judge at administrative hearings and may employ or appoint additional administrative ~~hearings officers~~ law judges to serve in the office as necessary to fulfill the duties of office as described in section 54-57-04 and section 3 of this Act and to provide administrative ~~hearings officers~~ law judges to preside at administrative hearings as requested by agencies. After the effective date of this Act, the director of administrative hearings may employ or appoint only such additional administrative law judges who are attorneys at law in good standing, admitted to the bar in the state, and currently licensed by the state bar board. The director may delegate to an employee the exercise of a specific statutory power or duty as deemed advisable, subject to the director's control, including the powers and duties of a deputy director. All administrative ~~hearings officers~~ law judges must be classified employees, except that the director of administrative hearings must be an unclassified employee who only may be removed, during a term of office, for cause. Each administrative ~~hearings officer~~ law judge must have a demonstrated knowledge of administrative practices and procedures and must be free of any association that would impair the

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[172] Section 51-19-09 was also amended by section 13 of House Bill No. 1165, chapter 100.

[173] Section 51-23-20 was also amended by section 20 of House Bill No. 1165, chapter 100.

~~officer's~~ person's ability to function officially in a fair and objective manner.

5. The director of administrative hearings shall develop categories of positions in the classified service under class titles for the appointment or employment of ~~hearings officers~~ administrative law judges and support staff in consultation with and approved by the director of the central personnel division, including the salary to be paid for each position or category of position.

SECTION 9. AMENDMENT. Section 54-57-02 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

54-57-02. Temporary administrative ~~hearings officers~~ law judges. When regularly appointed administrative ~~hearings officers~~ law judges are not available, the director of administrative hearings may contract on a temporary basis with qualified individuals to serve as administrative ~~hearings officers~~ law judges for the office of administrative hearings. Temporary administrative law judges are not employees of the state.

SECTION 10. AMENDMENT. Section 54-57-03 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

54-57-03. Hearings before administrative ~~hearings officers~~ law judges.

1. Notwithstanding the authority granted in chapter 28-32 allowing agency heads or other persons to preside in an administrative proceeding, all hearings of administrative agencies under chapter 28-32, except hearings conducted by the public service commission, the industrial commission, the commissioner of insurance, the workers compensation bureau, the state engineer, the department of transportation, job service North Dakota, and the commissioner of labor, except investigatory hearings under section 28-32-08, and except rulemaking hearings held in accordance with section 28-32-02, must be conducted by the office of administrative hearings in accordance with the administrative hearings provisions of chapter 28-32 and any rules adopted pursuant to chapter 28-32. But, appeals hearings pursuant to section 61-03-22 and drainage appeals from water resource boards to the state engineer pursuant to chapter 61-32 must be conducted by the office of administrative hearings. Additionally, hearings of the department of corrections and rehabilitation for the parole board in accordance with chapters 12-56.1 and 12-59, regarding parole violations; job discipline and dismissal appeals to the board of higher education; Individuals With Disabilities Education Act and section 504 due process hearings of the superintendent of public instruction; and chapter 37-19.1 veterans' preferences hearings for any agency must be conducted by the office of administrative hearings in accordance with applicable laws.

2. The agency head shall make a written request to the director requesting the designation of ~~a hearings officer~~ an administrative law judge for each administrative hearing to be held. An agency may request ~~a hearings officer~~ an administrative law judge to be designated to preside over the entire administrative proceeding. ~~If a statute so requires, an agency shall, or unless a statute prohibits, an agency may, request that the hearings officer designated issue the final order in the matter.~~ Informal disposition of an administrative proceeding may be made by an agency

at any time before or after the designation of ~~a hearings officer~~ an administrative law judge from the office of administrative hearings.

3. If a party to an administrative proceeding is in default, ~~prior to the hearing,~~ the agency may issue a default order and a written notice of default, including a statement of the grounds for default, prior to the hearing. The agency shall determine all the issues involved. If issued, the default notice and order must be served upon all the parties and the ~~hearings officer~~ administrative law judge, if one has been assigned. After service of the default notice and order, if a hearing is necessary to complete the administrative action with or without the participation of the party in default, ~~a hearings officer~~ an administrative law judge from the office of administrative hearings must preside.

4. When assigning administrative ~~hearings officers~~ law judges to conduct administrative hearings or to preside in an administrative proceeding, the director shall attempt to assign ~~a hearings officer~~ an administrative law judge having expertise in the subject matter to be dealt with.

5. The director of administrative hearings may assign an administrative ~~hearings officer~~ law judge to preside in an administrative proceeding, upon request, to any agency exempted from the provisions of this section, to any agency, or part of any agency, that is not an administrative agency subject to the provisions of chapter 28-32, to any unit of local government in this state, to any tribal government in this state, to the judicial branch, or to any agency to conduct a rulemaking hearing.

SECTION 11. AMENDMENT. Section 54-57-04 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

54-57-04. Duties of administrative ~~hearings officers~~ law judges. It is the duty of all administrative ~~hearings officers~~ law judges to:

~~1. Advise an agency that has requested a hearings officer, and other affected interests and parties, about the location and time for an administrative hearing, or related proceeding, to be held, in order to allow for participation by all affected interests and parties. The hearings officer shall give proper notice 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. When appropriate, make findings of fact, conclusions of law, and recommendations, taking notice whether the agency has documented its statutory authority to take the proposed action, fulfilled all relevant substantive and procedural requirements of law or rule, and, in rulemaking proceedings, conformed to the provisions of chapter 28-32.~~

~~5. Perform any and all other functions required by law, assigned by the director of administrative hearings, or delegated to the hearings officers by the agency.~~

6. ~~When an agency requests a hearings officer to preside only as a procedural hearings officer, the hearings officer may only conduct the hearing and perform such other functions of the proceeding as requested. If the hearings officer is presiding only as a procedural hearings officer, the agency head must be present at the hearing and the agency head shall issue findings of fact and conclusions of law, as well as any order resulting from the hearing. The procedural hearings 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~~ comply with the duties of hearing officers under section 3 of this Act for all hearings of administrative agencies under chapter 28-32, as well as for all hearings of administrative agencies not under chapter 28-32, in accordance with applicable laws.

SECTION 12. AMENDMENT. Section 54-57-05 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

54-57-05. Uniform rules of administrative practice or procedure - Effective date - ~~Hearings officer~~ Administrative law judge rules.

1. The director of administrative hearings shall adopt, in accordance with chapter 28-32, rules of administrative hearings practice or procedure which implement chapter 28-32 and which aid in the course and conduct of all administrative hearings and related proceedings conducted by administrative agencies under chapter 28-32. ~~The uniform rules must be effective January 1, 1992.~~ The uniform rules must be used by all administrative agencies subject to chapter 28-32 which do not have their own rules of administrative hearings practice or procedure governing the course and conduct of hearings. If an administrative agency's rules are silent on any aspect of the agency's administrative hearings practice or procedure, the applicable uniform rule governs.

2. The director of administrative hearings may adopt rules to further establish qualifications for ~~hearings officers~~ administrative law judges; to establish procedures for requesting and designating ~~hearings officers~~ administrative law judges; and to facilitate the performance of duties and responsibilities conferred by this chapter. Any rules adopted by the director of administrative hearings pursuant to this subsection must be adopted in accordance with chapter 28-32.

SECTION 13. AMENDMENT. Section 54-57-07 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

54-57-07. Compensation for provision of ~~hearings officers~~ administrative law judges - Special fund established - Continuing appropriation.

1. The office of administrative hearings may require payment for services rendered by any administrative ~~hearings officer~~ law judge provided by it to any agency, to any unit of local government in this state, to any tribal government in this state, or to the judicial branch, in the conduct of an administrative hearing and related proceedings, and those entities must make the required payment to the office. Payment may include payment for support staff necessary to render ~~hearings officer~~ administrative law judge services. General fund moneys may not be used for payment by state agencies pursuant to this subsection except for those payments required of the department of human services and the state department

of health and consolidated laboratories. Moneys received by the office of administrative hearings in payment for providing an administrative ~~hearings officer~~ law judge to conduct an administrative hearing and related proceedings must be deposited into the operating fund of the office of administrative hearings.

2. The office of administrative hearings may require payment for mileage, meals, and lodging in connection with services rendered by an administrative ~~hearings officer~~ law judge provided to any agency, ~~or~~ to any unit of local government in this state, to any tribal government in this state, or to the judicial branch, in the conduct of an administrative hearing and related proceedings, and those entities must make the required payment to the office. Payment for meals and lodging must be in the amounts allowable under section 44-08-04. Payment for mileage when using state vehicles must be in amounts set for user charges under section 24-02-03.5. All other payments must be in amounts allowed for other state officials and employees. Either general fund or special fund moneys, or other income, may be used for the payment of mileage, meals, and lodging under this subsection.

3. A special fund is established in the state treasury and designated as the administrative hearings fund. The director of administrative hearings shall deposit in the fund all moneys received by the office of administrative hearings in payment for providing temporary administrative ~~hearings officers~~ law judges to conduct administrative hearings and related proceedings under this chapter, as well as all moneys received by the office in payment for mileage, meals, and lodging in connection with providing any administrative ~~hearings officer~~ law judge to conduct an administrative hearing and related proceedings. The moneys in the fund are a standing and continuing appropriation and are appropriated, as necessary, for the following purposes:

   a. For the director of administrative hearings to contract with and make payment to temporary administrative ~~hearings officers~~ law judges, as necessary, for the purpose of providing requested administrative ~~hearings officers~~ law judges to agencies ~~or~~, to any unit of local government in this state, to any tribal government in this state, or to the judicial branch.

   b. For the director of administrative hearings to pay mileage, meals, and lodging to any ~~hearings officers~~ administrative law judges, as necessary, in connection with the services to be provided by this chapter.

SECTION 14. REPEAL. Section 10-04-13 of the North Dakota Century Code and section 54-57-06 of the 1993 Supplement to the North Dakota Century Code are repealed.

SECTION 15. LEGISLATIVE COUNCIL STUDY OF ADMINISTRATIVE VERSUS COURT PROCEEDINGS IN DRIVING OFFENSES. The legislative council shall consider studying the proper role of the administrative hearings process in suspension or revocation of motor vehicle operators' licenses in light of recent court decisions on double jeopardy issues. The legislative council shall report its findings and recommendations, and any legislation necessary to implement the recommendations, to the fifty-fifth legislative assembly.

Approved April 18, 1995
Filed April 18, 1995

CHAPTER 314

SENATE BILL NO. 2122

(Judiciary Committee)
(At the request of the Office of Administrative Hearings)

ADMINISTRATIVE PROCEEDING SUBPOENAS, DISCOVERY, AND ORDERS

AN ACT to amend and reenact subsections 1 and 7 of section 28-32-09 of the North Dakota Century Code, relating to subpoenas, discovery, and protective orders in administrative proceedings.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsections 1 and 7 of section 28-32-09 of the North Dakota Century Code are amended and reenacted as follows:

1. Any hearing officer may issue subpoenas, discovery orders, and protective orders in accordance with the North Dakota Rules of Civil Procedure. A motion to quash or modify, or any other motion relating to subpoenas, discovery, or protective orders must be made to the hearing officer. The hearing officer's rulings on these motions may be appealed under section 28-32-15 after issuance of the final order by the agency.

7. Subpoenas, discovery orders, protective orders, and other orders issued under this section may be enforced by applying to any judge of the district court for an order requiring the attendance of a witness, the production of all documents and objects described in the subpoena, or otherwise enforcing an order. Failure of a witness or other person to comply with the order of the district court is contempt of court which is punishable by the district court, upon application. The judge may award attorney's fees to the parties seeking enforcement of a subpoena under this subsection.

Approved March 10, 1995
Filed March 13, 1995

CHAPTER 315

HOUSE BILL NO. 1280
(Representative Payne)

CITY BOARD OF ADJUSTMENT APPEALS

AN ACT to amend and reenact section 28-34-01 and subsection 2 of section 40-47-11 of the North Dakota Century Code, relating to appeals of decisions of the governing body of a city.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 28-34-01 of the North Dakota Century Code is amended and reenacted as follows:

28-34-01. Appeals from local governing bodies - Procedures. This section, to the extent that it is not inconsistent with procedural rules adopted by the North Dakota supreme court, governs any appeal provided by statute from the decision of a local governing body, except those court reviews provided under sections 2-04-11; ~~40-47-11;~~ and 40-51.2-15. For the purposes of this section, "local governing body" includes any officer, board, commission, resource or conservation district, or other political subdivision. Each appeal is governed by the following procedure:

1. The notice of appeal must be filed with the clerk of the court within thirty days after the decision of the local governing body. A copy of the notice of appeal must be served on the local governing body in the manner provided by rule 4 of the North Dakota Rules of Civil Procedure.

2. The appellee shall prepare and file a single copy of the record on appeal with the court. Within thirty days, or such longer time as the court by order may direct, after the notice of appeal has been filed in the court, and after the deposit by the appellant of the estimated cost of a transcript of the evidence, the local governing body shall prepare and file in the office of the clerk of the court in which the appeal is pending the original or a certified copy of the entire proceedings before the local governing body, or such abstract of the record as may be agreed upon and stipulated by the parties, including the pleadings, notices, transcripts of all testimony taken, exhibits, reports or memoranda, exceptions or objections, briefs, findings of fact, proposed findings of fact submitted to the local governing body, and the decision of the local governing body in the proceedings. If the notice of appeal specifies that no exception or objection is made to the local governing body's findings of fact, and that the appeal is concerned only with the local governing body's conclusions based on the facts found by it, the evidence submitted at the hearing before the local governing body must be omitted from the record filed in the court. The court may permit amendments or additions to the record to complete the record.

3. If the court determines on its own motion or if an application for leave to adduce additional evidence is made to the court in which an appeal from a determination from a local governing body is pending, and it is shown to the satisfaction of the court that such additional evidence is

material and that there are reasonable grounds for the failure to adduce such evidence in the hearing or proceeding had before the local governing body, or that such evidence is material to the issues involved and was rejected or excluded by the local governing body, the court may order that such additional evidence be taken, heard, and considered by the local governing body on such terms and conditions as the court may determine. After considering the additional evidence, the local governing body may amend or modify its decision, and shall file with the court a transcript of the additional evidence together with its new or modified decision, if any.

SECTION 2. AMENDMENT. Subsection 2 of section 40-47-11 of the 1993 Supplement to the North Dakota Century Code is amended and reenacted as follows:

2. A decision of the governing body of the city on an appeal from a decision of the board of adjustment ~~is subject to review by certiorari. The application for a writ of certiorari shall~~ may be ~~made~~ appealed to the district court ~~of the county~~ in ~~which~~ the ~~city is situated within fifteen days after notice of the decision of the governing body of the city. The writ is returnable within twenty days after the rendition of the decision. The court may take evidence as may be required to determine the questions presented. The supreme court, upon application filed within fifteen days after the determination of the district court, shall review the action of the district court by certiorari~~ manner provided in section 28-34-01.

Approved March 6, 1995
Filed March 6, 1995