MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

1455

2001 HOUSE JUDICIARY

HB 1455

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1455

House Judiciary Committee

☐ Conference Committee

Hearing Date 02-05-01

Tape Number	Side A	Side B	Meter #
TAPE III		x	391 to 3640

Committee Clerk Signature Janet Dunn

Minutes:Chairman DeKrey opened the hearing on HB 1455. Relating to finality of decisions of administrative law judges in adjudicative proceedings of administrative agencies.

Rep Koppleman: District 13 of west Fargo This bill deals with area of the resolution that was brought before the house, but in a different way, it is the Office of Administrative Hearings. The deck is sort of stacked against the person who has a dispute with a state agency, a finding is made, the agency then says yes or no and then can set aside the ruling. HB 1455 would take a look at this and make it fair, a judge makes the ruling and it is binding.

Allen Hoberg: Director of Office of Administrative Hearing (see attached testimony)

Rep Klemin: In the court, if we don't like the judge, we can challenge the judge, can you do that now.

Allen Hoberg: No, we can not.

Rep Mahoney: How would this change the procedure.

Allen Hoberg: For some it would change, for others it would. He then goes on to explain.

Rep Mahoney: Under current law that would apply.

Allen Hoberg: the final decision of the agency head is the one that goes to court.

Rep Mahoney: What is in this bill?

Allen Hoberg: In this bill there would be no more recommended decisions.

Rep Klemin: We are not changing the scope of the review.

Allen Hoberg: That is correct.

Rep Klemin: So we still have the situation that it would apply, but the court would have to affirm the decision unless it comes in one of the six situations.

Allen Hoberg: That is correct.

Chairman DeKrey: If there are no questions, thank you for appearing.

Shelly Peterson: President of North Dakota Long term Association (see attached testimony)

Rep Mahoney: The concern about bias, judges don't know much about the rate setting procedures weighed in on the agency, how would this help.

Shelly Peterson: we feel many cases are not brought forward, because of the bias.

Chairman DeKrey: If there are no further questions, thank you for appearing. If there anyone who wishes to testify, for against or neutral.

Rick Clayburn: State tax Commissioner, I am neutral on the bill. I would like to point out the concerns of the tax department. The office of administrative hearing does provide a valuable service to the citizens of the state of North Dakota. In the tax department, we do not do many hearings at all. In making the hearing judges finding as final, we want to insure that it is a finding of fact, we are not asking to make the tax department exempt, but need to know that we have someone who is knowledgeable of tax law that reach beyond the state.

Rep Klemin: One of the grounds of the scope of review is if the findings of fact are not supported by the evidence, if you have the right to appeal wouldn't this be one of the grounds.

Rick Clayburn:One negative is that both parties would have to go to court and that costs both sides money.

Rep Klemin: I can understand that, but we want to have the findings of fact correct and what I am saying is that the scope of review is grounds for appeal.

Rick Clayburn: That is correct.

Dan Rause: legal council for the tax commissioner, the objective that we have, is that if we believe that there is a miss statement of finding of fact, the opportunity in the way of a recommended decision gives the agency head in a cost effective way to correct that record.

Rep Klemin: The agency believes that the finding of fact is not correct, would you not have the right to request reconsideration before it goes to court.

Dan Rause: That option is already available.

Rep Klemin: You could take care of the problem without going to court.

Dan Rause: It could.

Chairman DeKrey: If there are no further questions, thank you for appearing.

Rick Clayburn: That is the point, we may be looking for a problem that does not exist, but we do not want to have our hands tied.

Chairman DeKrey: makes a comment.

Rick Clayburn: We have utilized that less of late and have done more settling.

Chairman DeKrey: If there are no other questions, thank you for appearing.

Melissa Hauer: Director Legal Advisory Unit for Department of Human services (see attached testimony) the department opposed the bill.

Chairman DeKrey: asks a question about this law and how it effects federal law.

Melissa Hauer continues.

Rep Klemin: The alternative would be to exempt for the federal law.

Melissa Hauer: That would be one way of doing it.

Rep Klemin: The other side of this is that you have only rejected 16 of the decisions, so that would indicate that the system is working.

Melissa Hauer: I can agree.

Chairman DeKrey: Are there any questions, if not thank you for appearing.

Francis Swentz: from the Department of Health. The department is concerned with the delegation from the federal government and so they have those concerns.

Chairman DeKrey: Any one have questions, anyone wishing to testify, if not thank you for appearing.

Rep Koppelman: One comment, I asked the governors office if they had any issues that they wished to address before you pass out this bill.

Chairman DeKrey: we will not be acting on this bill at this time. We will close the hearing on HB 1455.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1455a

House Judiciary Committee

☐ Conference Committee

Hearing Date 02-14-01

Tape Number	Side A	Side B	Meter #
TAPE II	x		4241 to 6258
TAPE II		x	01 to 211
Committee Clerk Signature	Joan Dees		

Minutes:Chairman DeKrey called the committee to order on HB 1455.

Shelly Peterson:(see attached testimony)

Leslie Oliver: Shelly Peterson explained to you, the nursing home industry in this state, and probably in every other state, is regulated by the Department of Human Services. They take care of the Medicare and Medicaid programs in the state. Every step of the industry is impacted by the Department. There is no place for a voice by the industry except in Administrative process. Presently, nursing homes who wish to challenge rates, which establishes the budget for the nursing home for the year, they say yes or no, mostly they say no. You can ask the Department to look at it again and generally they will come back unfavorable. You then go to an Administrative hearing, where an independent hearing officer listens to evidence from both sides and makes a determination and then the agency has the discretion to be checked or to change the decision as made by the hearing officer. From the perspective of the nursing home industry, there is no place except the Administrative hearing, the fair hearing process, for administrators and owners of

nursing homes, to voice their opinion and be heard. It is really not due process for those people unless this bill passes. The memorandum that has been passed out, addresses two things, first the testimony that was offered by the Department of Human Services.. What I have gleaned from the testimony is that if this bill passes, the state will lose all of their Medicaid dollars because of the requirements of agency hearings.Having looked at the state budgeting plan and the federal regulations that underlie that, the state has to have a fair hearing process, but it doesn't require that the agency gets to control the entire process. In fact the federal regulations suggest that the administrative hearings would be provided by an impartial hearing officer and the decision would be made by the hearing officer. No where in the federal regulations is there the discretion of the agency to go back an object the decision.

Chairman DeKrey: It may surprise you to know that there are two ways to kill a bill, fiscal note and the threat of loss of federal funds.

Leslie Oliver: I am not suggesting that 1455 is right or wrong for the entire , all programs of the Department of Human Services administers, from the perspective of the nursing homes, it is essentially follows the administrative practices act. There is a separate statute on nursing home hearings. Ms Hauer's testimony should not be heard as applying to every program that the department administers. It does not pertain to nursing homes.The department has a separate obligation under its own state plan to nursing homes the way that it hears their appeals and it also has separate federal regulations, which provide for the terms of 1455.

Chairman DeKrey: Are there any questions, thank you for appearing. Rep Klemin, you have some amendments you want to present?

Rep Klemin: Reviews two sets of amendments, 10522.0101 and 10522.0102

DISCUSSION

COMMITTEE ACTION

Rep Klemin moved both amendments. Rep Wrangham seconded the amendments.

Chairman DeKrey: Voice vote on the amendments. amendments carry. What are the wishes of the committee? Rep Klemin moved a DO PASS as amend, Rep Kingsbury seconded. The clerk will call the roll on a DO PASS as amend on HB 1455. The motion passes with 10 YES, 2 NO and 3 ABSENT. Carrier Rep Klemin.

FISCAL NOTE

Requested by Legislative Council
04/12/2001

Bill/Resolution No.:

Amendment to: Engrossed HB 1455

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	$0	$0	$0	$0	$0	$0
Expenditures	$0	$0	$0	$0	$0	$0
Appropriations	$0	$0	$0	$0	$0	$0

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
$0	$0	$0	$0	$0	$0	$0	$0	$0

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

With the conference committee amendments this bill should have no significant fiscal impact on agencies, local governing bodies, courts, or OAH. The amendments that required the first two fiscal notes (after the original fiscal note on the original bill) have been removed. With this version now being considered, there will be no de novo review of agency and local governing body decisions, thus the impact on the district courts previously stated will be removed, as well as the impact on agencies and local governing bodies from de novo review. See 2/20/01 fiscal note. The Senate amendment that removed the Tax Commissioner from OAH jurisdiction has also been removed in this version, thus there will be no impact on OAH as previously stated in the 3/26/01 fiscal note.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the*

executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.

Name:	Allen C. Hoberg	**Agency:**	Office of Administrative Hearings
Phone Number:	328-3260	**Date Prepared:**	04/12/2001

FISCAL NOTE

Requested by Legislative Council
03/23/2001

Bill/Resolution No.:

Amendment to: Engrossed HB 1455

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				($2,268)		($2,268)
Expenditures				$0		$0
Appropriations				$0		$0

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

There are really two different scenarios concerning the Tax Commissioner's office and OAH. The first is the period between July 1, 1991 (when OAH began operations) and June 30, 1997. The second is the period between July 1, 1997, and the present. During the first period OAH received general funds that funded the provision of hearing officer services for the Tax Commissioner and many other "general fund" agencies. During this period, the Tax Commissioner's office was fairly active in requesting hearing officer services from OAH, i.e. it had a number of administrative tax cases scheduled to going to hearing each year. The average number of hours OAH ALJs spent on work for the Tax Commissioner's office was 135.6 hours per biennium. During the second period OAH did not receive any general funds for the provision of hearing officer services to any agency. In 1997 the Legislative Assembly removed all general funds from OAH's budget. Since July 1, 1997, OAH has billed all agencies to which it provides hearing officer services. For the biennium 1997-99, OAH billed the Tax Commissioner for only 28.4 hours of services provided. For the current biennium, to date, OAH has billed the Tax Commissioner for only 10.1 hours of services provided. OAH had only four requests for hearing officer services from the Tax Commissioner for the 1997-99 biennium, i.e. there had been only four administrative tax cases scheduled to go to hearing, and it has had only one request for hearing officer services for the current biennium. Currently, OAH bills agencies such as the Tax Commissioner at a rate of $79.52/hour for hearing officer services. OAH anticipates that this amount will increase some in the next two biennia, but this fiscal note reflects the current billing rate. OAH's billing rate is determined by a billing consultant based, essentially, on the previous two years actual expenditures. Therefore, the rate for the 2001-2003 biennium will be based on OAH's actual expenditures for the current biennium.

However, OAH believes that this biennium is not likely the norm for the Tax Commissioner's office, in regard to the number of requests for hearing officer services. The 1997-99 biennium is more likely closer to the norm in the current climate of billing the Tax Commissioner for services. Therefore, this fiscal note is based on the number of hours required for providing hearing officer services for the 1997-99 biennium. Actually, though, the number of hours for the Tax Commissioner, as for any agency, could easily be significantly higher. For the past four years not one of the Tax Commissioner's administrative hearing requests has actually gone to hearing. All have either been informally settled or have been decided based upon a stipulation of facts and the submission of briefs. The designated ALJ has not had to conduct a hearing. If even one Tax Commissioner case in a biennium was decided based on a hearing, it is quite possible that the number of hours for hearing officer services required for such a case could reach 30 hours or more. Therefore, although the numbers provided for this fiscal note, based on historical averages, are acurate, they do not tell the story about what could easily happen if just one Tax Commissioner case went to hearing. Of course, if two or more cases went to hearing, the impact would be considerably more. In other words, the Tax Commissioners office under the right circumstances could be a more significant revenue producer for OAH in the 2001-2003 or 2003-2005 bienniums if more hearings were actually held.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

Based on the 1997-99 biennium number of hours, and based on OAH's current billing rate, if the Tax Commissioner's office were exempted from OAH jurisdiction, and if the Tax Commissioner did not voluntarily use any hearing officer services from OAH, OAH would lose $2258.37 in revenues. It would lose the same amount of revenues for the 2003-2005 biennium. Again, this does not include any increases in billing rate that OAH is likely to exerience during the next two biennia. Again, also, depending upon whether a case actually goes to hearing, the number of hours actually required to complete a case could vary considerably.

If OAH lost this revenue, OAH's billing rate would go up very slightly to make up for this lost revenue because OAH's expenditures would not be affected. See below.

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Because the Tax Commissioners office is currently such a small portion of OAH's total business, the impact on expenditures for OAH is practically nothing. All of OAH's expenditures would remain the same.

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Also, the impact on OAH's overall appropriation may be practically nothing. If just one other case OAH

received from another agency amounted to about 28 hours in the next biennium, the lost revenues from the Tax Commissioner's office could easily be replaced. However, OAH is experiencing a period of declining caseloads for its user agencies, both for most of its mandatory and most of its voluntary user agencies. Therefore, it is safe to assume that a loss of the Tax Commissioner's caseload would have a very minor impact on OAH's revenues and the remainder of OAH's user agencies would be impacted in a very minor way through increased billings because OAH's expenditures and appropriation would remain the same.

Name:	Allen C. Hoberg	**Agency:**	Office of Administrative Hearings
Phone Number:	328-3260	**Date Prepared:**	03/26/2001

FISCAL NOTE

Requested by Legislative Council
2/20/2001

Bill/Resolution No.:

Amendment to: HB 1455

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

For the Office of Administrative Hearings, the amendments to H.B. 1455 would have no additional fiscal impact. The amendments have to do with requests for de novo review in the courts. This is an appellate level review beyond the hearings level with OAH and the agency. Therefore, it is anticipated that there would be no additional effect on OAH and the original fiscal note OAH filed for this bill would still be applicable, as to OAH.

However, the amendments to H.B. 1455 have the potential for substantial fiscal impact on numerous other state agencies, local governments or agencies, and the court system. Approximately 200 administrative matters are appealed to the district courts every year. With the language of the amendments, however, this number could increase significantly. With the opportunity for de novo review, substantially more parties from the both the state and local administrative hearings level may wish to appeal. It is impossible to guess how many. But, even if just 50% more would appeal there would be 300 cases on appeal as opposed to 200. Just how much of a financial burden this would place upon the courts is unknown. Of course, what makes for potentially great fiscal impact in the court system is that if in even 50% of these 300 cases on appeal the appellant asks for de novo review, 150 cases in the court system likely must have de novo hearings (a new trial) in the district court.

This would involve the use of considerable resources in the court system.

Yet, just what de novo review means and whether it needs to be granted upon request are questions that may need to be clearly answered. De novo review may mean a new hearing or trial. However, it may only mean just a new look by the district court at the administrative hearing record already in existence and making a new decision based on that record, disregarding the final decision of the agency. It may not mean that a new hearing or trial is required. Either way, considerable resources of the courts would be involved.

Not only would the impact on the courts be great but the impact on state agencies, including the Attorney General's office, would be great. If 150 cases went to a new trial in the district courts, the state would need additional legal representation in those cases. Even if a new trial would not be required, additional legal representation would be involved for these 150 cases. This would require that substantial time of assistant attorneys general and special assistant attoneys general be spent on representation for the agencies involved. The fiscal impact on the Attorney General's office (both for agencies for which it bills and those for which it does not) could be great. The fiscal impact on all of the state agencies whose final administrative orders are appealed under N.D.C.C. ch. 28-32 could also be great.

There would be fiscal impact on the local level similar to the impact at the state agency level, although the numbers of cases from the local level is not known. New trials or a new look at the case would be required for the de novo review process from the local level, too.

As a word of caution, this fiscal note does not estimate the potential costs to all of the state agencies, local agencies, and courts that may be involved. Even for those entities to make such an estimate may be more of a quess because the numbers of requests for de novo review that will be made is not something that can be known with any certainty. Again, there may be more appeals of administrative orders with these amendments. Just how many, no one knows for certain. Then, of all the cases appealed, it is impossible to say how many appellants would request de novo review. Such review could be costly to the appellant, as well as to the appellee. There may be other considerations, too, affecting the decision whether to request de novo review or standard appellate review.

Therefore, although this fiscal note states no additional impact on OAH, there would most certainly be a substantial fiscal impact of undetermined amount on numerous state agencies, on local agencies, and on the court system.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type*

and fund affected and any amounts included in the executive budget.

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Allen C. Hoberg	**Agency:**	Office of Administrative Hearings
Phone Number:	701-328-3260	**Date Prepared:**	02/20/2001

FISCAL NOTE

Requested by Legislative Council
01/23/2001

Bill/Resolution No.: HB 1455

Amendment to:

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues		($16,222)		($16,222)		($16,222)
Expenditures		($16,222)		($16,222)		($16,222)
Appropriations		($16,222)		($16,222)		($16,222)

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

For most of the work OAH currently does, this bill will have no fiscal impact. The work for writing a recommended decision is essentially the same as writing a final decision. However, it may be that some boards and commissions which currently have OAH write a recommended decision will under this bill only have OAH conduct the hearing (the board will write the decision). It really is impossible to know how many boards and commissions that currently have OAH write a recommended decision will switch to the other option. It may be that it will depend on the type of case. However, this bill has the potential to reduce OAH's revenues and expenditures, if boards that currently have OAH issue a recommended decision opt to only have OAH conduct the hearing, and related proceedings. For the last two years OAH had 34 requests from boards that usually have OAH issue a recommended decision. Usually decisions are written on about 50% of the requests. Although an OAH ALJ may spend from 3 to 30 hours writing a decision depending on the nature and complexity of the case, 12 hours is probably an average amount of time spent on writing a decision for a board or commission. Therefore, for 17 cases, if the board decided to have OAH only conduct the hearing (in reality it may only be for a portion of the 17), OAH would spend 204 hours less per biennium on writing decisions (17 x 12). At OAH's current billing rate of $79.52/hour, the amount is $16,222 (204 x $79.52). Assuming no increase in OAH's billing rate over the next three bienniums (and it is likely to increase some), $16,222 is the amount of decrease in revenues OAH can expect and, correspondingly it can expect $16,222 less in expenditures (savings from not having to hire temporary ALJs - full-time ALJs will now have about 204 hours more to spend on matters that temporary ALJs would otherwise have to do). Of course, OAH's appropriation would be less, then, too. Again, however, a caution; this is just a rough estimate. It is impossible to guess what each board or commission might do when faced with the choice of OAH issuing a final decision or OAH just providing a hearing officer to conduct the

hearing, because in the later situation, the board or commission must actually be at the hearing. If OAH is issuing a final decision, the board or commission need not be present at the hearing.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included ir the executive budget.*

See Narrative

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

See Narrative

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

See Narative

Name:	Allen C. Hoberg	**Agency:**	Office of Administrative Hearings
Phone Number:	328-3260	**Date Prepared:**	01/24/2001

10522.0101
Title.

Prepared by the Legislative Council staff for
Representative Klemin
February 14, 2001

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1455

Page 1, line 1, replace "and sections" with ", section"

Page 1, line 2, after "28-32-17" insert ", subsection 1 of section 28-34-01," and after "and" insert "section"

Page 1, line 3, after "agencies" insert "and appeals from decisions of local governing bodies"

Page 4, after line 6, insert:

"**SECTION 3. AMENDMENT.** Subsection 1 of section 28-34-01 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

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. The notice of appeal may include a request for de novo review by the court. 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."

Renumber accordingly

Adopted by the Judiciary Committee
February 14, 2001

VR
2/15/01

HOUSE AMENDMENTS TO HB 1455 HOUSE JUDICIARY 02-15-01
Page 1, line 2, after "28-32-17" insert ", 28-32-19, subsection 1 of section 28-34-01," and after "and" insert "section"

Page 1, line 3, after "agencies" insert "and appeals from decisions of local governing bodies"

HOUSE AMENDMENTS TO HB 1455 HOUSE JUDICIARY 02-15-01
Page 4, after line 6, insert:

"**SECTION 3. AMENDMENT.** Section 28-32-19 of the North Dakota Century Code is amended and reenacted as follows:

28-32-19. Scope of and procedure on appeal from determination of administrative agency. A notice of appeal may include a request for de novo review by the district court. If there is no request for de novo review, a judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it shall find that any of the following are present:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. Provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.

If the order of the agency is not affirmed by the court, it shall be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

SECTION 4. AMENDMENT. Subsection 1 of section 28-34-01 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

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. The notice of appeal may include a request for de novo review by the court. 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."

Renumber accordingly

Date: 02-14-01
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB-1455

House JUDICIARY Committee

☐ Subcommittee on _____

or

☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as amend

Motion Made By Rep Klemin Seconded By Rep Kingsbury

Representatives	Yes	No	Representatives	Yes	No
CHR - Duane DeKrey	✓				
VICE CHR --Wm E Kretschmar	✓				
Rep Curtis E Brekke	✓				
Rep Lois Delmore		✓			
Rep Rachael Disrud	✓				
Rep Bruce Eckre		✓			
Rep April Fairfield	✓				
Rep Bette Grande					
Rep G. Jane Gunter	✓				
Rep Joyce Kingsbury	✓				
Rep Lawrence R. Klemin	✓				
Rep John Mahoney					
Rep Andrew G Maragos					
Rep Kenton Onstad	✓				
Rep Dwight Wrangham	✓				

Total (Yes) 10 No 2

Absent 3

Floor Assignment Rep Klemin

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1455: Judiciary Committee (Rep. Klemin, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 2 NAYS, 3 ABSENT AND NOT VOTING). HB 1455 was placed on the Sixth order on the calendar.

Page 1, line 2, after "28-32-17" insert ", 28-32-19, subsection 1 of section 28-34-01," and after "and" insert "section"

Page 1, line 3, after "agencies" insert "and appeals from decisions of local governing bodies"

Page 4, after line 6, insert:

"**SECTION 3. AMENDMENT.** Section 28-32-19 of the North Dakota Century Code is amended and reenacted as follows:

28-32-19. Scope of and procedure on appeal from determination of administrative agency. A notice of appeal may include a request for de novo review by the district court. If there is no request for de novo review, a judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it shall find that any of the following are present:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. Provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.

If the order of the agency is not affirmed by the court, it shall be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

SECTION 4. AMENDMENT. Subsection 1 of section 28-34-01 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

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. The notice of appeal may include a request for de novo review by the court. 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."

Renumber accordingly

2001 SENATE JUDICIARY

HB 1455

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1455

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 14th, 2001

Tape Number	Side A	Side B	Meter #
1		x	19.8-end
2	x		0-end
		x	0
Mwl 21 1	+	+	51.3-end/0-9.1
Committee Clerk Signature			

Minutes: **Senator Traynor**, opened the hearing on HB 1455.

Rep. Koppelman, district 13, sponsor of the bill. Was amended in the house. Decision are binding upon the public but not on the agency. Actual process falls short of the standard. I think the Attorney General is going to offer an amendment. Urge your favorable consideration.

Senator Traynor, what does your bill do?

Rep. Klemin, appeared in favor of the bill. Only going to talk about section 3 and 4.

Senator Nelson, define "De Novo" review.

Rep. Klemin, (explains). Section 3 sets out 6 items that must be reviewed. De Novo review is a legal standard. Provided with testimony. This bill provides fro something more than we are doing now.

Allen Hoberg, Office Director of Administrative Hearings, supports the original bill. (testimony attached)

Senator Traynor, what is your definition of de-novo review?

Allen Hoberg, (explains his interpretation). Looking at it with a new fresh look.

Senator Bercier, why would it not go on the record?

Allen Hoberg, I don't think so.

Senator Bercier, legally by law it would go on record.

Allen Hoberg, district court can only look at the record.

Senator Bercier, someone clarify my question.

Leslie Oliver, (testimony attached) appeared in favor of the bill.

Benny Graff, District Judge, appeared in opposition to the bill. The proposed amendments changes the guts of this bill. I am speaking on the effect this bill would have on me as a district judge. I think with language the way it is, I would need 1 more judge in my district. Legislature has reduced the judiciary in ND. I have lost judges, but with this bill it is going to add to the workload and I have less people. Every time there is an appeal to me it means a trial.

Senator Nelson, the fiscal note says it has no impact.

Benny Graff, I doubt that we would get an extra judge.

Discussion.

Allen Hoberg, addressed the fiscal note. I had no ideal when I did fiscal note. I would be guessing and it is difficult to put numbers on it.

Bob Harns, council for Governor Hoeven, the Governor's stand is to do not pass. Cost of litigation will increase. The bill turns the process on it head. Expands district of decision making process in the executive branch by having some exempt agencies. Does not serve public interest well. Governor feels the bill is not appropriate. Does feel it is contrary to Federal Law. This bill does not deal with the rate setting process the Long Term Care Association is looking for. As written, Governor Hoeven requests a Do Not Pass.

Senator Trenbeath, how will they differ?

Bob Harns, differs in several aspects. Litigants will have experts, that is why agencies are concerned

John Olson, (testimony attached) special assistant attorney for the Board of Medical Examiners. The ND Board of Medical Examiners oppose this bill.

Christine Hogan, (testimony attached) Executive Director of the State Bar Association, testified that the State Bar Association opposes the "De Novo" concept.

Senator Trenbeath, almost entirely in agreement. Why is state bar taking the stand they are.

Christine Hogan, not opposed to recommending changes. Bar association would not be opposed to a study.

Senator Traynor, does the Bar Association raise matter by Bob Harns.

Brent Elison, (testimony attached) representing ND Workers Comp, appeared in opposition to sections 3 and 4 of engrossed HB 1455. Workers comp adopted a neutral position on the original bill.

Senator Lyson, agency cannot appeal?

Brent Elison, can't answer.

Doug Barr, of the Attorney Generals office appeared with amendments to the bill. There is a decision by the '79 supreme court raising concerns of a de novo review.

I disagree with Rep. Klemin' testimony. The attorney general recommends a do not pass the way the bill is written.

Senator Watne, I am not sure what page 4 line 27 item 8 is recommending.

Doug Barr, they have to explain why they rejected or modified the distrcit judges decision.

Senator Watne, isn't the ALJ decision final?

Doug Barr, this amendment changes it.

Senator Nelson, why not just hill the bill.

End of side a tape 2

Illone Jeffcoat-Sacco, public social committee appeared in opposition to the "de novo review" portion of the bill regarding agency appeals.

Don Rouse, (testimony attached) legal council for State Tax Committee, appeared in opposition to the bill.

Senator Traynor, if section 3 and 4 are removed you still oppose?

Don Rouse, yes, we do. Countless areas have upheld this philosophy.

Senator Trenbeath, how does the bill in original form affect tax dept.?

Don Rouse, the original bill does not allow us to operate properly.

Rep. Koppelman, provided a suggested amendment.

Rep. Klemin, suggested something between. More discussion on "de novo review" should try to disclose dissatisfaction if possible.

Senator Traynor, have you reviewed the Koppelman amendments?

Rep. Klemin, no I have not. I have reviewed the Attorney Generals amendments.

Senator Watne, I have not seen the amendment.

Senator Traynor, closed the hearing on HB 1455.

SENATOR NELSON MOTIONED TO MOVE ATTORNEY GENERAL'S AMENDMENTS, SECONDED BY SENATOR LYSON. VOTE INDICATED 7 YEAS, 0 NAYS AND 0 ABSENT AND NOT VOTING. SENATOR TRENBEATH MOTIONED TO PASS AMENDMENTS PROPOSED BY THE TAX COMMISSIONER, SECONDED BY SENATOR WATNE. VOTE INDICATED 7 YEAS, 0 NAYS AND 0 ABSENT AND

NOT VOTING. SENATOR WATNE MOTIONED TO DO PASS, SECONDED BY SENATOR BERCIER. VOTE INDICATED 7 YEAS, 0 NAYS AND 0 ABSENT AND NOT VOTING. SENATOR TRENBEATH VOLUNTEERED TO CARRY THE BILL.

Proposed by
Attorney General Wayne Stenehjem

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL 1455

Page 1, line 2, remove "subsection 1 of section 28-34-01," and remove the second "section"

Page 1, line 4, remove "and appeals from decisions of local"

Page 1, line 5, remove "governing bodies"

Page 1, line 15, remove ", and the provisions of subsection 5 do not apply"

Page 4, line 12, remove "notice of appeal may include a request for de novo review by the district court. If"

Page 4, line 13, remove "there is no request for de novo review, a"

Page 4, after line 27, insert:

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

Page 4, remove lines 30 and 31

Page 5, remove lines 1 through 5

Page 5, line 31, overstrike "An agency may request"

Page 6, overstrike lines 1 and 2

Page 6, remove lines 3 through 18

Renumber accordingly

10522.0202
Title.0300

Adopted by the Judiciary Committee
March 21, 2001

3-26-1

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1455

Page 1, line 2, remove "subsection 1 of section 28-34-01," and remove the second "section"

Page 1, line 4, remove "and appeals from decisions of local"

Page 1, line 5, remove "governing bodies"

Page 1, line 15, remove ", and the provisions of subsection 5 do not apply"

Page 4, line 12, remove "notice of appeal may include a request for de novo review by the district court. If"

Page 4, line 13, remove "there is no request for de novo review, a"

Page 4, after line 27, insert:

"7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge."

Page 4, remove lines 30 and 31

Page 5, remove lines 1 through 5

Page 5, line 14, after the third comma insert "the tax commissioner,"

Page 5, line 31, overstrike "An agency may request"

Page 6, overstrike lines 1 and 2

Page 6, remove lines 3 through 18

Page 6, line 19, replace "4" with "3"

Page 6, line 22, replace "5" with "4"

Page 7, line 1, replace "6" with "5"

Page 7, line 5, replace "7" with "6"

Renumber accordingly

Date: 3/21/01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1455

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken [redacted] Move Attorney General's Amendments

Motion Made By Nelson Seconded By Lyson

Senators	Yes	No	Senators	Yes	No
Traynor, J. Chairman	X		Bercier, D.	X	
Watne, D. Vice Chairman	X		Nelson, C.	X	
Dever, D.	X				
Lyson, S.	X				
Trenbeath, T.	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

10522.tax1
Title.

Prepared by the Office of State Tax Commissioner
March 21, 2001

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1455

Page 5, line 14, after "Dakota," insert "the tax commissioner,"

Renumber accordingly

Date: 3/21/01
Roll Call Vote #: 2

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1455

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Pass Amendments proposed by Tax Commissioner

Motion Made By Trenbeath Seconded By Watne

Senators	Yes	No	Senators	Yes	No
Traynor, J. Chairman	X		Bercier, D.	X	
Watne, D. Vice Chairman	X		Nelson, C.	X	
Dever, D.	X				
Lyson, S.	X				
Trenbeath, T.	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date: 3/21/01
Roll Call Vote #: 3

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1455

Senate Judiciary Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken DPA

Motion Made By Watne Seconded By Bercier

Senators	Yes	No	Senators	Yes	No
Traynor, J. Chairman	X		Bercier, D.	X	
Watne, D. Vice Chairman	X		Nelson, C.	X	
Dever, D.	X				
Lyson, S.	X				
Trenbeath, T.	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Trenbeath

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1455, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) *recommends* **AMENDMENTS AS FOLLOWS** *and when so amended, recommends* **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1455 was placed on the Sixth order on the calendar.

Page 1, line 2, remove "subsection 1 of section 28-34-01," and remove the second "section"

Page 1, line 4, remove "and appeals from decisions of local"

Page 1, line 5, remove "governing bodies"

Page 1, line 15, remove ", and the provisions of subsection 5 do not apply"

Page 4, line 12, remove "notice of appeal may include a request for de novo review by the district court. If"

Page 4, line 13, remove "there is no request for de novo review, a"

Page 4, after line 27, insert:

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Page 5, line 14, after the third comma insert "the tax commissioner,"

Page 5, line 31, overstrike "An agency may request"

Page 6, overstrike lines 1 and 2

Page 6, remove lines 3 through 18

Page 6, line 19, replace "4" with "3"

Page 6, line 22, replace "5" with "4"

Page 7, line 1, replace "6" with "5"

Page 7, line 5, replace "7" with "6"

Renumber accordingly

2001 HOUSE JUDICIARY

CONFERENCE COMMITTEE

HB 1455

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1455-conference

House Judiciary Committee

☐ Conference Committee

Hearing Date 04-06-01

Tape Number	Side A	Side B	Meter #
TAPE II	x		01 to 3931
Committee Clerk Signature			

Minutes: Chairman DeKrey called the conference committee to order on HB 1455. The clerk will call the roll. Do you want to tell us what your amendments do.

Senator Trenbeath: We took out de nove review and in doing so took out th sections that would relate that to local government proceedings also. Sub section five would come out of there also.

Chairman DeKrey: We have no problem with taking out the de nove review, but you also made it so the administrative judges decision is not final.

Senator Trenbeath: That is right, the administrative judges decision is as final as it ever was. On appeal it can be reversed or resided for two additional reasons, that were added in seven and eight.

Senator Traynor: Those were suggested by the Attorney General.

Chairman DeKrey: The group that had the greatest problem with the administrative law judges decision not being final was the long term care association. So would they tell us if they still have a problem with the bill with the Senate amendments.

Shelly Peterson: the bill as amended, isn't as good as we would like it. The agency still has the authority to change it, and that is the frustration with the bill. We were hoping for in this legislation is for the ability for the judge ruling not be recommended but would be final.

Senator Trenbeath: I think that all that we did, is make is so the agency was not going to follow the recommendation of the judge, they would have to state a reason. That reason would be appealable.

Chairman DeKrey: Appealable to whom.

Senator Watne: To district court.

Chairman DeKrey: I guess this bill is as strong as we can pass at this time.

Shelly Peterson: I agree with you, it is better.

Rep Eckre: Is that the same concern of the medical board.

John Olson: We are comfortable with the Senate amendments.

Chairman DeKrey: Have you seen the Koppelman amendments, Sandi Tabor, do you want to tell us what you think.

Sandi Tabor: This addresses concerns more of agencies, but I think what we did is better.

John Olson: This still tries to direct the finality to the administrative law judge, to the exclusion of the administrative agency.

Chairman DeKrey: The Senate objection to the bill was the finality.

Senator Traynor: We had a memo from the Attorney General, this bill didn't apply to the long term care people.

Senator Watne:I believe that the long term care people are under federal ruling and they could loose money unless they have control.

Rep Devlin: The Koppelman amendments is a compromise between both. It restores the original form providing the finality and also retains the Senate amendments. He spoke to the Administrative Rules process and why he had his position.

Senator Traynor: If we adopt this amendment, what happens.

John Olson: If you have this finality in the decision making process for the administrative law judge, the board of medical examiners most likely will not use the judge for decision making process. They will not let go of their responsibility in terms of disciplining physicians or reviewing license applications for physicians. They will not let go of their duty that they have to make the final decision.

Senator Traynor:John would you make a comment on four and five of the amendments.

John Olson: Number four is injecting finality and it is inviting subjective review.number five, the agency may or may not support the decision, unless they state a reason.

Senator Trenbeath: I see thousands of dollars being spent in court with this amendment.

Senator Traynor: We were told by the Attorney General that this is case law now.

Doug Bar: office of the Attorney General.I would like to make three points. First of all it is the long term care association that is really concerned about this. Yet the exception that is being proposed would exclude them from the benefit of the law. Second, we failing to recognize the purpose of administrative agencies. At the review, there is the right of appeal.

Chairman DeKrey: Do they appeal on the facts or that what wasn't done right.

Doug Barr: He gives his explanation.

Chairman DeKrey:Asks the question again.

Doug Barr: Both, final point, the amendments purpose is in conflict with other portions of the law.

Rep Koppelman: I have two point, one is that it is a good thing that we have talked about the issues, and secondly I would like to see my amendment adopted, but should an agency be able to rule on itself. There are other amendments drawn up by Allen Holberg, maybe we need to talk to him.

Chairman DeKrey: My question is, can you live with this or should we put the amendments back on and the Senate will kill the bill.

Rep Koppelman: I think a third option, what is in the Senate version of the bill is current law.

Senator Watne: The amendments are the same until we reach the line referring to the tax commissioner, why do you object to that and then why in this other part you put in appeal.

Rep Koppelman: The basic difference is that the Senate got rid of the finality of the administrative process, which was the original intent of the bill. You also got rid of the de nove review and that I agree with. The tax commissioner issue, I talked with Legislative Council was befuddled with the testimony, many of our state officials are constitutional offices, but nothing in the law says that they are immune to the processes of law. I recommend that we take a look at Mr Holberg's amendments, it is something to improve the process.

Chairman DeKrey: Long term care people said it was better than what they have now.

Rep Koppelman: It is better.

Senator Trenbeath: Senate amendments go a long way to helping that. This allows the judges to look at the facts. I do not like the finality finding, the agencies do not favor this nor does the Attorney General.

Chairman DeKrey: I agree, we got a bite out of the apple, maybe we had better agree.

Rep Devlin: we still have not accomplished much. He then makes a statement about the procedure with an example.

Senator Trenbeath: I understand.

Chairman DeKrey: I would have someone made a motion.

Rep Devlin: I move that we adopt the Koppelman amendments.

Senator Watne: Second.

Chairman DeKrey: Clerk will call the roll to adopt the Koppelman amendments 10522.0203.

Senator Trenbeath: The Senate would have to recede from their amendments, would have to be a part of the motion.

Senator Watne: We would have to take a look at page six line 3 through 18. Koppelman did not have them in there.

DISCUSSION

Chairman DeKrey: The clerk will take the roll on motion. The Senate will recede from their amendments and adopt the Koppelman amendments. The motion fails with a vote of 2 YES, 4 NO. We have the bill before us, are there any further motions.

Rep Koppelman: I would suggest that if you do decide to go with the Senate amendments that you would further amendment and still delete the tax commissioner.

Chairman DeKrey: My question is this, the state tax commissioner deals with a lot of peoples personal financial records and if we bring it into the administrative process does that open those people's records up to public record.

Rep Koppelman: Nothing would change.

Chairman DeKrey: I want to hear from the attorneys.

Rep Koppelman: If what has been said is true, and all the Senate amendment does is to codify what is currently present in case law, and if the tax commissioner is using the process now without much objection and it works for them, to remove them from the requirement to use the process, then the change is that we move the tax commissioner from the administrative hearing process.

Senator Traynor: Are these the Holberg amendments.

Doug Barr: I was at the committee hearing where the tax testified, and as I understand it, they don't care if they are not excluded if the ELJ is final.

DISCUSSION

Senator Trenbeath:I will move that Senate recede from its amendments and further amend with the Senate amendments 10522.0202 with the exemption procedure of the tax commissioner.

Rep Eckre: Second.

Chairman DeKrey: It has been moved and seconded, you heard the motion, any further discussion.

DISCUSSION

Chairman DeKrey: The clerk will call the roll on the motion on HB 1455. The motion passes with 5 YES and 1 NO.

Adopted by the Conference Committee
April 5, 2001

VR
4/6/01

CONFERENCE COMMITTEE AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1455 **JUD 04-06-01**

That the Senate recede from its amendments as printed on pages 1099 and 1100 of the House Journal and page 911 of the Senate Journal and that Engrossed House Bill No. 1455 be amended as follows:

Page 1, line 2, remove "subsection 1 of section 28-34-01," and remove the second "section"

Page 1, line 4, remove "and appeals from decisions of local"

Page 1, line 5, remove "governing bodies"

Page 1, line 15, remove ", and the provisions of subsection 5 do not apply"

Page 4, line 12, remove "notice of appeal may include a request for de novo review by the district court. If"

Page 4, line 13, remove "there is no request for de novo review, a"

Page 4, after line 27, insert:

"7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge."

Page 4, remove lines 30 and 31

Page 5, remove lines 1 through 5

Page 5, line 31, overstrike "An agency may request"

Page 6, overstrike lines 1 and 2

Page 6, remove lines 3 through 18

Page 6, line 19, replace "4" with "3"

Page 6, line 22, replace "5" with "4"

Page 7, line 1, replace "6" with "5"

Page 7, line 5, replace "7" with "6"

Renumber accordingly

Date: 4/06/01
Roll Call Vote # 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB-1455

House _____ Committee

☐ Subcommittee on _____

or

☒ Conference Committee

Legislative Council Amendment Number _____

Action Taken Senate recede from its amendments + adopt Koppelman amend

Motion Made By _____ Seconded By _____

Representatives	Yes	No	SENATORS	Yes	No
Chr DeKrey ✓	✓		Sen Trenbeath ✓		✓
Rep Devlin ✓	✓		Sen Traynor ✓		✓
Rep Eckre ✓		✓	Sen Watne ✓		✓

Total (Yes) 2 No 4

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 1/06/01
Roll Call Vote # 2

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB-1455

House _____ Committee

☐ Subcommittee on _____
or
☒ Conference Committee

Legislative Council Amendment Number _____

Action Taken Senate recede from its amend + further amend by putting back all Senate amend + further amend of last Committee

Motion Made By Sen Trenbeath Seconded By Rep Eckre

Representatives	Yes	No	SENATORS	Yes	No
Chr DeKrey	✓		Sen Trenbeath	✓	
Rep Delvin		✓	Sen Traynor	✓	
Rep Eckre	✓		Sen Wayne	✓	

Total (Yes) 5 No 1

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

REPORT OF CONFERENCE COMMITTEE

HB 1455, as engrossed: Your conference committee (Sens. Trenbeath, Traynor, Watne and Reps. DeKrey, Devlin, Eckre) recommends that the **SENATE RECEDE** from the Senate amendments on HJ pages 1099-1100, adopt further amendments as follows, and place HB 1455 on the Seventh order:

That the Senate recede from its amendments as printed on pages 1099 and 1100 of the House Journal and page 911 of the Senate Journal and that Engrossed House Bill No. 1455 be amended as follows:

Page 1, line 2, remove "subsection 1 of section 28-34-01," and remove the second "section"

Page 1, line 4, remove "and appeals from decisions of local"

Page 1, line 5, remove "governing bodies"

Page 1, line 15, remove "<u>, and the provisions of subsection 5 do not apply</u>"

Page 4, line 12, remove "<u>notice of appeal may include a request for de novo review by the district court. If</u>"

Page 4, line 13, remove "<u>there is no request for de novo review, a</u>"

Page 4, after line 27, insert:

"<u>7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.</u>

<u>8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.</u>"

Page 4, remove lines 30 and 31

Page 5, remove lines 1 through 5

Page 5, line 31, overstrike "An agency may request"

Page 6, overstrike lines 1 and 2

Page 6, remove lines 3 through 18

Page 6, line 19, replace "<u>4</u>" with "<u>3</u>"

Page 6, line 22, replace "<u>5</u>" with "<u>4</u>"

Page 7, line 1, replace "<u>6</u>" with "<u>5</u>"

Page 7, line 5, replace "<u>7</u>" with "<u>6</u>"

Renumber accordingly

Engrossed HB 1455 was placed on the Seventh order of business on the calendar.

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE) - 420

07398

(Bill Number) HB-1455 (, as (re)engrossed):

Your Conference Committee

For the Senate:	For the House:
Sen Trenbeath	Chr DeKrey
Sen Traynor	Rep Devlin
Sen Watne	Rep Eckre

☐ recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)
723/724 725/726 8724/8726 8723/8725
the (Senate/House) amendments on (~~SJ~~/HJ) page(s) _____ - _____

☐ and place HB-1455 on the Seventh order.
727

☒ , adopt (further) amendments as follows, and place HB-1455 on the Seventh order:

☐ having been unable to agree, recommends that the committee be discharged and a new committee be appointed. 690/515

((Re)Engrossed) HB-1455 was placed on the Seventh order of business on the calendar.

DATE: 04/06/01

CARRIER: _____

LC NO. _____ . _____ of amendment

LC NO. _____ . _____ of engrossment

Emergency clause added or deleted _____

Statement of purpose of amendment _____

(1) LC (2) LC (3) DESK (4) COMM.

2001 TESTIMONY

HB 1455

OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF NORTH DAKOTA
1707 North 9th Street
Bismarck, North Dakota 58501-1882

Allen C. Hoberg
Director

701-328-3260
FAX 701-328-3254

MEMORANDUM

TO: Fifty-seventh Legislative Assembly
State of North Dakota
House Judiciary Committee

FROM: Allen C. Hoberg, Director
Office of Administrative Hearings

RE: House Bill No. 1455

DATE: February 5, 2001

The Office of Administrative Hearings did not seek to have this bill introduced. However, the matter of final decision-making authority by ALJs has been a subject of conversation and study on a national level lately, and it has recently been a subject of conversation and study with OAH's statutory advisory body, the State Advisory Council for Administrative Hearings, though the SAC has taken no position on it. I believe that this is a conceptually sound bill. But, you are probably going to hear some good arguments for and against this bill. However, this bill is not about the need to have a central panel for administrative hearings; it is about whether North Dakota's Central Panel, OAH, should operate differently.

The Office of Administrative Hearings appears today in support of this bill today for three reasons. (1) this bill goes one step further down the road toward fairness in all administrative hearings; (2) it should not cost state agencies, including the office of administrative hearings, any additional monies to implement, and it may result in time and monetary savings for OAH and the agencies it serves; and (3) it avoids the need for the agency head to consult with attorneys and others about a decision, after a recommended decision is issued but prior to the issuance of a final decision.

OAH currently does issue final decisions for many state agencies, both for agencies within its mandatory jurisdiction and for agencies that voluntarily use its hearing officer services. OAH already issues final decisions for all Veterans Preference hearings, for all state employee grievance or job discipline hearings, for all DPI due process special education hearings, for all Bank of North Dakota Student Loan nearings, and for many other agency hearings when the agency head chooses to have OAH issue a final decision. All other decisions issued by OAH administrative law judges are recommended decisions for which the agency head issues the final decision. The agency head may accept, reject, or modify the ALJ's recommended decision. Under N.D.C.C. ch. 28-32, the only other option currently available to agencies that use OAH, besides the recommended

decision/final decision format, is for the agency to request that the OAH ALJ serve only as procedural hearing officer. If this option is used, the agency head must actually be present at the hearing. The hearing officer conducts the hearing but the agency head issues the final (the only) decision.

This bill requires all state agencies under the mandatory jurisdiction of OAH to request that OAH conduct the hearing and issue a final decision. However, it retains the option for boards and commissions to use a procedural hearing officer. Boards and commissions may not request a recommended decision from an OAH ALJ. No one under OAH's jurisdiction may any longer request that the designated OAH ALJ issue a recommended decision. However, every agency under OAH jurisdiction would have the right to appeal the final order issued by the ALJ to the courts.

This bill is in line with a recent trend developing nationwide to have independent hearing officers conduct the hearing and issue a final, rather than a recommended, decision. In South Carolina OAH ALJs now issue final decisions for all cases under OAH jurisdiction. Agencies may appeal the decision to the court system if they do not agree with it. The only exception in South Carolina is that in decisions for boards and commissions a party may appeal to the board or

commission before appealing to the courts, but it is an appeal of a final decision to the board or commission, not a review of a recommended decision. South Carolina's OAH has very broad jurisdiction over state agency administrative hearings.

In Maryland about 85% of the OAH ALJ's decisions for agencies are final decisions. [The Maryland OAH issues final decisions for Budget & Management, State Personnel, Department of Education, Gaming hearings, Health and Mental Hygiene Department hearings, Public Information Act hearings, Natural Resources Department hearings, Motor Vehicle Administration hearings (drivers license, suspension, etc.), Insurance Administration hearings, Correctional Department hearings (*e.g.*, inmate grievance), Human Resources Department (human services) hearings, and Housing & Community Development Department hearings.] Maryland's OAH has very broad jurisdiction over state administrative hearings.

In Oregon about 80% of the OAH ALJ decisions are final decisions. [The principal subject matters for the Oregon OAH issuing final decisions are unemployment insurance cases, implied consent (drunken driving cases), and

social services (human services) cases.] Oregon's OAH has very broad jurisdiction over state agency administrative hearings.

In Minnesota OAH ALJs issue final decisions only for a portion of its agency caseload. [The Minnesota OAH issues final decisions for all Workers Compensation Bureau hearings, human rights claims, local government boundary/incorporation disputes, and for sex offender community notification classification appeals.] Minnesota is also a state with fairly broad jurisdiction over state agency administrative hearings. But, for most cases, OAH ALJs still issues recommended decisions.

In Washington OAH ALJs issue final decisions only for a small portion of the agencies' caseload. [The Washington OAH issues final decisions for Department of Labor & Industries (contractor registration hearings), Department of Social & Health Services (juvenile parole revocation hearings), Human Rights Commission (employment discrimination hearings), Superintendent of Public Instruction (special education, teacher certification, student transfer, bus driver, and food program hearings), and Washington State Patrol (drug forfeiture hearings).] Washington's OAH also has fairly broad jurisdiction over state

agency administrative hearings. But, for most cases, Washington's OAH ALJs still issues recommended decisions.

California's OAH is the nation's oldest, but its jurisdiction is extremely small. Most state agencies are outside of its jurisdiction. For agencies in its jurisdiction, the California OAH issues only about 10% final decisions. [The biggest client agency for which it issues only final decisions is the Department of Developmental Disabilities.]

Massachusetts' Division of Administrative Law is also a central panel with limited jurisdiction. However, within its jurisdiction it issues final decisions for some agencies. [The Massachusetts DAL issues final decisions for nursing home and medical service provider rate hearings, hearings on payments to special needs schools, hearings on construction contract disputes, hearings on transfers of the mentally retarded, hearings on veteran's benefits, and hearings on disputes about the prevailing wage.] However, by law, even when DAL ALJs issue a recommended decision, the agency must give "deference" to the findings of fact in the decision of the ALJ when reviewing it for a final decision, and must give "substantial deference" to findings of fact of the ALJ when they are based upon credibility determinations.

The South Dakota OAH is also a central panel with limited jurisdiction. It has final decision-making authority only for property tax appeal hearings. In all other hearings under its jurisdiction it issues recommended decisions.

In North Carolina, all the decisions of OAH ALJs are recommended decisions, but a statute provides specific, strict guidelines for agency review of recommended decisions. *See* 1999 N.C. House Bill No. 968.

In the remainder of the states having central panels like North Dakota's OAH, OAH ALJs primarily issue recommended decisions and the agency head issues the final decision. As of December 1, 2000, 26 states have central panels. Some of these states, as in North Dakota, give the option to the agency head to ask for a final decision on a case-by-case basis.

Currently, when an OAH ALJ issues a recommended decision on an agency matter and the agency head is required to issue a final decision, the agency head may seek the advice of a "staff assistant," usually program staff, agency attorneys, or other agency personnel, before making a final decision. It is forbidden by law for the agency head to talk to the ALJ or to the parties, or to the

attorney who handled the matter at hearing for the agency, unless the agency head holds a session where all the parties can again be heard before final decision is made. *See* N.D.C.C. § 28-32-12.1 which forbids ex parte contacts. Under this bill, if OAH ALJs issued a final decision, obviously the agency head would not have to issue a final decision. If the agency were a party in the hearing, the agency would then only have to decide whether to appeal the ALJ's decision to the courts. In these discussions the agency attorney who handled the hearing could consult with the agency head. There should less involvement of agency personnel if an ALJ issues a final decision because the agency head does not have to issue any more final decisions and it will only be those decisions adverse to the agency with which the agency head and others will have to concern themselves regarding the question of appeal.

It will not involve any more time or effort for an OAH ALJ to issue a final decision as opposed to a recommended decision. The process is the same.

The agency will still be officially responsible for notifying the parties about the final decision and for maintaining the record and sending it to the courts if there is an appeal because it is still an agency matter, but the actual notification of the

parties about the final decision can be accomplished by the ALJ when the final decision is issued.

The most important element of final decision making is the question of fairness. With the passage of this bill all the parties, including the agency when it is a party, will be on the same level. All must abide by the decision of the ALJ and each will only have the right to challenge the decision on appeal to the courts. The agency would no longer be able to disagree with the ALJ, state its reasons for disagreeing, and then issue different findings of fact and different conclusions of law in a final decision which either modifies or rejects the ALJ's decision. The other parties in a hearing do not have this option. The argument is that the agencies should not have it either.

Of course, agencies would still retain statutory and rulemaking authority. With the final decision-making authority, fact-finding would be the complete province of the ALJ. However, final decision-making authority would still be substantially influenced by statutes and rules, as well as prior case law from the courts.

For all these reasons, OAH believes that this is a sound bill. It is another step toward complete fairness in administrative hearings.

Testimony on HB 1455
House Judiciary Committee
February 5, 2001

Chairman DeKrey and members of the House Judiciary Committee, thank you for the opportunity to testify on HB 1455. My name is Shelly Peterson, President of the North Dakota Long Term Care Association. I am here today on behalf of our members, nursing facilities, basic care facilities and assisted living facilities.

I am here today in support of HB 1455 and respectively request a "DO PASS."

Nursing facilities in North Dakota operate in accordance with laws and regulations administered by state agencies. Facilities with residents receiving medicaid benefits (all of them) are subject to ratesetting by the Department of Human Services. Ratesetting rules are promulgated by the department and published in the Administrative Code. The department interprets these rules, and establishes reimbursement rates for all nursing facilities. The rates established by the department apply to all residents, regardless of the resident's medicaid status.

A facility may formally disagree with the rates established by the department, by asking the department to reconsider its rate determination. In nearly all cases, the department has denied the request.

A facility may appeal the department's denial of reconsideration by submitting a notice of appeal to the department. The department requests the designation of an administrative law judge from the Office of Administrative Hearings.

The administrative law judge conducts a hearing. This is the first opportunity a nursing facility has to present "its side of the story" to an unbiased third party. At the hearing, the department and the facility present evidence related to the manner in which the facility's rates were established. Typically, administrative law judges do not understand the ratesetting regulations, and have admitted, during a hearing, that the department's interpretation is heavily relied upon. The administrative law judge considers the evidence and issues recommended findings of fact, recommended conclusions of law and a recommended order. These recommendations are then given back to the department. The department is permitted to amend or reject anything the judge has recommended. The final order after the hearing

is issued by the department, not the administrative law judge. An administrative law judge's recommendations which favor the facility can be overturned by the department. The facility is permitted to appeal to the district court and finally to the North Dakota Supreme Court. These courts defer to the department's "expertise" in ratesetting matters, and give the department's interpretation "appreciable deference". North Dakota Supreme Court cases are published and available for review. In the last twenty years, a nursing facility has not succeeded in a ratesetting challenge against the department.

Under the present law, North Dakota nursing facilities must challenge the department's established rate through a process which weighs heavily against its success. Any challenge by a facility requires time, energy and frequently, the cost for an attorney to represent the facility. Nursing facilities have largely decided such efforts are futile. Valid and legitimate disputes over rates have gone unchallenged and unheard because the system is fundamentally unfair.

The North Dakota Long Term Care Association supports HB 1455. The changes proposed by HB 1455 protect both parties in an administrative hearing. HB 1455 would require an independent administrative law judge from the Office of Administrative Hearings to preside over an administrative appeal and to issue a final order. HB 1455, if passed, would remove the agency's unilateral authority to arbitrarily change or reject the decision made by the administrative law judge. HB 1455 does not limit or impair the agency's authority in any other sense. This bill allows both parties to an administrative appeal to present evidence in a forum which is fundamentally fair and unbiased.

Thank you for your thoughtful consideration of HB 1455. Your support of HB 1455 is appreciated. I would be happy to answer any questions you might have at this time.

Shelly Peterson, President
North Dakota Long Term Care Association
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Bismarck, ND 58501
(701) 222-0660

MEMORANDUM

TO: HOUSE JUDICIARY COMMITTEE
Duane DeKrey, Chairman
William E. Kretschmar, Vice Chairman
Curtis E. Brekke
Lois Delmore
Rachael Disrud
Bruce Eckre
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Dwight Wrangham

FROM: NORTH DAKOTA LONG TERM CARE ASSOCIATION
Shelly Peterson, President

RE: HB 1455

DATE: February 12, 2001

On February 5, 2001, the House Judiciary Committee heard public testimony on House Bill 1455, a bill to amend and reenact portions of the Administrative Agencies Practice Act, North Dakota Century Code Chapter 28-32, and the Office of Administrative Agencies, North Dakota Century Code Chapter 54-57. The North Dakota Long Term Care Association (NDLTCA), by and through its President, Shelly Peterson, offered testimony in favor of this bill. The North Dakota Department of Human Services (NDDHS), by and through Attorney Melissa Hauer, Director of the Legal Advisory Unit, offered testimony against this bill.

The members of NDLTCA are dedicated to providing quality health care services to residents of long term care facilities in North Dakota. In this endeavor, NDLTCA works closely with NDDHS. NDLTCA and NDDHS have enjoyed a collaborative working relationship, based upon mutual respect, for

many years. NDLTCA members believe HB 1455 will strengthen the relationship with NDDHS, and offer the following comments for consideration by this Committee:

1. In the testimony offered by Attorney Hauer on behalf of NDDHS, she stated the changes proposed in HB 1455 would create a conflict with the federal medicaid statute 42 U.S.C. §1396 a(a)(3). NDDHS administers the medicaid (medical assistance) program. The federal medicaid statute requires NDDHS to offer a "fair hearing before the State Agency to any individual whose claim for medical assistance ... is denied". The federal regulations which implement this statute are found at 42 CFR §431.200 et. seq.("Subpart E"). The regulations require NDDHS to maintain a hearing system for any person denied medical assistance. 42 CFR §431.200. The process must include
   a. A hearing before the [State] agency; or
   b. An evidentiary hearing at the local level, with a right of appeal to a State agency hearing.

   42 CFR §435.205(b).

   The federal regulations require "an impartial officer" to preside over the hearing, and issue "recommendations or a decision." 42 CFR §§431.240, 431.244.

   Nothing in the federal regulations, however, permits the agency to amend or reject the recommendations or decision of the impartial hearing officer. As you are aware, the Administrative Agencies Practice Act requires an administrative agency to issue the final hearing order, but gives the agency the right to amend or reject the impartial hearing officer's recommendations. NDCC 28-32-13. The claimant may ask the agency to reconsider its order. NDCC 28-32-14.

   Nothing in the federal medicaid regulations precludes the process proposed in section 1 of HB 1455.

2. The federal medicaid statute cited by Attorney Hauer applies to the fair hearing process due an individual who has been denied medical assistance benefits. The provisions of 42 U.S.C. §1396

a(a)(3) do not apply to nursing facilities challenging final rates established by the Medicaid agency, NDDHS. Shelly Peterson testified about the complex process used by NDDHS to determine reimbursement rates, which effectively establishes the operating budget for each nursing facility in the state. Ratesetting for nursing facilities is a hybrid process of Medicare and Medicaid laws and regulations.

The appeals process for nursing facilities in the Medicaid regulations is found in 42 CFR §431.153. The reference to nursing facility appeals in the State Medicaid Plan cites this section as well. As required by the federal regulations, "the State must give the facility a full evidentiary hearing". 42 CFR §153. The "required elements" of this hearing process includes the right "to appear before an impartial decision-maker" and the right to "a written decision by the impartial decision-maker" after the hearing is concluded. 42 CFR §431.154. Nothing in the federal regulations require the medicaid agency to preside over the hearing, nor permits the agency to reject a decision made by "the impartial decision-maker".

The appeals process for North Dakota nursing facilities is found in Chapter 50-24.4, North Dakota Century Code, entitled "Nursing Home Rates", and follows the administrative hearing procedures from the Administrative Agencies Practice Act. NDCC §50-24.4-18. NDLTCA requests an amendment to HB 1455, Section 3, p. 4-5, to include a reference to administrative hearings under NDCC §50-24.4. If this acceptable to this Committee, a proposed amendment will be submitted.

3. NDLTCA believes HB 1455 complies with the appeal procedures under both Medicare and Medicaid, and urges a do-pass recommendation from this committee. The existing ratesetting mechanism for nursing facilities removes from each facility the right to establish and implement its annual operating budget. This authority has been relinquished to the state Medicaid agency - NDDHS, which is responsible for establishing, applying and interpreting the complex ratesetting mechanism. The checks

and balances between legislating this process and enforcing this process do not exist or are disregarded.

The North Dakota Long Term Care Association supports HB 1455. HB 1455, if passed, would remove some of the unchecked authority the ratesetting mechanism imposes upon NDDHS, and level the playing field in the administrative hearing process.

State Medicaid Plan - North Dakota
Federal Medicaid regulations

Hearing procedures for individual recipients

Revision: HCFA-AT-80-38 (BPP)
May 22, 1980

State North Dakota

Citation
42 CFR 431.202
AT-79-29
AT-80-34

4.2 Hearings for Applicants and Recipients

The Medicaid agency has a system of hearings that meets all the requirements of 42 CFR Part 431, Subpart E.

maker to refute the finding of noncompliance on which the adverse action was based;

(ii) To be represented by counsel or other representative; and

(iii) To be heard directly or through its representative, to call witnesses, and to present documentary evidence.

(2) A written decision by the impartial decisionmaker, setting forth the reasons for the decision and the evidence on which the decision is based.

(j) *Limits on scope of review:* Civil money penalty cases. In civil money penalty cases—

(1) The State's finding as to a NF's level of noncompliance must be upheld unless it is clearly erroneous; and

(2) The scope of review is as set forth in § 488.438(e) of this chapter.

[Amended at 59 FR 56232, Nov. 10, 1994; 61 FR 32348, June 24, 1996; 62 FR 43931, Aug. 18, 1997; 64 FR 30944, July 23, 1999]

§ 431.154 Informal reconsideration for ICFs/MR.

(a) If the State decides to provide the opportunity for an evidentiary hearing required by § 431.153(a) only after the effective date of a denial, or nonrenewal of participation, the State must offer the facility an informal reconsideration, to be completed before the effective date.

(b) Written notice to the facility of the denial, termination or nonrenewal and the findings upon which it was based;

(c) A reasonable opportunity for the facility to refute those findings in writing, and

(d) A written affirmation or reversal of the denial, termination, or nonrenewal

[Amended at 59 FR 56233, Nov. 10, 1994; 61 FR 32348, June 24, 1996]

Subpart E—Fair Hearings for Applicants and Recipients

SOURCE: 44 FR 17932, Mar. 29, 1979, unless otherwise noted

General Provisions

§ 431.200 Basis and purpose.

This subpart implements section 1902(a)(3) of the Act, which requires that a State plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly. This subpart also prescribes procedures for an opportunity for hearing if the Medicaid agency takes action to suspend, terminate, or reduce services. This subpart also implements sections 1819(f)(3), 1919(f)(3), and 1919(e)(7)(F) of the Act by providing an appeals process for individuals proposed to be transferred or discharged from skilled nursing facilities and nursing facilities and those adversely affected by the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

[57 FR 56505, Nov. 30, 1992]

§ 431.201 Definitions.

For purposes of this subpart:

Action means a termination, suspension, or reduction of Medicaid eligibility or covered services. It also means determinations by skilled nursing facilities and nursing facilities to transfer or discharge residents and adverse determinations made by a State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

Adverse determination means a determination made in accordance with sections 1919(b)(3)(F) or 1919(e)(7)(B) of the Act that the individual does not require the level of services provided by a nursing facility or that the individual does or does not require specialized services.

Date of action means the intended date on which a termination, suspension, reduction, transfer or discharge becomes effective. It also means the date of the determination made by a State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

De novo hearing means a hearing that starts over from the beginning.

Evidentiary hearing means a hearing conducted so that evidence may be presented.

Notice means a written statement that meets the requirements of § 431.210.

Request for a hearing means a clear expression by the applicant or recipient, or his authorized representative, that he wants the opportunity to present his case to a reviewing authority.

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56505, Nov. 30, 1992]

§ 431.202 State plan requirements.

A State plan must provide that the requirements of §§ 431.205 through 431.246 of this subpart are met.

§ 431.205 Provision of hearing system.

(a) The Medicaid agency must be responsible for maintaining a hearing system that meets the requirements of this subpart.

(b) The State's hearing system must provide for—

(1) A hearing before the agency; or

(2) An evidentiary hearing at the local level, with a right of appeal to a State agency hearing.

(c) The agency may offer local hearings in some political subdivisions and not in others.

(d) The hearing system must meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 245 (1970), and any additional standards specified in this subpart.

§ 431.206 Informing applicants and recipients.

(a) The agency must issue and publicize its hearing procedures.

(b) The agency must, at the time specified in paragraph (c) of this section, inform every applicant or recipient in writing—

(1) Of his right to a hearing;

(2) Of the method by which he may obtain a hearing; and

(3) That he may represent himself or use legal counsel, a relative, a friend, or other spokesman.

(c) *The agency must provide the information required in paragraph (b) of this section—(1)* At the time that the individual applies for Medicaid;

(2) At the time of any action affecting his or her claim;

(3) At the time a skilled nursing facility or a nursing facility notifies a resident in accordance with § 483.12 of this chapter that he or she is to be transferred or discharged; and

(4) At the time an individual receives an adverse determination by the State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56305, Nov. 30, 1992; 58 FR 25784, Apr. 28, 1993]

Notice

§ 431.210 Content of notice.

A notice required under § 431.206 (c)(2), (c)(3), or (c)(4) of this subpart must contain—

(a) A statement of what action the State, skilled nursing facility, or nursing facility intends to take.

(b) The reasons for the intended action.

(c) The specific regulations that support, or the change in Federal or State law that requires, the action.

(d) An explanation of—

(1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or

(2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and

(e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56305, Nov. 30, 1992]

§ 431.211 Advance notice.

The State or local agency must mail a notice at least 10 days before the date of action, except as permitted under §§ 431.213 and 431.214 of this subpart.

§ 431.213 Exceptions from advance notice.

The agency may mail a notice not later than the date of action if—

(a) The agency has factual information confirming the death of a recipient;

(b) The agency receives a clear written statement signed by a recipient that—

(1) He no longer wishes services; or

(2) Gives information that requires termination or reduction of services and indicates that he understands that this must be the result of supplying that information;

(c) The recipient has been admitted to an institution where he is ineligible under the plan for further services;

(d) The recipient's whereabouts are unknown and the post office returns agency mail directed to him indicating no forwarding address (See § 431.231 (d) of this subpart for procedure if the recipient's whereabouts become known);

(e) The agency establishes the fact that the recipient has been accepted for Medicaid services by another local jurisdiction, State, territory, or commonwealth;

(f) A change in the level of medical care is prescribed by the recipient's physician;

(g) The notice involves an adverse determination

(Text continued on page 2B-17)

made with regard to the preadmission screening requirements of section 1919(e)(7) of the Act; or

(h) The date of action will occur in less than 10 days, in accordance with § 483.12(a)(5)(ii), which provides exceptions to the 30 days notice requirements of § 483.12(a)(5)(i).

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56505, Nov. 30, 1992; 58 FR 25784, Apr. 28, 1993]

§ 431.214 Notice in cases of probable fraud.

The agency may shorten the period of advance notice to 5 days before the date of action if—

(a) The agency has facts indicating that action should be taken because of probable fraud by the recipient; and

(b) The facts have been verified, if possible, through secondary sources.

Right to Hearing

§ 431.220 When a hearing is required.

(a) The agency must grant an opportunity for a hearing to:

(1) Any applicant who requests it because his claim for services is denied or is not acted upon with reasonable promptness; and

(2) Any recipient who requests it because he or she believes the agency has taken an action erroneously.

(3) Any resident who requests it because he or she believes a skilled nursing facility or nursing facility has erroneously determined that he or she must be transferred or discharged; and

(4) Any individual who requests it because he or she believes the State has made an erroneous determination with regard to the preadmission and annual resident review requirements of section 1919(e)(7) of the Act.

(b) The agency need not grant a hearing if the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all recipients.

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56505, Nov. 30, 1992]

§ 431.221 Request for hearing.

(a) The agency may require that a request for a hearing be in writing.

(b) The agency may not limit or interfere with the applicant's or recipient's freedom to make a request for a hearing.

(c) The agency may assist the applicant or recipient in submitting and processing his request.

(d) The agency must allow the applicant or recipient a reasonable time, not to exceed 90 days from the date that notice of action is mailed, to request a hearing.

§ 431.222 Group hearings.

The agency—

(a) May respond to a series of individual requests for hearing by conducting a single group hearing;

(b) May consolidate hearings only in cases in which the sole issue involved is one of Federal or State law or policy;

(c) Must follow the policies of this subpart and its own policies governing hearings in all group hearings; and

(d) Must permit each person to present his own case or be represented by his authorized representative.

§ 431.223 Denial or dismissal of request for a hearing.

The agency may deny or dismiss a request for a hearing if—

(a) The applicant or recipient withdraws the request in writing; or

(b) The applicant or recipient fails to appear at a scheduled hearing without [illegible]cause

Procedures

§ 431.230 Maintaining services.

(a) If the agency mails the 10-day or 5-day notice as required under § 431.211 or § 431.214 of this subpart, and the recipient requests a hearing before the date of action, the agency may not terminate or reduce services until a decision is rendered after the hearing unless—

(1) It is determined at the hearing that the sole issue is one of Federal or State law or policy; and

(2) The agency promptly informs the recipient in writing that services are to be terminated or reduced pending the hearing decision.

(b) If the agency's action is sustained by the hearing decision, the agency may institute recovery procedures against the applicant or recipient to recoup the cost of any services furnished the recipient, to the extent they were furnished solely by reason of this section.

[44 FR 17932, Mar. 29, 1979, as amended at 45 FR 24883, Apr. 11, 1980]

§ 431.231 Reinstatement of services.

(a) The agency may reinstate services if a recipient requests a hearing not more than 10 days after the date of action.

(b) The reinstated services must continue until a hearing decision unless, at the hearing, it is determined that the sole issue is one of Federal or State law or policy.

(c) The agency must reinstate and continue services until a decision is rendered after a hearing if—

(1) Action is taken without the advance notice required under § 431.211 or § 431.214 of this subpart;

(2) The recipient requests a hearing within 10 days of the mailing of the notice of action; and

(3) The agency determines that the action resulted from other than the application of Federal or State law or policy.

(d) If a recipient's whereabouts are unknown, as indicated by the return of unforwardable agency mail directed to him, any discontinued services must be reinstated if his whereabouts become known during the time he is eligible for services.

§ 431.232 Adverse decision of local evidentiary hearing.

If the decision of a local evidentiary hearing is adverse to the applicant or recipient, the agency must—

(a) Inform the applicant or recipient of the decision;

(b) Inform the applicant or recipient that he has the right to appeal the decision to the State agency, in writing, within 15 days of the mailing of the notice of the adverse decision;

(c) Inform the applicant or recipient of his right to request that his appeal be a *de novo* hearing; and

(d) Discontinue services after the adverse decision.

§ 431.233 State agency hearing after adverse decision of local evidentiary hearing.

(a) Unless the applicant or recipient specifically requests a *de novo* hearing, the State agency hearing may consist of a review by the agency hearing officer of the record of the local evidentiary hearing to determine whether the decision of the local hearing officer was supported by substantial evidence in the record.

(b) A person who participates in the local decision being appealed may not participate in the State agency hearing decision.

§ 431.240 Conducting the hearing.

(a) All hearings must be conducted—

(1) At a reasonable time, date, and place;

(2) Only after adequate written notice of the hearing; and

(3) By one or more impartial officials or other individuals who have not been directly involved in the initial determination of the action in question.

(b) If the hearing involves medical issues such as those concerning a diagnosis, an examining physician's report, or a medical review team's decision, and if the hearing officer considers it necessary to have a medical assessment other than that of the individual involved in making the original decision, such a medical assessment must be obtained at agency expense and made part of the record.

§ 431.241 Matters to be considered at the hearing.

The hearing must cover—

(a) Agency action or failure to act with reasonable promptness on a claim for services, including both initial and subsequent decisions regarding eligibility;

(b) Agency decisions regarding changes in the type or amount of services;

(c) A decision by a skilled nursing facility or nursing facility to transfer or discharge a resident; and

(d) A State determination with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

[57 FR 56505, Nov. 30, 1992]

§ 431.242 Procedural rights of the applicant or recipient.

The applicant or recipient, or his representative, must be given an opportunity to—

(a) Examine at a reasonable time before the date of the hearing and during the hearing:

(1) The content of the applicant's or recipient's case file; and

(2) All documents and records to be used by the State or local agency or the skilled nursing facility or nursing facility at the hearing;

(b) Bring witnesses;

(c) Establish all pertinent facts and circumstances;

(d) Present an argument without undue interference; and

(e) Question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses.

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56506, Nov. 30, 1992]

§ 431.243 Parties in cases involving an eligibility determination.

If the hearing involves an issue of eligibility and the Medicaid agency is not responsible for eligibility determinations, the agency that is responsible for determining eligibility must participate in the hearing.

§ 431.244 Hearing decisions.

(a) Hearing recommendations or decisions must be based exclusively on evidence introduced at the hearing.

(b) The record must consist only of—

(1) The transcript or recording of testimony and exhibits, or an official report containing the substance of what happened at the hearing;

(2) All papers and requests filed in the proceeding; and

(3) The recommendation or decision of the hearing officer.

(c) The applicant or recipient must have access to the record at a convenient place and time.

(d) In any evidentiary hearing, the decision must be a written one that—

(1) Summarizes the facts; and

(2) Identifies the regulations supporting the decision.

(e) In a *de novo* hearing, the decision must—

(1) Specify the reasons for the decision; and

(2) Identify the supporting evidence and regulations.

(f) The agency must take final administrative action within 90 days from the date of the request for a hearing.

(g) The public must have access to all agency hearing decisions, subject to the requirements of Subpart F of this part for safeguarding of information.

§ 431.245 Notifying the applicant or recipient of a State agency decision.

The agency must notify the applicant or recipient in writing of—

(a) The decision; and

(b) His right to request a State agency hearing or seek judicial review, to the extent that either is available to him.

§ 431.246 Corrective action.

The agency must promptly make corrective payments, retroactive to the date an incorrect action was taken, and, if appropriate, provide for admission or readmission of an individual to a facility if—

(a) The hearing decision is favorable to the applicant or recipient; or

(b) The agency decides in the applicant's or recipient's favor before the hearing.

[57 FR 56506, Nov. 30, 1992]

Federal Financial Participation

§ 431.250 Federal financial participation.

FFP is available in expenditures for—

(a) Payments for services continued pending a hearing decision;

(b) Payments made—

(1) To carry out hearing decisions; and

(2) For services provided within the scope of the Federal Medicaid program and made under a court order.

(c) Payments made to take corrective action prior to a hearing;

(d) Payments made to extend the benefit of a hearing decision or court order to individuals in the same situation as those directly affected by the decision or order;

(e) Retroactive payments under paragraphs (b), (c), and (d) of this section in accordance with applicable Federal policies on corrective payments; and

(f) *Administrative costs incurred by the agency for— (1)* Transportation for the applicant or recipient, his representative, and witnesses to and from the hearing;

(2) Meeting other expenses of the applicant or recipient in connection with the hearing;

(3) Carrying out the hearing procedures, including expenses of obtaining the additional medical assessment specified in § 431.240 of this subpart; and

(4) Hearing procedures for Medicaid and non-Medicaid individuals appealing transfers, discharges

State Medicaid Plan - North Dakota
Federal Medicaid regulations

Hearing procedures for Nursing Facilities

Revision: HCFA-PM-93-1 (NPD)
January 1993

State/Territory: North Dakota

Citation	4.28 Appeals Process
42 CFR 431.152; AT-79-18 52 FR 22444; Secs. 1902(a)(28)(D)(i) and 1919(e)(7) of the Act; P.L. 100-203 (Sec. 4211(c)).	(a) The Medicaid agency has established appeals procedures for NFs as specified in 42 CFR 431.153 and 431.154. (b) The State provides an appeals system that meets the requirements of 42 CFR 431 Subpart E, 42 CFR 483.12, and 42 CFR 483 Subpart E for residents who wish to appeal a notice of intent to transfer or discharge from a NF and for individuals adversely affected by the preadmission and annual resident review requirements of 42 CFR 483 Subpart C.

a State's finding of noncompliance that has resulted in the denial, termination, or nonrenewal of its provider agreement.

(3) To an NF or ICF/MR that is dissatisfied with a determination as to the effective date of its provider agreement.

(b) *Special rules.* This subpart also sets forth the special rules that apply in particular circumstances, the limitations on the grounds for appeal, and the scope of review during a hearing.

[Amended in 59 FR 56232, Nov. 10, 1994; 61 FR 32348, June 24, 1996; 62 FR 43931, Aug. 18, 1997]

§ 431.152 State plan requirements.

The State plan must provide for appeals procedures that, as a minimum, satisfy the requirements of §§ 431.153 and 431.154.

[Amended at 59 FR 56232, Nov. 10, 1994; 61 FR 32348, June 24, 1996]

§ 431.153 Evidentiary hearing.

(a) *Right to hearing.* Except as provided in paragraph (b) of this section, and subject to the provisions of paragraphs (c) through (j) of this section, the State must give the facility a full evidentiary hearing for any of the actions specified in § 431.151.

(b) *Limit on grounds for appeal.* The following are not subject to appeal:

(1) The choice of sanction or remedy.

(2) The State monitoring remedy.

(3) [Reserved]

(4) The level of noncompliance found by a State except when a favorable final administrative review decision would affect the range of civil money penalty amounts the State could collect.

(5) A State survey agency's decision as to when to conduct an initial survey of a prospective provider.

(c) *Notice of deficiencies and impending remedies.* The State must give the facility a written notice that includes:

(1) The basis for the decision; and

(2) A statement of the deficiencies on which the decision was based.

(d) *Request for hearing.* The facility or its legal representative or other authorized official must file written request for hearing within 60 days of receipt of the notice of adverse action.

(e) *Special rules: Denial, termination or nonrenewal of provider agreement. (1) Appeal by an ICF/MR.* If an ICF/MR requests a hearing on denial, termination, or nonrenewal of its provider agreement—

(i) The evidentiary hearing must be completed either before, or within 120 days after, the effective date of the adverse action, and

(ii) If the hearing is made available only after the effective date of the action, the State must, before that date, offer the ICF/MR an informal reconsideration that meets the requirements of § 431.154.

(2) *Appeal by an NF.* If an NF requests a hearing on the denial or termination of its provider agreement, the request does not delay the adverse action and the hearing need not be completed before the effective date of the action.

(f) *Special rules: Imposition of remedies.* If a State imposes a civil money penalty or other remedies on an NF, the following rules apply:

(1) *Basic rule.* Except as provided in paragraph (f)(2) of this section (and notwithstanding any provision of State law), the State must impose all remedies timely on the NF, even if the NF requests a hearing.

(2) *Exception.* The State may not collect a civil money penalty until after the 60-day period for request of hearing has elapsed or, if the NF requests a hearing, until issuance of a final administrative decision that supports imposition of the penalty.

(g) *Special rules: Dually participating facilities.* If an NF is also participating or seeking to participate in Medicare as an SNF, and the basis for the State's denial or termination of participation in Medicaid is also a basis for denial or termination of participation in Medicare, the State must advise the facility that—

(1) The appeals procedures specified for Medicare facilities in part 498 of this chapter apply, and

(2) A final decision entered under the Medicare appeals procedures is binding for both programs.

(h) *Special rules: Adverse action by HCFA.* If HCFA finds that an NF is not in substantial compliance and either terminates the NF's Medicaid provider agreement or imposes alternative remedies on the NF (because HCFA's findings and proposed remedies prevail over those of the State in accordance with § 488.452 of this chapter), the NF is entitled only to the appeals procedures set forth in part 498 of this chapter, instead of the procedures specified in this subpart.

(i) *Required elements of hearing.* The hearing must include at least the following:

(1) Opportunity for the facility—

(i) To appear before an impartial decision-

maker to refute the finding of noncompliance on which the adverse action was based;

(ii) To be represented by counsel or other representative; and

(iii) To be heard directly or through its representative, to call witnesses, and to present documentary evidence.

(2) A written decision by the impartial decision-maker, setting forth the reasons for the decision and the evidence on which the decision is based.

(j) *Limits on scope of review.* Civil money penalty cases. In civil money penalty cases—

(1) The State's finding as to a NF's level of noncompliance must be upheld unless it is clearly erroneous; and

(2) The scope of review is as set forth in § 488.438(e) of this chapter.

[Amended at 59 FR 56232, Nov. 10, 1994, 61 FR 32348, June 24, 1996, 62 FR 43931, Aug. 18, 1997, 64 FR 39934, July 23, 1999]

§ 431.154 Informal reconsideration for ICFs/MR.

(a) If the State decides to provide the opportunity for an evidentiary hearing required by § 431.153(a) only after the effective date of a denial, or nonrenewal of participation, the State must offer the facility an informal reconsideration, to be completed before the effective date.

(b) Written notice to the facility of the denial, termination or nonrenewal and the findings upon which it was based;

(c) A reasonable opportunity for the facility to refute those findings in writing, and

(d) A written affirmation or reversal of the denial, termination, or nonrenewal

[Amended at 59 FR 56233, Nov. 10, 1994, 61 FR 32348, June 24, 1996]

Subpart E—Fair Hearings for Applicants and Recipients

SOURCE: 44 FR 17932, Mar. 29, 1979, unless otherwise noted.

General Provisions

§ 431.200 Basis and purpose.

This subpart implements section 1902(a)(3) of the Act, which requires that a State plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly. This subpart also prescribes procedures for an opportunity for hearing if the Medicaid agency takes action to suspend, terminate, or reduce services. This subpart also implements sections 1819(f)(3), 1919(f)(3), and 1919(e)(7)(F) of the Act by providing an appeals process for individuals proposed to be transferred or discharged from skilled nursing facilities and nursing facilities and those adversely affected by the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

[57 FR 56505, Nov. 30, 1992]

§ 431.201 Definitions.

For purposes of this subpart:

Action means a termination, suspension, or reduction of Medicaid eligibility or covered services. It also means determinations by skilled nursing facilities and nursing facilities to transfer or discharge residents and adverse determinations made by a State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

Adverse determination means a determination made in accordance with sections 1919(b)(3)(F) or 1919(e)(7)(B) of the Act that the individual does not require the level of services provided by a nursing facility or that the individual does or does not require specialized services.

Date of action means the intended date on which a termination, suspension, reduction, transfer or discharge becomes effective. It also means the date of the determination made by a State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

De novo hearing means a hearing that starts over from the beginning.

Evidentiary hearing means a hearing conducted so that evidence may be presented.

Notice means a written statement that meets the requirements of § 431.210.

Request for a hearing means a clear expression by the applicant or recipient, or his authorized representative, that he wants the opportunity to present his case to a reviewing authority.

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56505, Nov. 30, 1992]

§ 431.202 State plan requirements.

A State plan must provide that the requirements of §§ 431.205 through 431.246 of this subpart are met.

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
REGARDING HOUSE BILL No. 1455
February 5, 2001

Chairman DeKrey and members of the House Judiciary Committee, my name is Melissa Hauer. I am the Director of the Legal Advisory Unit for the Department of Human Services. I appear before you today to testify regarding House Bill 1455. The Department is opposed to this bill and urges the Committee to give it a do not pass recommendation.

Current law, found at NDCC 54-57-03, specifies which agencies must use an administrative law judge provided by the office of administrative hearings to preside over their appeals. NDCC 28-32-13 provides that if the agency head, or another person authorized by the agency head or by law to issue a final order is not presiding over the appeal, the person presiding (the administrative law judge) shall issue recommended findings of fact, conclusions of law and a recommended order. The Department is concerned that that there may be some who mistakenly assume that the right or duty to preside over an administrative appeal is the same as the right or duty to render a final decision in such an appeal.

Of concern to the Department is section three of the bill. Subsection three on page five of the bill states that all agencies required to have their administrative proceedings conducted by the office of administrative hearings must also accept the administrative law judge's determination in that appeal as final. The current statute exempts several agencies from the requirement of using the office of administrative hearings to provide an administrative law judge to preside over administrative appeals. The Department is not listed as one of the exempt agencies. When this statute was originally passed, the Department did not oppose the requirement of

having an administrative law judge preside over its hearings and issue findings and orders so long as their findings and orders were recommended and not final (as currently required by NDCC 28-32-13). That is so because the federal laws and regulations governing several of our programs require that the agency make the final determination in an administrative appeal. If we do not fulfill this requirement, we will be in violation of federal statute and will risk losing millions of dollars of federal money.

This bill, if passed, would create problems with the following programs administered by the Department:

1. The federal law governing the Medicaid program states that the "State plan for medical assistance must provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." (42 U.S.C. section 1396a(a)(3)). This means that the responsibility to make a final determination cannot be delegated outside the agency.

2. The Food Stamp program requires that the hearing authority is the person designated by the state agency to render a final administrative decision. (7 C.F.R. 273.15(n)).

3. The Vocational Rehabilitation Act of 1998 allows states the option of review of an administrative law judge's decision by the head of the agency. North Dakota chose that option and it is contained in section 4.16(b)(2) of our state Vocational Rehabilitation plan. The requirements of this bill would mean that the state would have to seek federal approval to amend its Vocational Rehabilitation plan and would risk losing federal funds until that process were completed.

If the bill goes forward and the office of administrative hearings is to be the final authority in administrative appeals, the Department would request consideration of an amendment to page four, line sixteen to include the Department in the list of agencies that are exempt from the requirement of having their appeals conducted by the office of administrative hearings. That in turn would mean that the amendments contained on page five starting at line 4 which would require the administrative law judge's decision to be final would not apply to the Department. Otherwise, the State will be in violation of federal law and will risk losing a great deal of federal money in its Medicaid, Food Stamp and Vocational Rehabilitation programs.

For these reasons, the Department urges a do not pass recommendation on House Bill 1455. I would be happy to try to answer any questions the Committee members may have. Thank you.

Presented by:

Melissa Hauer, Director
Legal Advisory Unit
ND Dept. of Human Services

TESTIMONY
BY
CALVIN N. ROLFSON
SPECIAL ASSISTANT ATTORNEY GENERAL
NORTH DAKOTA BOARD OF NURSING
REGARDING
ENGROSSED HOUSE BILL 1455

My name is Cal Rolfson. I am the Special Assistant Attorney General for the North Dakota Board of Nursing. I appear on behalf of the Board to express its serious concern regarding Engrossed House Bill 1455.

There are two provisions in this Engrossed Bill that would be adverse to the interests of the Board's statutory responsibility. Each will be discussed separately below.

DE NOVO REVIEW

"De novo" means to hear or review "anew." As I interpret this provision (as found on page 4, lines 12 and 13, and on page 5, lines 2 and 3 of the Engrossed Bill) a party aggrieved by the decision of the administrative law judge may seek a new review, which may include an entirely new full-fledged evidentiary hearing, before the district court. Aside from adding to the significant cost burden of the district court in doing so, there is absolutely no reason to require a second hearing or "review" once a full administrative "on the record" hearing has been conducted before the administrative law judge.

Having a de novo review possibility will create significant additional cost to the Board of Nursing, which will, of course, necessarily need to be passed on to the 12,000+ nurse licensees in the state of North Dakota in the form of increased license

fees. The Board of Nursing conducts dozens of nursing investigations each year and holds numerous formal administrative hearings before an administrative law judge each year. Those hearings are expensive, albeit necessary to protect the health and safety of the public which is the legislative policy directed to the Board and specifically set out by statute in NDCC 43-12.1-01.

There is no demonstrated necessity for this Bill. It will adversely affect in the same fashion a host of other administrative agencies that do not desire this legislation.

If you add the dozens of administrative agencies whose administrative hearings will be subject to a de novo review under this proposed legislation, it may be safe to assume that the additional cost to administrative agencies and thus passed on to the licensees, will be significant state-wide. Why should the few respondents or one administrative agency, through this proposed legislation, cause potential financial hardship to the vast majority of licensees who are not brought to administrative hearing?

FINALITY OF ADMINISTRATIVE LAW JUDGE'S ORDER

The second provision of this proposed legislation to which the North Dakota Board of Nursing has serious concern is generally found on page 6, lines 3-18 of the Engrossed Bill.

The particular provision of concern (found on page 6, lines 3-7) is contrary to decades of responsible due process presently utilized by the Board and apparently the vast majority of all other administrative agencies governed by this proposed

legislation. Currently the Board designates an administrative law judge to conduct hearings and to issue recommended findings of fact, conclusions of law and a recommended order. The Board is free to modify such recommendations, but seldom does. I am aware of only one case in which the Board had modified the findings and order of the administrative law judge following a hearing.

It is important to note that it is the Board of Nursing, and not an administrative law judge, to which the legislative public policy of North Dakota is directed to protect the health and safety of the public by regulating the practice of nursing. (Again, see NDCC 43-12.1-01, a copy of which is attached for your easy reference.) To require an administrative law judge to supplant the authority of the Board in regulating the practice of nursing may amount to an ambiguous conflict with NDCC 43-12.1-01. That section of the law is the very reason why the legislature has seen fit to require a broad-based board to regulate nursing practice and discipline nurses, not an administrative law judge with whose decisions the Board may or may not agree. To supplant that authority of a gubernatorily appointed board with that of a single administrative law judge appears to be imprudent public policy.

If this portion of Engrossed House Bill 1455 passes, the Board will be left with the option to hold all administrative hearings in front of the full nine-member Board with an administrative law judge service merely as the procedural hearing officer. Not only will that increase the cost to the Board through extended bi-monthly Board hearings to accommodate administrative law cases, but will duplicate costs of administrative law hearing by having both the Board and an ALJ present.

CONCLUSIONS

The remaining portions of Engrossed House Bill 1544 are not of concern to the Board. However, for the reasons set out above, I urge the Committee to give a DO-NOT-PASS recommendation to Engrossed Bill 1455 or to amend out the objectionable provisions set out above.

On behalf of the Board, I express my sincere appreciation for being able to present these views for the benefit of the committee.

Calvin N. Rolfson
Special Assistant Attorney General
North Dakota Board of Nursing

43-12.1-01. Statement of policy. The legislative assembly finds that the practice of nursing is directly related to the public welfare of the citizens of the state of North Dakota and is subject to regulation and control in the public interest to assure that qualified, competent practitioners and high quality standards are available. The legislative assembly recognizes that the practice of nursing is continually evolving and responding to changes within health care patterns and systems and recognizes the existence of overlapping functions within the practice of nursing and other providers of health care.

Source: S.L. 1977, ch. 400, § 1; 1991, ch. 453, § 1; 1995, ch. 403, § 2.

Effective Date.
The 1995 amendment of this section by section 2 of chapter 403, S.L. 1995 became effective July 1, 1995, pursuant to N.D. Const., Art. IV, § 13.

Note.
Section 18 of chapter 403, S.L. 1995, provides: "**Transition.** Rights and duties that have matured, penalties that were incurred, and proceedings that were commenced before August 1, 1995 remain valid under the law in effect at the time of the occurrence. Any person holding a license or registration to practice nursing that is valid on August 1, 1995 is deemed to be licensed or registered under the provisions of this Act and is eligible for renewal of the license or registration under the conditions and standards prescribed in this Act. Any person holding a lapsed license or registration on August 1, 1995 may become licensed or registered by applying for reinstatement according to the standards prescribed in this Act."

43-12.1-02. Definitions. In this chapter, unless the context or subject matter otherwise requires:

1. "Advanced practice registered nurse" means a person who holds a current license to practice in this state as an advanced practice registered nurse and either has a graduate degree with a nursing focus or has completed the educational requirements in effect when the person was initially licensed.
2. "Board" means the North Dakota board of nursing.
3. "Licensed practical nurse" means a person who holds a current license to practice in this state as a licensed practical nurse and either has an associate degree with a major in nursing or has completed the educational requirements in effect when the person was initially licensed.
4. "Nurse" means any person currently licensed as an advanced practice registered nurse, registered nurse, or licensed practical nurse.
5. "Nurse assistant" means a person who is authorized by the board to perform nursing tasks delegated and supervised by a licensed nurse.
6. "Nursing" means the performance of acts utilizing specialized knowledge, skills, and abilities for people in a variety of settings. Nursing includes the following acts, which may not be deemed to include acts of medical diagnosis or treatment or the practice of medicine as defined in chapter 43-17:
   a. The maintenance of health and prevention of illness.
   b. Diagnosing human responses to actual or potential health problems.
   c. Providing supportive and restorative care and nursing treatment, medication administration, health counseling and teaching, case finding and referra
   ing changes in the
   d. Administration, te
   of health and nurs
   e. Collaboration with
   mentation of the t
   health care regim
   licensed under titl
7. "Prescriptive practice
   nizing agents, or devi
   licensed pharmacist.
8. "Registered nurse" m
   practice in this stat
   baccalaureate degree
   educational requirem
   licensed.

Source: S.L. 1977, ch. 400, § 1, 516, § 1; 1989, ch. 519, § 1; 1991, § 2; 1991, ch. 454, § 1; 1995, ch. 40

Effective Date.
The 1995 amendment of this se

43-12.1-03. License re
who provides nursing care to
license or registration issued
practice nursing, offer to prac
or use any title, abbreviation
practicing nursing or assistin
that person is currently lic
currently licensed advanced
proved by the board; a curr
abbreviation "R.N."; a curre
abbreviation "L.P.N."; and a p
use the title identified by th
"nurse" or be referred to as a

Source: S.L. 1977, ch. 400, § 1, 403, § 4.

Effective Date.
The 1995 amendment of this se

43-12.1-04. (Effective from provisions of chapter

1. Persons who perform
   ter.
2. Students practicing nu
   education program.
3. Legally licensed nurses
   United States govern
   agencies.
4. A nurse licensed by a
   requires the nurse to n
   health care.

HB 1455 as it conflicts with implementation of the Medicaid Program.

The bill, as introduced, requires that the Office of Administrative Hearing ALJ assigned to hear an appeal would also be authorized to issue the final decision in most administrative cases, including DHS' appeals.

Under the federal regulations implementing the Medicaid Program, which the State of North Dakota is required to follow, the Department must make the final decision in cases appealing eligibility determinations. The regulations specifically provide:

> If other State or local agencies or offices perform services for the Medicaid agency, they must not have the authority to change or disapprove any administrative decision of that agency, **or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency.**

42 C.F.R. § 431.10(e)(3). Other federal Medicaid regulations requiring state agency hearings for adverse agency actions also anticipate the state agency will make the final decisions.

To the extent the Long Term Care Association has expressed an interest in this bill, it is a mistake. Appeals from the Department's rate setting for nursing facilities do not fall under N.D.C.C. § 28-32. The federal Medicaid regulations do not give nursing homes a right of appeal for rate setting decisions of a State agency. The North Dakota legislature did give them such a right at N.D.C.C. § 50-24.4-18, which specifically states that the Department makes the final decision. A change to chapter 28-32 will not affect LTC appeals.

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Tracie

Here is the
memo from Doug
Baker + Jean Mullen
regarding Medicaid + 1455

TESTIMONY ON HOUSE BILL 1455
SENATE JUDICIARY COMMITTEE
MARCH 14, 2001

Skilled nursing facilities in North Dakota are regulated largely by the North Dakota Department of Human Services. Any facility with residents receiving medicaid (medical assistance) benefits are subject to the rate setting process promulgated by the Department of Human Services. The Department interprets these rules, and establishes reimbursement rates for all nursing facilities. The rates established by the Department apply to all residents, regardless of the resident's medicaid status. The reimbursement rates effectively set the operating budget for each facility.

A facility may formally disagree with the rates established by the Department, by asking the Department to reconsider its rate determination. In nearly all cases, the Department has denied these requests.

A facility may appeal the Department's denial of reconsideration by submitting a notice of appeal to the Department. The Department requests the designation of an administrative law judge from the Office of Administrative Hearings.

The administrative law judge conducts a hearing. This is the first opportunity a nursing facility has to present "its side of the story" to an unbiased third party. At the hearing, the Department and the facility present evidence related to the manner in which the facility's rates were established. Typically, administrative law judges do not understand the ratesetting regulations, and have admitted, during a hearing, that the Department's interpretation is heavily relied upon. The administrative law judge considers the evidence and issues recommended findings of fact, recommended conclusions of law and a recommended order. These recommendations are then given back to the Department. The Department is permitted to amend or reject anything the judge has recommended. The final order after the hearing is issued by the Department, not the administrative law judge. An administrative law judge's recommendations which favor the facility can be overturned by the Department.

The facility is permitted to appeal to the district court and finally to the North Dakota Supreme Court. These courts defer to the Department's "expertise" in ratesetting matters, and give the Department's interpretation "appreciable deference". North Dakota Supreme Court cases are published and available

for review. In the last twenty years, a nursing facility has not succeeded in a ratesetting challenge against the Department.

Under the present law, North Dakota nursing facilities must challenge the Department's established rate through a process which weighs heavily against its success. Any challenge by a facility requires time, energy and frequently, the cost for an attorney to represent the facility. Nursing facilities have largely decided such efforts are futile. Valid and legitimate disputes over rates have gone unchallenged and unheard because the system is fundamentally unfair.

The North Dakota Long Term Care Association supports HB 1455. The changes proposed by HB 1455 protect both parties in an administrative hearing. HB 1455 would require an independent administrative law judge from the Office of Administrative Hearings to preside over an administrative appeal and to issue a final order. HB 1455, if passed, would remove the agency's unilateral authority to arbitrarily change or reject the decision made by the administrative law judge. HB 1455 does not limit or impair the agency's authority in any other sense. This bill allows both parties to an administrative appeal to present evidence in a forum which is fundamentally fair and unbiased.

Thank you for your thoughtful consideration of HB 1455. Your support of this bill is appreciated. I would be happy to answer any questions you might have at this time.

Leslie Bakken Oliver
N.D. Lobbyist # 386

North Dakota Long Term Care Association
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MEMORANDUM

TO: Fifty-seventh Legislative Assembly
State of North Dakota
Senate Judiciary Committee

FROM: Allen C. Hoberg, Director
Office of Administrative Hearings

RE: House Bill No. 1455

DATE: March 14, 2001

The Office of Administrative Hearings did not seek to have this bill introduced. However, the matter of final decision-making authority by ALJs has been a subject of conversation and study on a national level lately, and it has recently been a subject of conversation and study with OAH's statutory advisory body, the State Advisory Council for Administrative Hearings, though the SAC has taken no position on it. I believe that this bill as introduced is a conceptually sound bill. But, you are probably going to hear some good arguments for and against this bill. However, this bill as amended is cause for concern.

The Office of Administrative Hearings appears today in support of the original bill for three reasons. (1) this bill goes one step further down the road toward fairness in all administrative hearings; (2) it should not cost state agencies,

including the office of administrative hearings, any additional monies to implement, and it may result in time and monetary savings for OAH and the agencies it serves; and (3) it avoids the need for the agency head to consult with attorneys and others about a decision, after a recommended decision is issued but prior to the issuance of a final decision.

OAH currently does issue final decisions for many state agencies, both for agencies within its mandatory jurisdiction and for agencies that voluntarily use its hearing officer services. OAH already issues final decisions for all Veterans Preference hearings, for all state employee grievance or job discipline hearings, for all DPI due process special education hearings, for all Bank of North Dakota Student Loan hearings, and for many other agency hearings when the agency head chooses to have OAH issue a final decision. All other decisions issued by OAH administrative law judges are recommended decisions for which the agency head issues the final decision. The agency head may accept, reject, or modify the ALJ's recommended decision. Under N.D.C.C. ch. 28-32, the only other option currently available to agencies that use OAH, besides the recommended decision/final decision format, is for the agency to request that the OAH ALJ serve only as procedural hearing officer. If this option is used, the agency head

must actually be present at the hearing. The hearing officer conducts the hearing but the agency head issues the final (the only) decision.

This bill as introduced requires all state agencies under the mandatory jurisdiction of OAH to request that OAH conduct the hearing and issue a final decision. However, it retains the option for boards and commissions to use a procedural hearing officer. Boards and commissions may not request a recommended decision from an OAH ALJ. No one under OAH's jurisdiction may any longer request that the designated OAH ALJ issue a recommended decision. However, every agency under OAH jurisdiction would have the right to appeal the final order issued by the ALJ to the courts.

This bill is in line with a recent trend developing nationwide to have independent hearing officers conduct the hearing and issue a final, rather than a recommended, decision. In South Carolina OAH ALJs now issue final decisions for all cases under OAH jurisdiction. Agencies may appeal the decision to the court system if they do not agree with it. The only exception in South Carolina is that in decisions for boards and commissions a party may appeal to the board or commission before appealing to the courts, but it is an appeal of a final decision to the board or commission, not a review of a recommended decision. South

Carolina's OAH has very broad jurisdiction over state agency administrative hearings.

In Maryland about 85% of the OAH ALJ's decisions for agencies are final decisions. [The Maryland OAH issues final decisions for Budget & Management, State Personnel, Department of Education, Gaming hearings, Health and Mental Hygiene Department hearings, Public Information Act hearings, Natural Resources Department hearings, Motor Vehicle Administration hearings (drivers license, suspension, etc.), Insurance Administration hearings, Correctional Department hearings (*e.g.*, inmate grievance), Human Resources Department (human services) hearings, and Housing & Community Development Department hearings.] Maryland's OAH has very broad jurisdiction over state administrative hearings.

In Oregon about 80% of the OAH ALJ decisions are final decisions. [The principal subject matters for the Oregon OAH issuing final decisions are unemployment insurance cases, implied consent (drunken driving cases), and social services (human services) cases.] Oregon's OAH has very broad jurisdiction over state agency administrative hearings.

In Minnesota OAH ALJs issue final decisions only for a portion of its agency caseload. [The Minnesota OAH issues final decisions for all Workers Compensation Bureau hearings, human rights claims, local government boundary/incorporation disputes, and for sex offender community notification classification appeals.] Minnesota is also a state with fairly broad jurisdiction over state agency administrative hearings. But, for most cases, OAH ALJs still issues recommended decisions.

In Washington OAH ALJs issue final decisions only for a small portion of the agencies' caseload. [The Washington OAH issues final decisions for Department of Labor & Industries (contractor registration hearings), Department of Social & Health Services (juvenile parole revocation hearings), Human Rights Commission (employment discrimination hearings), Superintendent of Public Instruction (special education, teacher certification, student transfer, bus driver, and food program hearings), and Washington State Patrol (drug forfeiture hearings).] Washington's OAH also has fairly broad jurisdiction over state agency administrative hearings. But, for most cases, Washington's OAH ALJs still issues recommended decisions.

California's OAH is the nation's oldest, but its jurisdiction is extremely small. Most state agencies are outside of its jurisdiction. For agencies in its jurisdiction, the California OAH issues only about 10% final decisions. [The biggest client agency for which it issues only final decisions is the Department of Developmental Disabilities.]

Massachusetts' Division of Administrative Law is also a central panel with limited jurisdiction. Within its jurisdiction it issues final decisions for some agencies. [The Massachusetts DAL issues final decisions for nursing home and medical service provider rate hearings, hearings on payments to special needs schools, hearings on construction contract disputes, hearings on transfers of the mentally retarded, hearings on veteran's benefits, and hearings on disputes about the prevailing wage.] However, by law, even when DAL ALJs issue a recommended decision, the agency must give "deference" to the findings of fact in the decision of the ALJ when reviewing it for a final decision, and must give "substantial deference" to findings of fact of the ALJ when they are based upon credibility determinations.

The South Dakota OAH is also a central panel with limited jurisdiction. It has final decision-making authority only for property tax appeal hearings. In all other hearings under its jurisdiction it issues recommended decisions.

In North Carolina, all the decisions of OAH ALJs are recommended decisions, but there are specific, strict statutory guidelines for agency review of recommended decisions.

In the remainder of the states having central panels like North Dakota's OAH, OAH ALJs primarily issue recommended decisions and the agency head issues the final decision. As of December 1, 2000, 26 states have central panels. Some of these states, as in North Dakota, give the option to the agency head to ask for a final decision on a case-by-case basis.

Currently, when an OAH ALJ issues a recommended decision on an agency matter and the agency head is required to issue a final decision, the agency head may seek the advice of a "staff assistant," usually program staff, agency attorneys, or other agency personnel, before making a final decision. However, it is forbidden by law for the agency head to talk to the ALJ or to the parties, or to the attorney who handled the matter at hearing for the agency, unless the agency

head holds a session where all the parties can again be heard before final decision is made. *See* N.D.C.C. § 28-32-12.1 which forbids ex parte contacts. Under this bill, if OAH ALJs issued a final decision, obviously the agency head would not have to issue a final decision. If the agency were a party in the hearing, the agency would then only have to decide whether to appeal the ALJ's decision to the courts. In discussions about appeals the agency attorney who handled the hearing could consult with the agency head. There should less involvement of agency personnel if an ALJ issues a final decision because the agency head does not have to issue any more final decisions and it will only be those decisions adverse to the agency with which the agency head and others will have to concern themselves regarding the question of whether to appeal.

It will not involve any more time or effort for an OAH ALJ to issue a final decision as opposed to a recommended decision. The process is the same.

The agency will still be officially responsible for notifying the parties about the final decision and for maintaining the record and sending it to the courts if there is an appeal because it is still an agency matter, but the actual notification of the parties about the final decision can be accomplished by the ALJ when the final decision is issued.

The most important element of final decision making is the question of fairness. With the passage of this bill as introduced, all the parties, including the agency when it is a party, will be on the same level. All must abide by the decision of the ALJ and each will only have the right to challenge the decision on appeal to the courts. The agency would no longer be able to disagree with the ALJ, state its reasons for disagreeing, and then issue different findings of fact and different conclusions of law in a final decision which either modifies or rejects the ALJ's decision. The other parties in a hearing do not have this option. The argument is that the agencies should not have it either.

Of course, agencies would still retain statutory and rulemaking authority. With the final decision-making authority, fact-finding would be the complete province of the ALJ. However, final decision-making authority would still be substantially influenced by statutes and rules, as well as prior case law from the courts.

Of concern to OAH is the amendment to N.D.C.C. § 28-32-19, which allows appellants of final administrative hearing decisions to request de novo review in the district court. The requesting appellant could be an agency or some other party. If a final decision is issued by an independent ALJ, it seem unnecessary

to allow any party the right to request de novo review in the district court, on appeal. I talk more about the possible impact of this amendment in the fiscal note I wrote after these amendments were passed.

Without the amendment to 28-32-19, OAH believes that this is a conceptually sound bill. It is another step toward complete fairness in administrative hearings.

Testimony on House Bill 1455
Senate Judiciary Committee
March 14, 2001
By Christine Hogan, Executive Director
State Bar Association of North Dakota

Chair Traynor and members of the Committee, my name is Christine Hogan, and I am speaking here today on behalf of the State Bar Association of North Dakota. The Legislative Committee and the Board of Governors of the Association opposes the amendments added to this bill in the House that inserted the concept of a de novo review by the district court in an appeal from a determination of an administrative agency.

The Bar Association has serious concerns about the impact that requests for de novo review in district court would almost certainly have on the judicial system. The bill offers *de novo review* as an alternative to the usual appeal *on the record* from an administration agency decision that we have now. But, as a practical matter, it would be the *only* alternative. There would be no reason for the losing party not to request a de novo review. Thus, in reality, you would be replacing the current appeal procedure set forth in § 28-32-19 and all the case law that has been developed to interpret it. In other words, every decision of an administration agency would be subject to de novo review in district court. That is a problem. There is no good public policy to create such a problem.

This bill would cause a significant increase in the number of cases appealed to district court and a corresponding increase in the burden on the court system. Under the current system, only a percentage of cases are appealed from administrative agency decisions. Many claimants feel they cannot meet the statutory standards of review to overturn an agency decision. That is because current law accords significant deference to agency decisions. (§ 28-32-19 N.D.C.C.)

But if de novo review were always an option on appeal, the losing claimant would have no reason not to take his or her chances in a new proceeding in district court. It would probably be malpractice for the claimant's attorney *not* to request a de novo hearing.

There is no good policy reason to change the current appeal procedure. Administrative agency decisions are accorded deference under the law because the agency has expertise in the subject matter. But more importantly, as a policy matter, there is no reason to encourage more court proceedings. Multiplying the number of hearings that a litigant may request as of right would not only strain limited judicial resources, it would also increase the costs and legal fees of the litigants—both private parties and public agencies. This would ultimately result in higher costs to the public in terms of higher agency budgets and the need for more court personnel to handle increased caseloads. No good public policy reasons have been advanced to justify making this change in the appeal procedure.

For these reasons, the State Bar Association opposes the de novo review concept in House Bill 1455.

Thank you . I would be pleased to answer any questions.

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OF COUNSEL
HARRY J. PEARCE

March 14, 2001

Dennis Schulz, Secretary-Treasurer
North Dakota Real Estate Commission
314 East Thayer Avenue
Bismarck, ND 58501

Re: House Bill 1455 and amendments

Dear Dennis:

You asked me to review and comment on House Bill 1455, and the proposed amendments thereto, as this legislation would impact the North Dakota Real Estate Commission. House Bill 1455 would amend certain provisions of the Administrative Agencies Practices Act, Chapter 28-32 N.D.C.C. The provisions of this bill which would have the greatest impact on the Commission are: (1) allowing for de novo review of the Commission's Orders by the district court (Section 3); and, (2) requiring the Administrative Law Judge to issue the final order for the Commission if the ALJ conducts the hearing and prepares the findings of fact and conclusions of law and not allowing the ALJ to issue recommended findings of fact and conclusions of law to the Commission (Section 5, ¶3).

The proposed amendments to § 28-32-19 N.D.C.C. contained in Section 3 of the Bill would allow for de novo review of decisions by the Real Estate Commission in state district court. De novo review means that a complainant who is not satisfied with an order issued by the Commission could request a new hearing in district court. The matter would be re-litigated in its entirety and the district court would not be obligated to review or give any deference to the decision reached by the Commission. Under the current state of the law, as contained in § 28-32-19, when a district court reviews a decision of an administrative agency, the court only reviews the record of the agency proceedings. The court does not re-hear the case and does not substitute its judgment for the judgment of the agency on substantive matters. The court is required to affirm the decision of the administrative agency unless the order is contrary to law, violates the constitutional or due process rights of the complainant, the

findings of fact are not supported by a preponderance of the evidence, or the conclusions of law are not supported by the findings of fact.

If HB 1455 were to pass, any complainant receiving an adverse decision from the Commission could request that the matter be re-tried, in its entirety, before the district court. Such a procedure would make the administrative hearing procedures afforded by the Commission meaningless. The expertise of the real estate professionals on the Commission who initially heard and decided the complaint would be disregarded. Instead, this matter would be heard by a district court judge who has no particular expertise in real estate licensee law matters. Trying a complaint de novo in district court would significantly increase the cost of the complaint process. In addition, the final outcome of any action by the Commission would likely be delayed by several months. The amendments to Section 28-32-19 contained in Section 3 of HB 1455 seem to be counter to the underlying goals of the Administrative Agencies Practices Act of providing a speedy, relatively inexpensive resolution to a dispute, with the determination being made by persons with expertise in that particular profession.

The amendments contained in Section 5 of HB 1455 pertain to the role of the administrative hearing officer in adjudicative proceedings. If the hearing officer conducts the hearing and makes findings of fact and conclusions of law, the hearing officer, and not the agency, would be required to issue the final order. An agency could no longer use a hearing officer to issue recommended findings and conclusions, as is the case under the current law. HB 1455 would permit the Commission to continue its current usual practice of using a hearing officer for procedural matters only with the Commission preparing its own findings of fact, conclusions of law and order. However, HB 1455 would take away the option of using a hearing officer to issue recommended findings and conclusions, with the Commission making the final determination as to whether or not to adopt the hearing officer's recommendations. I can certainly envision circumstances when it might be desirable to use an ALJ to make recommended findings and conclusions for the Commission. If HB 1455 were to pass, and the Commission wanted to use a hearing officer to conduct the hearing and make findings of fact and conclusions of law, then the hearing officer, and not the Commission, would issue the final order. In such a case, the hearing before the Commission, which is required by section 43-23-11.1(3) N.D.C.C. before a licensee can be disciplined, would be meaningless. While section 43-23-11.1(1) N.D.C.C. currently provides that the Commission has the authority to investigate complaints and discipline its licensees for violations of the statutes and regulations governing real estate licensees, under HB 1455 such authority would be taken away from the Commission and given to the hearing officer in those cases in which the ALJ conducts the hearing and makes findings of fact and conclusions of law.

In summary, I believe HB 1455 potentially could have a significant adverse impact on the Commission's statutory authority to investigate consumer complaints, conduct hearings, and discipline licensees. Passage of HB 1455 would likely increase the cost of the complaint procedure, delay the final resolution of complaints, and essentially render the administrative complaint procedure meaningless. I believe the Commission should strongly oppose the passage of HB 1455.

If you have any questions or comments regarding any of the matters discussed in this letter, please let me know. Thank you.

Very truly yours,

PEARCE & DURICK, P.L.L.P.

BY David E. Reich
David E. Reich
Special Assistant Attorney General to the
North Dakota Real Estate Commission

DER/lf

Engrossed House Bill No. 1455

Fifty-seventh Legislative Assembly
Before the Senate Judiciary Committee
March 14, 2001

Testimony of Brent J. Edison
North Dakota Workers Compensation

Mr. Chairman, Members of the Committee:

My name is Brent Edison. I am the Vice President of Legal and Special Investigations for North Dakota Workers Compensation (NDWC) and I am here to testify in opposition to sections 3 and 4 of 2001 Engrossed House Bill No. 1455.

The Workers Compensation Board of Directors adopted a neutral position on the original bill but opposes the amendments engrossed as sections 3 and 4. Those sections would allow the district courts to provide *de novo* review of administrative agency decisions. The parameters of *de novo* review, and the resulting burden on the district courts, are uncertain because the bill does not define or limit the phrase "*de novo* review." NDWC is concerned that any benefits of *de novo* review would be substantially outweighed by the uncertainties and costs associated with another layer of litigation at the district court level.

North Dakota case law suggests that, at a minimum, *de novo* review would include the ability to hear testimony from new witnesses and receive exhibits that were not part of the proceedings before the agency. It may be construed more broadly, however. For example, Black's Law Dictionary defines "*hearing de novo*" as follows:

> ***"Generally, a new hearing or a hearing for the second time, contemplating an entire trial in same manner in which matter was originally heard and a review of previous hearing. On hearing "de***

novo" court hears matter as court of original and not appellate jurisdiction."

As pointed out in the fiscal note submitted by the Director of the Office of Administrative Hearings, allowing litigants a hearing *de novo* in the district courts would "have the potential for substantial fiscal impact on numerous other state agencies, local governments or agencies, and the court system." The fiscal impact would arise from the need for additional lawyer time, judge time and support staff time to handle *de novo* trials or hearings in the district courts. In addition, uncertainties over the parameters of *de novo* review, and when *de novo* review is available, would likely foster litigation and increase costs for litigants and the court system.

The increased fiscal demands of *de novo* review will not yield a corresponding benefit for litigants because courts reviewing agency decisions will still be limited to the six grounds for reversal set forth in Section 28-32-19 of the Century Code. A review of those grounds for reversal, specifically paragraphs 5 and 6, indicates that the scope of review contemplated by the law is inconsistent with *de novo* review in the district courts. In addition, the North Dakota Supreme Court has repeatedly stated that it reviews the decision of the agency, and not the decision of the district court, further indicating that *de novo* review is inconsistent with the scope of review for administrative appeals.

After resolving a substantial back log of cases from the mid-90's, NDWC is committed to making further improvements in the timeliness of its claims handling and litigation procedures. NDWC fears, however, that the addition of a layer of litigation in the form of *de novo* review in the district courts is counterproductive to that effort. Accordingly, NDWC opposes sections 3 and 4 of Engrossed House Bill No. 1455. That concludes my testimony. I will be happy to respond to any questions you may have at this time.

North Dakota State
Board of Medical Examiners

ROLF P. SLETTEN
Executive Secretary and Treasurer

LYNETTE LEWIS
Administrative Assistant

TO: MEMBERS OF THE SENATE JUDICIARY COMMITTEE

FROM: JOHN M. OLSON, SPECIAL ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE BOARD OF MEDICAL EXAMINERS

RE: HOUSE BILL NO. 1455

DATE: MARCH 14, 2001

The North Dakota Board of Medical Examiners opposes House Bill 1455 for the following reasons:

1. Section 3 of the bill (Page 4, Line 12) provides that, "A notice of appeal may include a request for de novo review by the district court....". In other words, the respondent in a disciplinary action before the Board of Medical Examiners would suddenly be given not one but two hearings on the merits of the case. The result would be completely redundant, prohibitively expensive (the cost of prosecuting a disciplinary action against a physician often runs into the tens of thousands of dollars and sometimes into the hundreds of thousands of dollars), and wholly impractical. Not even in criminal law, where the due process requirements are most stringent, does the accused have the right to have two hearings on the merits of the allegations. If this bill passes, the Board will be required to prove its case twice while the respondent need only prevail once. The respondent will be able to use the first hearing as a sort of preliminary hearing whose only function will be to force the Board to show all its cards. The "real" hearing will then come in the district

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court.

2. Section 5 (Page 6, Line 8-13) provides that, "...boards and commissions may request an administrative law judge to be designated to preside over the entire administrative proceeding or adjudicative proceeding and to issue the final order of the agency under subsection 6 of section 28-32-08.5, or they may request an administrative law judge to be designated to preside only as the procedural hearing officer under subsection 5 of section 28-32-08.5....".

This amendment totally subverts the Board's ability to use the Office of Administrative Hearings in any workable way, it radically changes the complexion of our hearings and it has a tremendous impact on what it means to accept an appointment to the Board of Medical Examiners. If this bill is passed into law, then instead of employing a hearing officer to conduct the Board's disciplinary hearings and to write proposed Findings of Fact, Conclusions of Law, and a proposed Order for the Board's consideration, the Board would be reduced to choosing between the two new options: The ALJ can preside over the entire proceeding and issue the final order. In other words, we can abdicate our authority and turn our disciplinary function over to the ALJ thereby abandoning one of our two main functions (licensing and discipline). Unfortunately, under this bill the only other choice doesn't work either.

Section 28-32-08.5, NDCC, provides that, "If the hearing officer is presiding only as a procedural hearing office, the agency head must be present at the hearing...". Section 28-

FISCAL NOTE

Requested by Legislative Council
04/12/2001

Bill/Resolution No.:

Amendment to: Engrossed HB 1455

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	$0	$0	$0	$0	$0	$0
Expenditures	$0	$0	$0	$0	$0	$0
Appropriations	$0	$0	$0	$0	$0	$0

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
$0	$0	$0	$0	$0	$0	$0	$0	$0

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

With the conference committee amendments this bill should have no significant fiscal impact on agencies, local governing bodies, courts, or OAH. The amendments that required the first two fiscal notes (after the original fiscal note on the original bill) have been removed. With this version now being considered, there will be no de novo review of agency and local governing body decisions, thus the impact on the district courts previously stated will be removed, as well as the impact on agencies and local governing bodies from de novo review. See 2/20/01 fiscal note. The Senate amendment that removed the Tax Commissioner from OAH jurisdiction has also been removed in this version, thus there will be no impact on OAH as previously stated in the 3/26/01 fiscal note.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the*

executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.

Name:	Allen C. Hoberg	**Agency:**	Office of Administrative Hearings
Phone Number:	328-3260	**Date Prepared:**	04/12/2001

FISCAL NOTE

Requested by Legislative Council
03/23/2001

Bill/Resolution No.:

Amendment to: Engrossed HB 1455

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				($2,268)		($2,268)
Expenditures				$0		$0
Appropriations				$0		$0

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

There are really two different scenarios concerning the Tax Commissioner's office and OAH. The first is the period between July 1, 1991 (when OAH began operations) and June 30, 1997. The second is the period between July 1, 1997, and the present. During the first period OAH received general funds that funded the provision of hearing officer services for the Tax Commissioner and many other "general fund" agencies. During this period, the Tax Commissioner's office was fairly active in requesting hearing officer services from OAH, i.e. it had a number of administrative tax cases scheduled to going to hearing each year. The average number of hours OAH ALJs spent on work for the Tax Commissioner's office was 135.6 hours per biennium. During the second period OAH did not receive any general funds for the provision of hearing officer services to any agency. In 1997 the Legislative Assembly removed all general funds from OAH's budget. Since July 1, 1997, OAH has billed all agencies to which it provides hearing officer services. For the biennium 1997-99, OAH billed the Tax Commissioner for only 28.4 hours of services provided. For the current biennium, to date, OAH has billed the Tax Commissioner for only 10.1 hours of services provided. OAH had only four requests for hearing officer services from the Tax Commissioner for the 1997-99 biennium, i.e. there had been only four administrative tax cases scheduled to go to hearing, and it has had only one request for hearing officer services for the current biennium. Currently, OAH bills agencies such as the Tax Commissioner at a rate of $79.52/hour for hearing officer services. OAH anticipates that this amount will increase some in the next two biennia, but this fiscal note reflects the current billing rate. OAH's billing rate is determined by a billing consultant based, essentially, on the previous two years actual expenditures. Therefore, the rate for the 2001-2003 biennium will be based on OAH's actual expenditures for the current biennium.

However, OAH believes that this biennium is not likely the norm for the Tax Commissioner's office, in regard to the number of requests for hearing officer services. The 1997-99 biennium is more likely closer to the norm in the current climate of billing the Tax Commissioner for services. Therefore, this fiscal note is based on the number of hours required for providing hearing officer services for the 1997-99 biennium. Actually, though, the number of hours for the Tax Commissioner, as for any agency, could easily be significantly higher. For the past four years not one of the Tax Commissioner's administrative hearing requests has actually gone to hearing. All have either been informally settled or have been decided based upon a stipulation of facts and the submission of briefs. The designated ALJ has not had to conduct a hearing. If even one Tax Commissioner case in a biennium was decided based on a hearing, it is quite possible that the number of hours for hearing officer services required for such a case could reach 30 hours or more. Therefore, although the numbers provided for this fiscal note, based on historical averages, are acurate, they do not tell the story about what could easily happen if just one Tax Commissioner case went to hearing. Of course, if two or more cases went to hearing, the impact would be considerably more. In other words, the Tax Commissioners office under the right circumstances could be a more significant revenue producer for OAH in the 2001-2003 or 2003-2005 bienniums if more hearings were actually held.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

Based on the 1997-99 biennium number of hours, and based on OAH's current billing rate, if the Tax Commissioner's office were exempted from OAH jurisdiction, and if the Tax Commissioner did not voluntarily use any hearing officer services from OAH, OAH would lose $2258.37 in revenues. It would lose the same amount of revenues for the 2003-2005 biennium. Again, this does not include any increases in billing rate that OAH is likely to exerience during the next two biennia. Again, also, depending upon whether a case actually goes to hearing, the number of hours actually required to complete a case could vary considerably.

If OAH lost this revenue, OAH's billing rate would go up very slightly to make up for this lost revenue because OAH's expenditures would not be affected. See below.

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Because the Tax Commissioners office is currently such a small portion of OAH's total business, the impact on expenditures for OAH is practically nothing. All of OAH's expenditures would remain the same.

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Also, the impact on OAH's overall appropriation may be practically nothing. If just one other case OAH

received from another agency amounted to about 28 hours in the next biennium, the lost revenues from the Tax Commissioner's office could easily be replaced. However, OAH is experiencing a period of declining caseloads for its user agencies, both for most of its mandatory and most of its voluntary user agencies. Therefore, it is safe to assume that a loss of the Tax Commissioner's caseload would have a very minor impact on OAH's revenues and the remainder of OAH's user agencies would be impacted in a very minor way through increased billings because OAH's expenditures and appropriation would remain the same.

Name:	Allen C. Hoberg	**Agency:**	Office of Administrative Hearings
Phone Number:	328-3260	**Date Prepared:**	03/26/2001

FISCAL NOTE

Requested by Legislative Council
2/20/2001

Bill/Resolution No.:

Amendment to: HB 1455

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

For the Office of Administrative Hearings, the amendments to H.B. 1455 would have no additional fiscal impact. The amendments have to do with requests for de novo review in the courts. This is an appellate level review beyond the hearings level with OAH and the agency. Therefore, it is anticipated that there would be no additional effect on OAH and the original fiscal note OAH filed for this bill would still be applicable, as to OAH.

However, the amendments to H.B. 1455 have the potential for substantial fiscal impact on numerous other state agencies, local governments or agencies, and the court system. Approximately 200 administrative matters are appealed to the district courts every year. With the language of the amendments, however, this number could increase significantly. With the opportunity for de novo review, substantially more parties from the both the state and local administrative hearings level may wish to appeal. It is impossible to guess how many. But, even if just 50% more would appeal there would be 300 cases on appeal as opposed to 200. Just how much of a financial burden this would place upon the courts is unknown. Of course, what makes for potentially great fiscal impact in the court system is that if in even 50% of these 300 cases on appeal the appellant asks for de novo review, 150 cases in the court system likely must have de novo hearings (a new trial) in the district court.

This would involve the use of considerable resources in the court system.

Yet, just what de novo review means and whether it needs to be granted upon request are questions that may need to be clearly answered. De novo review may mean a new hearing or trial. However, it may only mean just a new look by the district court at the administrative hearing record already in existence and making a new decision based on that record, disregarding the final decision of the agency. It may not mean that a new hearing or trial is required. Either way, considerable resources of the courts would be involved.

Not only would the impact on the courts be great but the impact on state agencies, including the Attorney General's office, would be great. If 150 cases went to a new trial in the district courts, the state would need additional legal representation in those cases. Even if a new trial would not be required, additional legal representation would be involved for these 150 cases. This would require that substantial time of assistant attorneys general and special assistant attoneys general be spent on representation for the agencies involved. The fiscal impact on the Attorney General's office (both for agencies for which it bills and those for which it does not) could be great. The fiscal impact on all of the state agencies whose final administrative orders are appealed under N.D.C.C. ch. 28-32 could also be great.

There would be fiscal impact on the local level similar to the impact at the state agency level, although the numbers of cases from the local level is not known. New trials or a new look at the case would be required for the de novo review process from the local level, too.

As a word of caution, this fiscal note does not estimate the potential costs to all of the state agencies, local agencies, and courts that may be involved. Even for those entities to make such an estimate may be more of a quess because the numbers of requests for de novo review that will be made is not something that can be known with any certainty. Again, there may be more appeals of administrative orders with these amendments. Just how many, no one knows for certain. Then, of all the cases appealed, it is impossible to say how many appellants would request de novo review. Such review could be costly to the appellant, as well as to the appellee. There may be other considerations, too, affecting the decision whether to request de novo review or standard appellate review.

Therefore, although this fiscal note states no additional impact on OAH, there would most certainly be a substantial fiscal impact of undetermined amount on numerous state agencies, on local agencies, and on the court system.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type*

and fund affected and any amounts included in the executive budget.

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Allen C. Hoberg	**Agency:**	Office of Administrative Hearings
Phone Number:	701-328-3260	**Date Prepared:**	02/20/2001

FISCAL NOTE

Requested by Legislative Council
01/23/2001

Bill/Resolution No.: HB 1455

Amendment to:

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues		($16,222)		($16,222)		($16,222)
Expenditures		($16,222)		($16,222)		($16,222)
Appropriations		($16,222)		($16,222)		($16,222)

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

For most of the work OAH currently does, this bill will have no fiscal impact. The work for writing a recommended decision is essentially the same as writing a final decision. However, it may be that some boards and commissions which currently have OAH write a recommended decision will under this bill only have OAH conduct the hearing (the board will write the decision). It really is impossible to know how many boards and commissions that currently have OAH write a recommended decision will switch to the other option. It may be that it will depend on the type of case. However, this bill has the potential to reduce OAH's revenues and expenditures, if boards that currently have OAH issue a recommended decision opt to only have OAH conduct the hearing, and related proceedings. For the last two years OAH had 34 requests from boards that usually have OAH issue a recommended decision. Usually decisions are written on about 50% of the requests. Although an OAH ALJ may spend from 3 to 30 hours writing a decision depending on the nature and complexity of the case, 12 hours is probably an average amount of time spent on writing a decision for a board or commission. Therefore, for 17 cases, if the board decided to have OAH only conduct the hearing (in reality it may only be for a portion of the 17), OAH would spend 204 hours less per biennium on writing decisions (17 x 12). At OAH's current billing rate of $79.52/hour, the amount is $16,222 (204 x $79.52). Assuming no increase in OAH's billing rate over the next three bienniums (and it is likely to increase some), $16,222 is the amount of decrease in revenues OAH can expect and, correspondingly it can expect $16,222 less in expenditures (savings from not having to hire temporary ALJs - full-time ALJs will now have about 204 hours more to spend on matters that temporary ALJs would otherwise have to do). Of course, OAH's appropriation would be less, then, too. Again, however, a caution; this is just a rough estimate. It is impossible to guess what each board or commission might do when faced with the choice of OAH issuing a final decision or OAH just providing a hearing officer to conduct the

hearing, because in the later situation, the board or commission must actually be at the hearing. If OAH is issuing a final decision, the board or commission need not be present at the hearing.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*
   A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included ir the executive budget.*

See Narrative

   B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

See Narrative

   C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

See Narative

Name:	Allen C. Hoberg	**Agency:**	Office of Administrative Hearings
Phone Number:	328-3260	**Date Prepared:**	01/24/2001

10522.0101
Title.

Prepared by the Legislative Council staff for
Representative Klemin
February 14, 2001

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1455

Page 1, line 1, replace "and sections" with ", section"

Page 1, line 2, after "28-32-17" insert ", subsection 1 of section 28-34-01," and after "and" insert "section"

Page 1, line 3, after "agencies" insert "and appeals from decisions of local governing bodies"

Page 4, after line 6, insert:

"**SECTION 3. AMENDMENT.** Subsection 1 of section 28-34-01 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

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. The notice of appeal may include a request for de novo review by the court. 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."

Renumber accordingly

Adopted by the Judiciary Committee
February 14, 2001

VR
2/15/01

HOUSE AMENDMENTS TO HB 1455 HOUSE JUDICIARY 02-15-01
Page 1, line 2, after "28-32-17" insert ", 28-32-19, subsection 1 of section 28-34-01," and after "and" insert "section"

Page 1, line 3, after "agencies" insert "and appeals from decisions of local governing bodies"

HOUSE AMENDMENTS TO HB 1455 HOUSE JUDICIARY 02-15-01
Page 4, after line 6, insert:

"**SECTION 3. AMENDMENT.** Section 28-32-19 of the North Dakota Century Code is amended and reenacted as follows:

28-32-19. Scope of and procedure on appeal from determination of administrative agency. A notice of appeal may include a request for de novo review by the district court. If there is no request for de novo review, a judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it shall find that any of the following are present:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. Provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.

If the order of the agency is not affirmed by the court, it shall be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

SECTION 4. AMENDMENT. Subsection 1 of section 28-34-01 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

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. The notice of appeal may include a request for de novo review by the court. 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."

Renumber accordingly

Date: 02-14-01
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB-1455

House JUDICIARY Committee

☐ Subcommittee on _____

or

☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as amend

Motion Made By Rep Klemin Seconded By Rep Kingsbury

Representatives	Yes	No	Representatives	Yes	No
CHR - Duane DeKrey	✓				
VICE CHR --Wm E Kretschmar	✓				
Rep Curtis E Brekke	✓				
Rep Lois Delmore		✓			
Rep Rachael Disrud	✓				
Rep Bruce Eckre		✓			
Rep April Fairfield	✓				
Rep Bette Grande					
Rep G. Jane Gunter	✓				
Rep Joyce Kingsbury	✓				
Rep Lawrence R. Klemin	✓				
Rep John Mahoney					
Rep Andrew G Maragos					
Rep Kenton Onstad	✓				
Rep Dwight Wrangham	✓				

Total (Yes) 10 No 2

Absent 3

Floor Assignment Rep Klemin

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1455: Judiciary Committee (Rep. Klemin, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 2 NAYS, 3 ABSENT AND NOT VOTING). HB 1455 was placed on the Sixth order on the calendar.

Page 1, line 2, after "28-32-17" insert ", 28-32-19, subsection 1 of section 28-34-01," and after "and" insert "section"

Page 1, line 3, after "agencies" insert "and appeals from decisions of local governing bodies"

Page 4, after line 6, insert:

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1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. Provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.

If the order of the agency is not affirmed by the court, it shall be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

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Renumber accordingly

2001 SENATE JUDICIARY

HB 1455

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1455

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 14th, 2001

Tape Number	Side A	Side B	Meter #
1		x	19.8-end
2	x		0-end
		x	0
Mwl 21 1	+	+	51.3-end/0-9.1
Committee Clerk Signature			

Minutes: **Senator Traynor**, opened the hearing on HB 1455.

Rep. Koppelman, district 13, sponsor of the bill. Was amended in the house. Decision are binding upon the public but not on the agency. Actual process falls short of the standard. I think the Attorney General is going to offer an amendment. Urge your favorable consideration.

Senator Traynor, what does your bill do?

Rep. Klemin, appeared in favor of the bill. Only going to talk about section 3 and 4.

Senator Nelson, define "De Novo" review.

Rep. Klemin, (explains). Section 3 sets out 6 items that must be reviewed. De Novo review is a legal standard. Provided with testimony. This bill provides fro something more than we are doing now.

Allen Hoberg, Office Director of Administrative Hearings, supports the original bill. (testimony attached)

Senator Traynor, what is your definition of de-novo review?

Allen Hoberg, (explains his interpretation). Looking at it with a new fresh look.

Senator Bercier, why would it not go on the record?

Allen Hoberg, I don't think so.

Senator Bercier, legally by law it would go on record.

Allen Hoberg, district court can only look at the record.

Senator Bercier, someone clarify my question.

Leslie Oliver, (testimony attached) appeared in favor of the bill.

Benny Graff, District Judge, appeared in opposition to the bill. The proposed amendments changes the guts of this bill. I am speaking on the effect this bill would have on me as a district judge. I think with language the way it is, I would need 1 more judge in my district. Legislature has reduced the judiciary in ND. I have lost judges, but with this bill it is going to add to the workload and I have less people. Every time there is an appeal to me it means a trial.

Senator Nelson, the fiscal note says it has no impact.

Benny Graff, I doubt that we would get an extra judge.

Discussion.

Allen Hoberg, addressed the fiscal note. I had no ideal when I did fiscal note. I would be guessing and it is difficult to put numbers on it.

Bob Harns, council for Governor Hoeven, the Governor's stand is to do not pass. Cost of litigation will increase. The bill turns the process on it head. Expands district of decision making process in the executive branch by having some exempt agencies. Does not serve public interest well. Governor feels the bill is not appropriate. Does feel it is contrary to Federal Law. This bill does not deal with the rate setting process the Long Term Care Association is looking for. As written, Governor Hoeven requests a Do Not Pass.

Senator Trenbeath, how will they differ?

Bob Harns, differs in several aspects. Litigants will have experts, that is why agencies are concerned

John Olson, (testimony attached) special assistant attorney for the Board of Medical Examiners. The ND Board of Medical Examiners oppose this bill.

Christine Hogan, (testimony attached) Executive Director of the State Bar Association, testified that the State Bar Association opposes the "De Novo" concept.

Senator Trenbeath, almost entirely in agreement. Why is state bar taking the stand they are.

Christine Hogan, not opposed to recommending changes. Bar association would not be opposed to a study.

Senator Traynor, does the Bar Association raise matter by Bob Harns.

Brent Elison, (testimony attached) representing ND Workers Comp, appeared in opposition to sections 3 and 4 of engrossed HB 1455. Workers comp adopted a neutral position on the original bill.

Senator Lyson, agency cannot appeal?

Brent Elison, can't answer.

Doug Barr, of the Attorney Generals office appeared with amendments to the bill. There is a decision by the '79 supreme court raising concerns of a de novo review.

I disagree with Rep. Klemin' testimony. The attorney general recommends a do not pass the way the bill is written.

Senator Watne, I am not sure what page 4 line 27 item 8 is recommending.

Doug Barr, they have to explain why they rejected or modified the distrcit judges decision.

Senator Watne, isn't the ALJ decision final?

Doug Barr, this amendment changes it.

Senator Nelson, why not just hill the bill.

End of side a tape 2

Illone Jeffcoat-Sacco, public social committee appeared in opposition to the "de novo review" portion of the bill regarding agency appeals.

Don Rouse, (testimony attached) legal council for State Tax Committee, appeared in opposition to the bill.

Senator Traynor, if section 3 and 4 are removed you still oppose?

Don Rouse, yes, we do. Countless areas have upheld this philosophy.

Senator Trenbeath, how does the bill in original form affect tax dept.?

Don Rouse, the original bill does not allow us to operate properly.

Rep. Koppelman, provided a suggested amendment.

Rep. Klemin, suggested something between. More discussion on "de novo review" should try to disclose dissatisfaction if possible.

Senator Traynor, have you reviewed the Koppelman amendments?

Rep. Klemin, no I have not. I have reviewed the Attorney Generals amendments.

Senator Watne, I have not seen the amendment.

Senator Traynor, closed the hearing on HB 1455.

SENATOR NELSON MOTIONED TO MOVE ATTORNEY GENERAL'S AMENDMENTS, SECONDED BY SENATOR LYSON. VOTE INDICATED 7 YEAS, 0 NAYS AND 0 ABSENT AND NOT VOTING. SENATOR TRENBEATH MOTIONED TO PASS AMENDMENTS PROPOSED BY THE TAX COMMISSIONER, SECONDED BY SENATOR WATNE. VOTE INDICATED 7 YEAS, 0 NAYS AND 0 ABSENT AND

NOT VOTING. SENATOR WATNE MOTIONED TO DO PASS, SECONDED BY SENATOR BERCIER. VOTE INDICATED 7 YEAS, 0 NAYS AND 0 ABSENT AND NOT VOTING. SENATOR TRENBEATH VOLUNTEERED TO CARRY THE BILL.

Proposed by
Attorney General Wayne Stenehjem

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL 1455

Page 1, line 2, remove "subsection 1 of section 28-34-01," and remove the second "section"

Page 1, line 4, remove "and appeals from decisions of local"

Page 1, line 5, remove "governing bodies"

Page 1, line 15, remove ", and the provisions of subsection 5 do not apply"

Page 4, line 12, remove "notice of appeal may include a request for de novo review by the district court. If"

Page 4, line 13, remove "there is no request for de novo review, a"

Page 4, after line 27, insert:

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

Page 4, remove lines 30 and 31

Page 5, remove lines 1 through 5

Page 5, line 31, overstrike "An agency may request"

Page 6, overstrike lines 1 and 2

Page 6, remove lines 3 through 18

Renumber accordingly

10522.0202
Title.0300

Adopted by the Judiciary Committee
March 21, 2001

3-26-1

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1455

Page 1, line 2, remove "subsection 1 of section 28-34-01," and remove the second "section"

Page 1, line 4, remove "and appeals from decisions of local"

Page 1, line 5, remove "governing bodies"

Page 1, line 15, remove ", and the provisions of subsection 5 do not apply"

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Page 4, line 13, remove "there is no request for de novo review, a"

Page 4, after line 27, insert:

"7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge."

Page 4, remove lines 30 and 31

Page 5, remove lines 1 through 5

Page 5, line 14, after the third comma insert "the tax commissioner,"

Page 5, line 31, overstrike "An agency may request"

Page 6, overstrike lines 1 and 2

Page 6, remove lines 3 through 18

Page 6, line 19, replace "4" with "3"

Page 6, line 22, replace "5" with "4"

Page 7, line 1, replace "6" with "5"

Page 7, line 5, replace "7" with "6"

Renumber accordingly

Date: 3/21/01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1455

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken [redacted] Move Attorney General's Amendments

Motion Made By Nelson Seconded By Lyson

Senators	Yes	No	Senators	Yes	No
Traynor, J. Chairman	X		Bercier, D.	X	
Watne, D. Vice Chairman	X		Nelson, C.	X	
Dever, D.	X				
Lyson, S.	X				
Trenbeath, T.	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

10522.tax1
Title.

Prepared by the Office of State Tax Commissioner
March 21, 2001

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1455

Page 5, line 14, after "Dakota," insert "the tax commissioner,"

Renumber accordingly

Date: 3/21/01
Roll Call Vote #: 2

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1455

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Pass Amendments proposed by Tax Commissioner

Motion Made By Trenbeath Seconded By Watne

Senators	Yes	No	Senators	Yes	No
Traynor, J. Chairman	X		Bercier, D.	X	
Watne, D. Vice Chairman	X		Nelson, C.	X	
Dever, D.	X				
Lyson, S.	X				
Trenbeath, T.	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date: 3/21/01
Roll Call Vote #: 3

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1455

Senate Judiciary Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken DPA

Motion Made By Watne Seconded By Bercier

Senators	Yes	No	Senators	Yes	No
Traynor, J. Chairman	X		Bercier, D.	X	
Watne, D. Vice Chairman	X		Nelson, C.	X	
Dever, D.	X				
Lyson, S.	X				
Trenbeath, T.	X				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Trenbeath

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1455, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) *recommends* **AMENDMENTS AS FOLLOWS** *and when so amended, recommends* **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1455 was placed on the Sixth order on the calendar.

Page 1, line 2, remove "subsection 1 of section 28-34-01," and remove the second "section"

Page 1, line 4, remove "and appeals from decisions of local"

Page 1, line 5, remove "governing bodies"

Page 1, line 15, remove ", and the provisions of subsection 5 do not apply"

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Page 4, after line 27, insert:

"7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge."

Page 4, remove lines 30 and 31

Page 5, remove lines 1 through 5

Page 5, line 14, after the third comma insert "the tax commissioner,"

Page 5, line 31, overstrike "An agency may request"

Page 6, overstrike lines 1 and 2

Page 6, remove lines 3 through 18

Page 6, line 19, replace "4" with "3"

Page 6, line 22, replace "5" with "4"

Page 7, line 1, replace "6" with "5"

Page 7, line 5, replace "7" with "6"

Renumber accordingly

2001 HOUSE JUDICIARY

CONFERENCE COMMITTEE

HB 1455

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1455-conference

House Judiciary Committee

☐ Conference Committee

Hearing Date 04-06-01

Tape Number	Side A	Side B	Meter #
TAPE II	x		01 to 3931
Committee Clerk Signature			

Minutes: Chairman DeKrey called the conference committee to order on HB 1455. The clerk will call the roll. Do you want to tell us what your amendments do.

Senator Trenbeath: We took out de nove review and in doing so took out th sections that would relate that to local government proceedings also. Sub section five would come out of there also.

Chairman DeKrey: We have no problem with taking out the de nove review, but you also made it so the administrative judges decision is not final.

Senator Trenbeath: That is right, the administrative judges decision is as final as it ever was. On appeal it can be reversed or resided for two additional reasons, that were added in seven and eight.

Senator Traynor: Those were suggested by the Attorney General.

Chairman DeKrey: The group that had the greatest problem with the administrative law judges decision not being final was the long term care association. So would they tell us if they still have a problem with the bill with the Senate amendments.

Shelly Peterson: the bill as amended, isn't as good as we would like it. The agency still has the authority to change it, and that is the frustration with the bill. We were hoping for in this legislation is for the ability for the judge ruling not be recommended but would be final.

Senator Trenbeath: I think that all that we did, is make is so the agency was not going to follow the recommendation of the judge, they would have to state a reason. That reason would be appealable.

Chairman DeKrey: Appealable to whom.

Senator Watne: To district court.

Chairman DeKrey: I guess this bill is as strong as we can pass at this time.

Shelly Peterson: I agree with you, it is better.

Rep Eckre: Is that the same concern of the medical board.

John Olson: We are comfortable with the Senate amendments.

Chairman DeKrey: Have you seen the Koppelman amendments, Sandi Tabor, do you want to tell us what you think.

Sandi Tabor: This addresses concerns more of agencies, but I think what we did is better.

John Olson: This still tries to direct the finality to the administrative law judge, to the exclusion of the administrative agency.

Chairman DeKrey: The Senate objection to the bill was the finality.

Senator Traynor: We had a memo from the Attorney General, this bill didn't apply to the long term care people.

Senator Watne:I believe that the long term care people are under federal ruling and they could loose money unless they have control.

Rep Devlin: The Koppelman amendments is a compromise between both. It restores the original form providing the finality and also retains the Senate amendments. He spoke to the Administrative Rules process and why he had his position.

Senator Traynor: If we adopt this amendment, what happens.

John Olson: If you have this finality in the decision making process for the administrative law judge, the board of medical examiners most likely will not use the judge for decision making process. They will not let go of their responsibility in terms of disciplining physicians or reviewing license applications for physicians. They will not let go of their duty that they have to make the final decision.

Senator Traynor:John would you make a comment on four and five of the amendments.

John Olson: Number four is injecting finality and it is inviting subjective review.number five, the agency may or may not support the decision, unless they state a reason.

Senator Trenbeath: I see thousands of dollars being spent in court with this amendment.

Senator Traynor: We were told by the Attorney General that this is case law now.

Doug Bar: office of the Attorney General.I would like to make three points. First of all it is the long term care association that is really concerned about this. Yet the exception that is being proposed would exclude them from the benefit of the law. Second, we failing to recognize the purpose of administrative agencies. At the review, there is the right of appeal.

Chairman DeKrey: Do they appeal on the facts or that what wasn't done right.

Doug Barr: He gives his explanation.

Chairman DeKrey:Asks the question again.

Doug Barr: Both, final point, the amendments purpose is in conflict with other portions of the law.

Rep Koppelman: I have two point, one is that it is a good thing that we have talked about the issues, and secondly I would like to see my amendment adopted, but should an agency be able to rule on itself. There are other amendments drawn up by Allen Holberg, maybe we need to talk to him.

Chairman DeKrey: My question is, can you live with this or should we put the amendments back on and the Senate will kill the bill.

Rep Koppelman: I think a third option, what is in the Senate version of the bill is current law.

Senator Watne: The amendments are the same until we reach the line referring to the tax commissioner, why do you object to that and then why in this other part you put in appeal.

Rep Koppelman: The basic difference is that the Senate got rid of the finality of the administrative process, which was the original intent of the bill. You also got rid of the de nove review and that I agree with. The tax commissioner issue, I talked with Legislative Council was befuddled with the testimony, many of our state officials are constitutional offices, but nothing in the law says that they are immune to the processes of law. I recommend that we take a look at Mr Holberg's amendments, it is something to improve the process.

Chairman DeKrey: Long term care people said it was better than what they have now.

Rep Koppelman: It is better.

Senator Trenbeath: Senate amendments go a long way to helping that. This allows the judges to look at the facts. I do not like the finality finding, the agencies do not favor this nor does the Attorney General.

Chairman DeKrey: I agree, we got a bite out of the apple, maybe we had better agree.

Rep Devlin: we still have not accomplished much. He then makes a statement about the procedure with an example.

Senator Trenbeath: I understand.

Chairman DeKrey: I would have someone made a motion.

Rep Devlin: I move that we adopt the Koppelman amendments.

Senator Watne: Second.

Chairman DeKrey: Clerk will call the roll to adopt the Koppelman amendments 10522.0203.

Senator Trenbeath: The Senate would have to recede from their amendments, would have to be a part of the motion.

Senator Watne: We would have to take a look at page six line 3 through 18. Koppelman did not have them in there.

DISCUSSION

Chairman DeKrey: The clerk will take the roll on motion. The Senate will recede from their amendments and adopt the Koppelman amendments. The motion fails with a vote of 2 YES, 4 NO. We have the bill before us, are there any further motions.

Rep Koppelman: I would suggest that if you do decide to go with the Senate amendments that you would further amendment and still delete the tax commissioner.

Chairman DeKrey: My question is this, the state tax commissioner deals with a lot of peoples personal financial records and if we bring it into the administrative process does that open those people's records up to public record.

Rep Koppelman: Nothing would change.

Chairman DeKrey: I want to hear from the attorneys.

Rep Koppelman: If what has been said is true, and all the Senate amendment does is to codify what is currently present in case law, and if the tax commissioner is using the process now without much objection and it works for them, to remove them from the requirement to use the process, then the change is that we move the tax commissioner from the administrative hearing process.

Senator Traynor: Are these the Holberg amendments.

Doug Barr: I was at the committee hearing where the tax testified, and as I understand it, they don't care if they are not excluded if the ELJ is final.

DISCUSSION

Senator Trenbeath:I will move that Senate recede from its amendments and further amend with the Senate amendments 10522.0202 with the exemption procedure of the tax commissioner.

Rep Eckre: Second.

Chairman DeKrey: It has been moved and seconded, you heard the motion, any further discussion.

DISCUSSION

Chairman DeKrey: The clerk will call the roll on the motion on HB 1455. The motion passes with 5 YES and 1 NO.

Adopted by the Conference Committee
April 5, 2001

VR
4/6/01

CONFERENCE COMMITTEE AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1455 **JUD 04-06-01**

That the Senate recede from its amendments as printed on pages 1099 and 1100 of the House Journal and page 911 of the Senate Journal and that Engrossed House Bill No. 1455 be amended as follows:

Page 1, line 2, remove "subsection 1 of section 28-34-01," and remove the second "section"

Page 1, line 4, remove "and appeals from decisions of local"

Page 1, line 5, remove "governing bodies"

Page 1, line 15, remove ", and the provisions of subsection 5 do not apply"

Page 4, line 12, remove "notice of appeal may include a request for de novo review by the district court. If"

Page 4, line 13, remove "there is no request for de novo review, a"

Page 4, after line 27, insert:

"7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge."

Page 4, remove lines 30 and 31

Page 5, remove lines 1 through 5

Page 5, line 31, overstrike "An agency may request"

Page 6, overstrike lines 1 and 2

Page 6, remove lines 3 through 18

Page 6, line 19, replace "4" with "3"

Page 6, line 22, replace "5" with "4"

Page 7, line 1, replace "6" with "5"

Page 7, line 5, replace "7" with "6"

Renumber accordingly

Date: 4/06/01
Roll Call Vote # 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB-1455

House _____ Committee

☐ Subcommittee on _____

or

☒ Conference Committee

Legislative Council Amendment Number _____

Action Taken Senate recede from its amendments + adopt Koppelman amend

Motion Made By _____ Seconded By _____

Representatives	Yes	No	SENATORS	Yes	No
Chr DeKrey ✓	✓		Sen Trenbeath ✓		✓
Rep Devlin ✓	✓		Sen Traynor ✓		✓
Rep Eckre ✓		✓	Sen Watne ✓		✓

Total (Yes) 2 No 4

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 1/06/01
Roll Call Vote # 2

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB-1455

House _____ Committee

☐ Subcommittee on _____
or
☒ Conference Committee

Legislative Council Amendment Number _____

Action Taken Senate recede from its amend + further amend by putting back all Senate amend + further amend of last Committee

Motion Made By Sen Trenbeath Seconded By Rep Eckre

Representatives	Yes	No	SENATORS	Yes	No
Chr DeKrey	✓		Sen Trenbeath	✓	
Rep Delvin		✓	Sen Traynor	✓	
Rep Eckre	✓		Sen Wayne	✓	

Total (Yes) 5 No 1

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

REPORT OF CONFERENCE COMMITTEE

HB 1455, as engrossed: Your conference committee (Sens. Trenbeath, Traynor, Watne and Reps. DeKrey, Devlin, Eckre) recommends that the **SENATE RECEDE** from the Senate amendments on HJ pages 1099-1100, adopt further amendments as follows, and place HB 1455 on the Seventh order:

That the Senate recede from its amendments as printed on pages 1099 and 1100 of the House Journal and page 911 of the Senate Journal and that Engrossed House Bill No. 1455 be amended as follows:

Page 1, line 2, remove "subsection 1 of section 28-34-01," and remove the second "section"

Page 1, line 4, remove "and appeals from decisions of local"

Page 1, line 5, remove "governing bodies"

Page 1, line 15, remove "<u>, and the provisions of subsection 5 do not apply</u>"

Page 4, line 12, remove "<u>notice of appeal may include a request for de novo review by the district court. If</u>"

Page 4, line 13, remove "<u>there is no request for de novo review, a</u>"

Page 4, after line 27, insert:

"<u>7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.</u>

<u>8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.</u>"

Page 4, remove lines 30 and 31

Page 5, remove lines 1 through 5

Page 5, line 31, overstrike "An agency may request"

Page 6, overstrike lines 1 and 2

Page 6, remove lines 3 through 18

Page 6, line 19, replace "<u>4</u>" with "<u>3</u>"

Page 6, line 22, replace "<u>5</u>" with "<u>4</u>"

Page 7, line 1, replace "<u>6</u>" with "<u>5</u>"

Page 7, line 5, replace "<u>7</u>" with "<u>6</u>"

Renumber accordingly

Engrossed HB 1455 was placed on the Seventh order of business on the calendar.

REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE) - 420

07398

(Bill Number) HB-1455 (, as (re)engrossed):

Your Conference Committee

For the Senate:	For the House:
Sen Trenbeath	Chr DeKrey
Sen Traynor	Rep Devlin
Sen Watne	Rep Eckre

☐ recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)
723/724 725/726 8724/8726 8723/8725
the (Senate/House) amendments on (~~SJ~~/HJ) page(s) _____ - _____

☐ and place HB-1455 on the Seventh order.
727

☒ , adopt (further) amendments as follows, and place HB-1455 on the Seventh order:

☐ having been unable to agree, recommends that the committee be discharged and a new committee be appointed. 690/515

((Re)Engrossed) HB-1455 was placed on the Seventh order of business on the calendar.

DATE: 04/06/01

CARRIER: _____

LC NO. _____ . _____ of amendment

LC NO. _____ . _____ of engrossment

Emergency clause added or deleted _____

Statement of purpose of amendment _____

(1) LC (2) LC (3) DESK (4) COMM.

2001 TESTIMONY

HB 1455

OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF NORTH DAKOTA
1707 North 9th Street
Bismarck, North Dakota 58501-1882

Allen C. Hoberg
Director

701-328-3260
FAX 701-328-3254

MEMORANDUM

TO: Fifty-seventh Legislative Assembly
State of North Dakota
House Judiciary Committee

FROM: Allen C. Hoberg, Director
Office of Administrative Hearings

RE: House Bill No. 1455

DATE: February 5, 2001

The Office of Administrative Hearings did not seek to have this bill introduced. However, the matter of final decision-making authority by ALJs has been a subject of conversation and study on a national level lately, and it has recently been a subject of conversation and study with OAH's statutory advisory body, the State Advisory Council for Administrative Hearings, though the SAC has taken no position on it. I believe that this is a conceptually sound bill. But, you are probably going to hear some good arguments for and against this bill. However, this bill is not about the need to have a central panel for administrative hearings; it is about whether North Dakota's Central Panel, OAH, should operate differently.

The Office of Administrative Hearings appears today in support of this bill today for three reasons. (1) this bill goes one step further down the road toward fairness in all administrative hearings; (2) it should not cost state agencies, including the office of administrative hearings, any additional monies to implement, and it may result in time and monetary savings for OAH and the agencies it serves; and (3) it avoids the need for the agency head to consult with attorneys and others about a decision, after a recommended decision is issued but prior to the issuance of a final decision.

OAH currently does issue final decisions for many state agencies, both for agencies within its mandatory jurisdiction and for agencies that voluntarily use its hearing officer services. OAH already issues final decisions for all Veterans Preference hearings, for all state employee grievance or job discipline hearings, for all DPI due process special education hearings, for all Bank of North Dakota Student Loan nearings, and for many other agency hearings when the agency head chooses to have OAH issue a final decision. All other decisions issued by OAH administrative law judges are recommended decisions for which the agency head issues the final decision. The agency head may accept, reject, or modify the ALJ's recommended decision. Under N.D.C.C. ch. 28-32, the only other option currently available to agencies that use OAH, besides the recommended

decision/final decision format, is for the agency to request that the OAH ALJ serve only as procedural hearing officer. If this option is used, the agency head must actually be present at the hearing. The hearing officer conducts the hearing but the agency head issues the final (the only) decision.

This bill requires all state agencies under the mandatory jurisdiction of OAH to request that OAH conduct the hearing and issue a final decision. However, it retains the option for boards and commissions to use a procedural hearing officer. Boards and commissions may not request a recommended decision from an OAH ALJ. No one under OAH's jurisdiction may any longer request that the designated OAH ALJ issue a recommended decision. However, every agency under OAH jurisdiction would have the right to appeal the final order issued by the ALJ to the courts.

This bill is in line with a recent trend developing nationwide to have independent hearing officers conduct the hearing and issue a final, rather than a recommended, decision. In South Carolina OAH ALJs now issue final decisions for all cases under OAH jurisdiction. Agencies may appeal the decision to the court system if they do not agree with it. The only exception in South Carolina is that in decisions for boards and commissions a party may appeal to the board or

commission before appealing to the courts, but it is an appeal of a final decision to the board or commission, not a review of a recommended decision. South Carolina's OAH has very broad jurisdiction over state agency administrative hearings.

In Maryland about 85% of the OAH ALJ's decisions for agencies are final decisions. [The Maryland OAH issues final decisions for Budget & Management, State Personnel, Department of Education, Gaming hearings, Health and Mental Hygiene Department hearings, Public Information Act hearings, Natural Resources Department hearings, Motor Vehicle Administration hearings (drivers license, suspension, etc.), Insurance Administration hearings, Correctional Department hearings (*e.g.*, inmate grievance), Human Resources Department (human services) hearings, and Housing & Community Development Department hearings.] Maryland's OAH has very broad jurisdiction over state administrative hearings.

In Oregon about 80% of the OAH ALJ decisions are final decisions. [The principal subject matters for the Oregon OAH issuing final decisions are unemployment insurance cases, implied consent (drunken driving cases), and

social services (human services) cases.] Oregon's OAH has very broad jurisdiction over state agency administrative hearings.

In Minnesota OAH ALJs issue final decisions only for a portion of its agency caseload. [The Minnesota OAH issues final decisions for all Workers Compensation Bureau hearings, human rights claims, local government boundary/incorporation disputes, and for sex offender community notification classification appeals.] Minnesota is also a state with fairly broad jurisdiction over state agency administrative hearings. But, for most cases, OAH ALJs still issues recommended decisions.

In Washington OAH ALJs issue final decisions only for a small portion of the agencies' caseload. [The Washington OAH issues final decisions for Department of Labor & Industries (contractor registration hearings), Department of Social & Health Services (juvenile parole revocation hearings), Human Rights Commission (employment discrimination hearings), Superintendent of Public Instruction (special education, teacher certification, student transfer, bus driver, and food program hearings), and Washington State Patrol (drug forfeiture hearings).] Washington's OAH also has fairly broad jurisdiction over state

agency administrative hearings. But, for most cases, Washington's OAH ALJs still issues recommended decisions.

California's OAH is the nation's oldest, but its jurisdiction is extremely small. Most state agencies are outside of its jurisdiction. For agencies in its jurisdiction, the California OAH issues only about 10% final decisions. [The biggest client agency for which it issues only final decisions is the Department of Developmental Disabilities.]

Massachusetts' Division of Administrative Law is also a central panel with limited jurisdiction. However, within its jurisdiction it issues final decisions for some agencies. [The Massachusetts DAL issues final decisions for nursing home and medical service provider rate hearings, hearings on payments to special needs schools, hearings on construction contract disputes, hearings on transfers of the mentally retarded, hearings on veteran's benefits, and hearings on disputes about the prevailing wage.] However, by law, even when DAL ALJs issue a recommended decision, the agency must give "deference" to the findings of fact in the decision of the ALJ when reviewing it for a final decision, and must give "substantial deference" to findings of fact of the ALJ when they are based upon credibility determinations.

The South Dakota OAH is also a central panel with limited jurisdiction. It has final decision-making authority only for property tax appeal hearings. In all other hearings under its jurisdiction it issues recommended decisions.

In North Carolina, all the decisions of OAH ALJs are recommended decisions, but a statute provides specific, strict guidelines for agency review of recommended decisions. *See* 1999 N.C. House Bill No. 968.

In the remainder of the states having central panels like North Dakota's OAH, OAH ALJs primarily issue recommended decisions and the agency head issues the final decision. As of December 1, 2000, 26 states have central panels. Some of these states, as in North Dakota, give the option to the agency head to ask for a final decision on a case-by-case basis.

Currently, when an OAH ALJ issues a recommended decision on an agency matter and the agency head is required to issue a final decision, the agency head may seek the advice of a "staff assistant," usually program staff, agency attorneys, or other agency personnel, before making a final decision. It is forbidden by law for the agency head to talk to the ALJ or to the parties, or to the

attorney who handled the matter at hearing for the agency, unless the agency head holds a session where all the parties can again be heard before final decision is made. *See* N.D.C.C. § 28-32-12.1 which forbids ex parte contacts. Under this bill, if OAH ALJs issued a final decision, obviously the agency head would not have to issue a final decision. If the agency were a party in the hearing, the agency would then only have to decide whether to appeal the ALJ's decision to the courts. In these discussions the agency attorney who handled the hearing could consult with the agency head. There should less involvement of agency personnel if an ALJ issues a final decision because the agency head does not have to issue any more final decisions and it will only be those decisions adverse to the agency with which the agency head and others will have to concern themselves regarding the question of appeal.

It will not involve any more time or effort for an OAH ALJ to issue a final decision as opposed to a recommended decision. The process is the same.

The agency will still be officially responsible for notifying the parties about the final decision and for maintaining the record and sending it to the courts if there is an appeal because it is still an agency matter, but the actual notification of the

parties about the final decision can be accomplished by the ALJ when the final decision is issued.

The most important element of final decision making is the question of fairness. With the passage of this bill all the parties, including the agency when it is a party, will be on the same level. All must abide by the decision of the ALJ and each will only have the right to challenge the decision on appeal to the courts. The agency would no longer be able to disagree with the ALJ, state its reasons for disagreeing, and then issue different findings of fact and different conclusions of law in a final decision which either modifies or rejects the ALJ's decision. The other parties in a hearing do not have this option. The argument is that the agencies should not have it either.

Of course, agencies would still retain statutory and rulemaking authority. With the final decision-making authority, fact-finding would be the complete province of the ALJ. However, final decision-making authority would still be substantially influenced by statutes and rules, as well as prior case law from the courts.

For all these reasons, OAH believes that this is a sound bill. It is another step toward complete fairness in administrative hearings.

Testimony on HB 1455
House Judiciary Committee
February 5, 2001

Chairman DeKrey and members of the House Judiciary Committee, thank you for the opportunity to testify on HB 1455. My name is Shelly Peterson, President of the North Dakota Long Term Care Association. I am here today on behalf of our members, nursing facilities, basic care facilities and assisted living facilities.

I am here today in support of HB 1455 and respectively request a "DO PASS."

Nursing facilities in North Dakota operate in accordance with laws and regulations administered by state agencies. Facilities with residents receiving medicaid benefits (all of them) are subject to ratesetting by the Department of Human Services. Ratesetting rules are promulgated by the department and published in the Administrative Code. The department interprets these rules, and establishes reimbursement rates for all nursing facilities. The rates established by the department apply to all residents, regardless of the resident's medicaid status.

A facility may formally disagree with the rates established by the department, by asking the department to reconsider its rate determination. In nearly all cases, the department has denied the request.

A facility may appeal the department's denial of reconsideration by submitting a notice of appeal to the department. The department requests the designation of an administrative law judge from the Office of Administrative Hearings.

The administrative law judge conducts a hearing. This is the first opportunity a nursing facility has to present "its side of the story" to an unbiased third party. At the hearing, the department and the facility present evidence related to the manner in which the facility's rates were established. Typically, administrative law judges do not understand the ratesetting regulations, and have admitted, during a hearing, that the department's interpretation is heavily relied upon. The administrative law judge considers the evidence and issues recommended findings of fact, recommended conclusions of law and a recommended order. These recommendations are then given back to the department. The department is permitted to amend or reject anything the judge has recommended. The final order after the hearing

is issued by the department, not the administrative law judge. An administrative law judge's recommendations which favor the facility can be overturned by the department. The facility is permitted to appeal to the district court and finally to the North Dakota Supreme Court. These courts defer to the department's "expertise" in ratesetting matters, and give the department's interpretation "appreciable deference". North Dakota Supreme Court cases are published and available for review. In the last twenty years, a nursing facility has not succeeded in a ratesetting challenge against the department.

Under the present law, North Dakota nursing facilities must challenge the department's established rate through a process which weighs heavily against its success. Any challenge by a facility requires time, energy and frequently, the cost for an attorney to represent the facility. Nursing facilities have largely decided such efforts are futile. Valid and legitimate disputes over rates have gone unchallenged and unheard because the system is fundamentally unfair.

The North Dakota Long Term Care Association supports HB 1455. The changes proposed by HB 1455 protect both parties in an administrative hearing. HB 1455 would require an independent administrative law judge from the Office of Administrative Hearings to preside over an administrative appeal and to issue a final order. HB 1455, if passed, would remove the agency's unilateral authority to arbitrarily change or reject the decision made by the administrative law judge. HB 1455 does not limit or impair the agency's authority in any other sense. This bill allows both parties to an administrative appeal to present evidence in a forum which is fundamentally fair and unbiased.

Thank you for your thoughtful consideration of HB 1455. Your support of HB 1455 is appreciated. I would be happy to answer any questions you might have at this time.

Shelly Peterson, President
North Dakota Long Term Care Association
1900 North 11th Street
Bismarck, ND 58501
(701) 222-0660

MEMORANDUM

TO: HOUSE JUDICIARY COMMITTEE
Duane DeKrey, Chairman
William E. Kretschmar, Vice Chairman
Curtis E. Brekke
Lois Delmore
Rachael Disrud
Bruce Eckre
April Fairfield
Bette Grande
G. Jane Gunter
Joyce Kingsbury
Lawrence R. Klemin
John Mahoney
Andrew G. Maragos
Kenton Onstad
Dwight Wrangham

FROM: NORTH DAKOTA LONG TERM CARE ASSOCIATION
Shelly Peterson, President

RE: HB 1455

DATE: February 12, 2001

On February 5, 2001, the House Judiciary Committee heard public testimony on House Bill 1455, a bill to amend and reenact portions of the Administrative Agencies Practice Act, North Dakota Century Code Chapter 28-32, and the Office of Administrative Agencies, North Dakota Century Code Chapter 54-57. The North Dakota Long Term Care Association (NDLTCA), by and through its President, Shelly Peterson, offered testimony in favor of this bill. The North Dakota Department of Human Services (NDDHS), by and through Attorney Melissa Hauer, Director of the Legal Advisory Unit, offered testimony against this bill.

The members of NDLTCA are dedicated to providing quality health care services to residents of long term care facilities in North Dakota. In this endeavor, NDLTCA works closely with NDDHS. NDLTCA and NDDHS have enjoyed a collaborative working relationship, based upon mutual respect, for

many years. NDLTCA members believe HB 1455 will strengthen the relationship with NDDHS, and offer the following comments for consideration by this Committee:

1. In the testimony offered by Attorney Hauer on behalf of NDDHS, she stated the changes proposed in HB 1455 would create a conflict with the federal medicaid statute 42 U.S.C. §1396 a(a)(3). NDDHS administers the medicaid (medical assistance) program. The federal medicaid statute requires NDDHS to offer a "fair hearing before the State Agency to any individual whose claim for medical assistance ... is denied". The federal regulations which implement this statute are found at 42 CFR §431.200 et. seq.("Subpart E"). The regulations require NDDHS to maintain a hearing system for any person denied medical assistance. 42 CFR §431.200. The process must include
   a. A hearing before the [State] agency; or
   b. An evidentiary hearing at the local level, with a right of appeal to a State agency hearing.

   42 CFR §435.205(b).

   The federal regulations require "an impartial officer" to preside over the hearing, and issue "recommendations or a decision." 42 CFR §§431.240, 431.244.

   Nothing in the federal regulations, however, permits the agency to amend or reject the recommendations or decision of the impartial hearing officer. As you are aware, the Administrative Agencies Practice Act requires an administrative agency to issue the final hearing order, but gives the agency the right to amend or reject the impartial hearing officer's recommendations. NDCC 28-32-13. The claimant may ask the agency to reconsider its order. NDCC 28-32-14.

   Nothing in the federal medicaid regulations precludes the process proposed in section 1 of HB 1455.

2. The federal medicaid statute cited by Attorney Hauer applies to the fair hearing process due an individual who has been denied medical assistance benefits. The provisions of 42 U.S.C. §1396

a(a)(3) do not apply to nursing facilities challenging final rates established by the Medicaid agency, NDDHS. Shelly Peterson testified about the complex process used by NDDHS to determine reimbursement rates, which effectively establishes the operating budget for each nursing facility in the state. Ratesetting for nursing facilities is a hybrid process of Medicare and Medicaid laws and regulations.

The appeals process for nursing facilities in the Medicaid regulations is found in 42 CFR §431.153. The reference to nursing facility appeals in the State Medicaid Plan cites this section as well. As required by the federal regulations, "the State must give the facility a full evidentiary hearing". 42 CFR §153. The "required elements" of this hearing process includes the right "to appear before an impartial decision-maker" and the right to "a written decision by the impartial decision-maker" after the hearing is concluded. 42 CFR §431.154. Nothing in the federal regulations require the medicaid agency to preside over the hearing, nor permits the agency to reject a decision made by "the impartial decision-maker".

The appeals process for North Dakota nursing facilities is found in Chapter 50-24.4, North Dakota Century Code, entitled "Nursing Home Rates", and follows the administrative hearing procedures from the Administrative Agencies Practice Act. NDCC §50-24.4-18. NDLTCA requests an amendment to HB 1455, Section 3, p. 4-5, to include a reference to administrative hearings under NDCC §50-24.4. If this acceptable to this Committee, a proposed amendment will be submitted.

3. NDLTCA believes HB 1455 complies with the appeal procedures under both Medicare and Medicaid, and urges a do-pass recommendation from this committee. The existing ratesetting mechanism for nursing facilities removes from each facility the right to establish and implement its annual operating budget. This authority has been relinquished to the state Medicaid agency - NDDHS, which is responsible for establishing, applying and interpreting the complex ratesetting mechanism. The checks

and balances between legislating this process and enforcing this process do not exist or are disregarded.

The North Dakota Long Term Care Association supports HB 1455. HB 1455, if passed, would remove some of the unchecked authority the ratesetting mechanism imposes upon NDDHS, and level the playing field in the administrative hearing process.

State Medicaid Plan - North Dakota
Federal Medicaid regulations

Hearing procedures for individual recipients

Revision: HCFA-AT-80-38 (BPP)
May 22, 1980

State North Dakota

Citation
42 CFR 431.202
AT-79-29
AT-80-34

4.2 Hearings for Applicants and Recipients

The Medicaid agency has a system of hearings that meets all the requirements of 42 CFR Part 431, Subpart E.

maker to refute the finding of noncompliance on which the adverse action was based;

(ii) To be represented by counsel or other representative; and

(iii) To be heard directly or through its representative, to call witnesses, and to present documentary evidence.

(2) A written decision by the impartial decisionmaker, setting forth the reasons for the decision and the evidence on which the decision is based.

(j) *Limits on scope of review:* Civil money penalty cases. In civil money penalty cases—

(1) The State's finding as to a NF's level of noncompliance must be upheld unless it is clearly erroneous; and

(2) The scope of review is as set forth in § 488.438(e) of this chapter.

[Amended at 59 FR 56232, Nov. 10, 1994; 61 FR 32348, June 24, 1996; 62 FR 43931, Aug. 18, 1997; 64 FR 30944, July 23, 1999]

§ 431.154 Informal reconsideration for ICFs/MR.

(a) If the State decides to provide the opportunity for an evidentiary hearing required by § 431.153(a) only after the effective date of a denial, or nonrenewal of participation, the State must offer the facility an informal reconsideration, to be completed before the effective date.

(b) Written notice to the facility of the denial, termination or nonrenewal and the findings upon which it was based;

(c) A reasonable opportunity for the facility to refute those findings in writing, and

(d) A written affirmation or reversal of the denial, termination, or nonrenewal

[Amended at 59 FR 56233, Nov. 10, 1994; 61 FR 32348, June 24, 1996]

Subpart E—Fair Hearings for Applicants and Recipients

SOURCE: 44 FR 17932, Mar. 29, 1979, unless otherwise noted

General Provisions

§ 431.200 Basis and purpose.

This subpart implements section 1902(a)(3) of the Act, which requires that a State plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly. This subpart also prescribes procedures for an opportunity for hearing if the Medicaid agency takes action to suspend, terminate, or reduce services. This subpart also implements sections 1819(f)(3), 1919(f)(3), and 1919(e)(7)(F) of the Act by providing an appeals process for individuals proposed to be transferred or discharged from skilled nursing facilities and nursing facilities and those adversely affected by the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

[57 FR 56505, Nov. 30, 1992]

§ 431.201 Definitions.

For purposes of this subpart:

Action means a termination, suspension, or reduction of Medicaid eligibility or covered services. It also means determinations by skilled nursing facilities and nursing facilities to transfer or discharge residents and adverse determinations made by a State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

Adverse determination means a determination made in accordance with sections 1919(b)(3)(F) or 1919(e)(7)(B) of the Act that the individual does not require the level of services provided by a nursing facility or that the individual does or does not require specialized services.

Date of action means the intended date on which a termination, suspension, reduction, transfer or discharge becomes effective. It also means the date of the determination made by a State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

De novo hearing means a hearing that starts over from the beginning.

Evidentiary hearing means a hearing conducted so that evidence may be presented.

Notice means a written statement that meets the requirements of § 431.210.

Request for a hearing means a clear expression by the applicant or recipient, or his authorized representative, that he wants the opportunity to present his case to a reviewing authority.

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56505, Nov. 30, 1992]

§ 431.202 State plan requirements.

A State plan must provide that the requirements of §§ 431.205 through 431.246 of this subpart are met.

§ 431.205 Provision of hearing system.

(a) The Medicaid agency must be responsible for maintaining a hearing system that meets the requirements of this subpart.

(b) The State's hearing system must provide for—

(1) A hearing before the agency; or

(2) An evidentiary hearing at the local level, with a right of appeal to a State agency hearing.

(c) The agency may offer local hearings in some political subdivisions and not in others.

(d) The hearing system must meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 245 (1970), and any additional standards specified in this subpart.

§ 431.206 Informing applicants and recipients.

(a) The agency must issue and publicize its hearing procedures.

(b) The agency must, at the time specified in paragraph (c) of this section, inform every applicant or recipient in writing—

(1) Of his right to a hearing;

(2) Of the method by which he may obtain a hearing; and

(3) That he may represent himself or use legal counsel, a relative, a friend, or other spokesman.

(c) *The agency must provide the information required in paragraph (b) of this section—(1)* At the time that the individual applies for Medicaid;

(2) At the time of any action affecting his or her claim;

(3) At the time a skilled nursing facility or a nursing facility notifies a resident in accordance with § 483.12 of this chapter that he or she is to be transferred or discharged; and

(4) At the time an individual receives an adverse determination by the State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56305, Nov. 30, 1992; 58 FR 25784, Apr. 28, 1993]

Notice

§ 431.210 Content of notice.

A notice required under § 431.206 (c)(2), (c)(3), or (c)(4) of this subpart must contain—

(a) A statement of what action the State, skilled nursing facility, or nursing facility intends to take.

(b) The reasons for the intended action.

(c) The specific regulations that support, or the change in Federal or State law that requires, the action.

(d) An explanation of—

(1) The individual's right to request an evidentiary hearing if one is available, or a State agency hearing; or

(2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and

(e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56305, Nov. 30, 1992]

§ 431.211 Advance notice.

The State or local agency must mail a notice at least 10 days before the date of action, except as permitted under §§ 431.213 and 431.214 of this subpart.

§ 431.213 Exceptions from advance notice.

The agency may mail a notice not later than the date of action if—

(a) The agency has factual information confirming the death of a recipient;

(b) The agency receives a clear written statement signed by a recipient that—

(1) He no longer wishes services; or

(2) Gives information that requires termination or reduction of services and indicates that he understands that this must be the result of supplying that information;

(c) The recipient has been admitted to an institution where he is ineligible under the plan for further services;

(d) The recipient's whereabouts are unknown and the post office returns agency mail directed to him indicating no forwarding address (See § 431.231 (d) of this subpart for procedure if the recipient's whereabouts become known);

(e) The agency establishes the fact that the recipient has been accepted for Medicaid services by another local jurisdiction, State, territory, or commonwealth;

(f) A change in the level of medical care is prescribed by the recipient's physician;

(g) The notice involves an adverse determination

(Text continued on page 2B-17)

made with regard to the preadmission screening requirements of section 1919(e)(7) of the Act; or

(h) The date of action will occur in less than 10 days, in accordance with § 483.12(a)(5)(ii), which provides exceptions to the 30 days notice requirements of § 483.12(a)(5)(i).

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56505, Nov. 30, 1992; 58 FR 25784, Apr. 28, 1993]

§ 431.214 Notice in cases of probable fraud.

The agency may shorten the period of advance notice to 5 days before the date of action if—

(a) The agency has facts indicating that action should be taken because of probable fraud by the recipient; and

(b) The facts have been verified, if possible, through secondary sources.

Right to Hearing

§ 431.220 When a hearing is required.

(a) The agency must grant an opportunity for a hearing to:

(1) Any applicant who requests it because his claim for services is denied or is not acted upon with reasonable promptness; and

(2) Any recipient who requests it because he or she believes the agency has taken an action erroneously.

(3) Any resident who requests it because he or she believes a skilled nursing facility or nursing facility has erroneously determined that he or she must be transferred or discharged; and

(4) Any individual who requests it because he or she believes the State has made an erroneous determination with regard to the preadmission and annual resident review requirements of section 1919(e)(7) of the Act.

(b) The agency need not grant a hearing if the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all recipients.

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56505, Nov. 30, 1992]

§ 431.221 Request for hearing.

(a) The agency may require that a request for a hearing be in writing.

(b) The agency may not limit or interfere with the applicant's or recipient's freedom to make a request for a hearing.

(c) The agency may assist the applicant or recipient in submitting and processing his request.

(d) The agency must allow the applicant or recipient a reasonable time, not to exceed 90 days from the date that notice of action is mailed, to request a hearing.

§ 431.222 Group hearings.

The agency—

(a) May respond to a series of individual requests for hearing by conducting a single group hearing;

(b) May consolidate hearings only in cases in which the sole issue involved is one of Federal or State law or policy;

(c) Must follow the policies of this subpart and its own policies governing hearings in all group hearings; and

(d) Must permit each person to present his own case or be represented by his authorized representative.

§ 431.223 Denial or dismissal of request for a hearing.

The agency may deny or dismiss a request for a hearing if—

(a) The applicant or recipient withdraws the request in writing; or

(b) The applicant or recipient fails to appear at a scheduled hearing without [illegible]cause

Procedures

§ 431.230 Maintaining services.

(a) If the agency mails the 10-day or 5-day notice as required under § 431.211 or § 431.214 of this subpart, and the recipient requests a hearing before the date of action, the agency may not terminate or reduce services until a decision is rendered after the hearing unless—

(1) It is determined at the hearing that the sole issue is one of Federal or State law or policy; and

(2) The agency promptly informs the recipient in writing that services are to be terminated or reduced pending the hearing decision.

(b) If the agency's action is sustained by the hearing decision, the agency may institute recovery procedures against the applicant or recipient to recoup the cost of any services furnished the recipient, to the extent they were furnished solely by reason of this section.

[44 FR 17932, Mar. 29, 1979, as amended at 45 FR 24883, Apr. 11, 1980]

§ 431.231 Reinstatement of services.

(a) The agency may reinstate services if a recipient requests a hearing not more than 10 days after the date of action.

(b) The reinstated services must continue until a hearing decision unless, at the hearing, it is determined that the sole issue is one of Federal or State law or policy.

(c) The agency must reinstate and continue services until a decision is rendered after a hearing if—

(1) Action is taken without the advance notice required under § 431.211 or § 431.214 of this subpart;

(2) The recipient requests a hearing within 10 days of the mailing of the notice of action; and

(3) The agency determines that the action resulted from other than the application of Federal or State law or policy.

(d) If a recipient's whereabouts are unknown, as indicated by the return of unforwardable agency mail directed to him, any discontinued services must be reinstated if his whereabouts become known during the time he is eligible for services.

§ 431.232 Adverse decision of local evidentiary hearing.

If the decision of a local evidentiary hearing is adverse to the applicant or recipient, the agency must—

(a) Inform the applicant or recipient of the decision;

(b) Inform the applicant or recipient that he has the right to appeal the decision to the State agency, in writing, within 15 days of the mailing of the notice of the adverse decision;

(c) Inform the applicant or recipient of his right to request that his appeal be a *de novo* hearing; and

(d) Discontinue services after the adverse decision.

§ 431.233 State agency hearing after adverse decision of local evidentiary hearing.

(a) Unless the applicant or recipient specifically requests a *de novo* hearing, the State agency hearing may consist of a review by the agency hearing officer of the record of the local evidentiary hearing to determine whether the decision of the local hearing officer was supported by substantial evidence in the record.

(b) A person who participates in the local decision being appealed may not participate in the State agency hearing decision.

§ 431.240 Conducting the hearing.

(a) All hearings must be conducted—

(1) At a reasonable time, date, and place;

(2) Only after adequate written notice of the hearing; and

(3) By one or more impartial officials or other individuals who have not been directly involved in the initial determination of the action in question.

(b) If the hearing involves medical issues such as those concerning a diagnosis, an examining physician's report, or a medical review team's decision, and if the hearing officer considers it necessary to have a medical assessment other than that of the individual involved in making the original decision, such a medical assessment must be obtained at agency expense and made part of the record.

§ 431.241 Matters to be considered at the hearing.

The hearing must cover—

(a) Agency action or failure to act with reasonable promptness on a claim for services, including both initial and subsequent decisions regarding eligibility;

(b) Agency decisions regarding changes in the type or amount of services;

(c) A decision by a skilled nursing facility or nursing facility to transfer or discharge a resident; and

(d) A State determination with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

[57 FR 56505, Nov. 30, 1992]

§ 431.242 Procedural rights of the applicant or recipient.

The applicant or recipient, or his representative, must be given an opportunity to—

(a) Examine at a reasonable time before the date of the hearing and during the hearing:

(1) The content of the applicant's or recipient's case file; and

(2) All documents and records to be used by the State or local agency or the skilled nursing facility or nursing facility at the hearing;

(b) Bring witnesses;

(c) Establish all pertinent facts and circumstances;

(d) Present an argument without undue interference; and

(e) Question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses.

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56506, Nov. 30, 1992]

§ 431.243 Parties in cases involving an eligibility determination.

If the hearing involves an issue of eligibility and the Medicaid agency is not responsible for eligibility determinations, the agency that is responsible for determining eligibility must participate in the hearing.

§ 431.244 Hearing decisions.

(a) Hearing recommendations or decisions must be based exclusively on evidence introduced at the hearing.

(b) The record must consist only of—

(1) The transcript or recording of testimony and exhibits, or an official report containing the substance of what happened at the hearing;

(2) All papers and requests filed in the proceeding; and

(3) The recommendation or decision of the hearing officer.

(c) The applicant or recipient must have access to the record at a convenient place and time.

(d) In any evidentiary hearing, the decision must be a written one that—

(1) Summarizes the facts; and

(2) Identifies the regulations supporting the decision.

(e) In a *de novo* hearing, the decision must—

(1) Specify the reasons for the decision; and

(2) Identify the supporting evidence and regulations.

(f) The agency must take final administrative action within 90 days from the date of the request for a hearing.

(g) The public must have access to all agency hearing decisions, subject to the requirements of Subpart F of this part for safeguarding of information.

§ 431.245 Notifying the applicant or recipient of a State agency decision.

The agency must notify the applicant or recipient in writing of—

(a) The decision; and

(b) His right to request a State agency hearing or seek judicial review, to the extent that either is available to him.

§ 431.246 Corrective action.

The agency must promptly make corrective payments, retroactive to the date an incorrect action was taken, and, if appropriate, provide for admission or readmission of an individual to a facility if—

(a) The hearing decision is favorable to the applicant or recipient; or

(b) The agency decides in the applicant's or recipient's favor before the hearing.

[57 FR 56506, Nov. 30, 1992]

Federal Financial Participation

§ 431.250 Federal financial participation.

FFP is available in expenditures for—

(a) Payments for services continued pending a hearing decision;

(b) Payments made—

(1) To carry out hearing decisions; and

(2) For services provided within the scope of the Federal Medicaid program and made under a court order.

(c) Payments made to take corrective action prior to a hearing;

(d) Payments made to extend the benefit of a hearing decision or court order to individuals in the same situation as those directly affected by the decision or order;

(e) Retroactive payments under paragraphs (b), (c), and (d) of this section in accordance with applicable Federal policies on corrective payments; and

(f) *Administrative costs incurred by the agency for— (1)* Transportation for the applicant or recipient, his representative, and witnesses to and from the hearing;

(2) Meeting other expenses of the applicant or recipient in connection with the hearing;

(3) Carrying out the hearing procedures, including expenses of obtaining the additional medical assessment specified in § 431.240 of this subpart; and

(4) Hearing procedures for Medicaid and non-Medicaid individuals appealing transfers, discharges

State Medicaid Plan - North Dakota
Federal Medicaid regulations

Hearing procedures for Nursing Facilities

Revision: HCFA-PM-93-1 (NPD)
January 1993

State/Territory: North Dakota

Citation	4.28 Appeals Process
42 CFR 431.152; AT-79-18 52 FR 22444; Secs. 1902(a)(28)(D)(i) and 1919(e)(7) of the Act; P.L. 100-203 (Sec. 4211(c)).	(a) The Medicaid agency has established appeals procedures for NFs as specified in 42 CFR 431.153 and 431.154. (b) The State provides an appeals system that meets the requirements of 42 CFR 431 Subpart E, 42 CFR 483.12, and 42 CFR 483 Subpart E for residents who wish to appeal a notice of intent to transfer or discharge from a NF and for individuals adversely affected by the preadmission and annual resident review requirements of 42 CFR 483 Subpart C.

a State's finding of noncompliance that has resulted in the denial, termination, or nonrenewal of its provider agreement.

(3) To an NF or ICF/MR that is dissatisfied with a determination as to the effective date of its provider agreement.

(b) *Special rules.* This subpart also sets forth the special rules that apply in particular circumstances, the limitations on the grounds for appeal, and the scope of review during a hearing.

[Amended in 59 FR 56232, Nov. 10, 1994; 61 FR 32348, June 24, 1996; 62 FR 43931, Aug. 18, 1997]

§ 431.152 State plan requirements.

The State plan must provide for appeals procedures that, as a minimum, satisfy the requirements of §§ 431.153 and 431.154.

[Amended at 59 FR 56232, Nov. 10, 1994; 61 FR 32348, June 24, 1996]

§ 431.153 Evidentiary hearing.

(a) *Right to hearing.* Except as provided in paragraph (b) of this section, and subject to the provisions of paragraphs (c) through (j) of this section, the State must give the facility a full evidentiary hearing for any of the actions specified in § 431.151.

(b) *Limit on grounds for appeal.* The following are not subject to appeal:

(1) The choice of sanction or remedy.

(2) The State monitoring remedy.

(3) [Reserved]

(4) The level of noncompliance found by a State except when a favorable final administrative review decision would affect the range of civil money penalty amounts the State could collect.

(5) A State survey agency's decision as to when to conduct an initial survey of a prospective provider.

(c) *Notice of deficiencies and impending remedies.* The State must give the facility a written notice that includes:

(1) The basis for the decision; and

(2) A statement of the deficiencies on which the decision was based.

(d) *Request for hearing.* The facility or its legal representative or other authorized official must file written request for hearing within 60 days of receipt of the notice of adverse action.

(e) *Special rules: Denial, termination or nonrenewal of provider agreement. (1) Appeal by an ICF/MR.* If an ICF/MR requests a hearing on denial, termination, or nonrenewal of its provider agreement—

(i) The evidentiary hearing must be completed either before, or within 120 days after, the effective date of the adverse action, and

(ii) If the hearing is made available only after the effective date of the action, the State must, before that date, offer the ICF/MR an informal reconsideration that meets the requirements of § 431.154.

(2) *Appeal by an NF.* If an NF requests a hearing on the denial or termination of its provider agreement, the request does not delay the adverse action and the hearing need not be completed before the effective date of the action.

(f) *Special rules: Imposition of remedies.* If a State imposes a civil money penalty or other remedies on an NF, the following rules apply:

(1) *Basic rule.* Except as provided in paragraph (f)(2) of this section (and notwithstanding any provision of State law), the State must impose all remedies timely on the NF, even if the NF requests a hearing.

(2) *Exception.* The State may not collect a civil money penalty until after the 60-day period for request of hearing has elapsed or, if the NF requests a hearing, until issuance of a final administrative decision that supports imposition of the penalty.

(g) *Special rules: Dually participating facilities.* If an NF is also participating or seeking to participate in Medicare as an SNF, and the basis for the State's denial or termination of participation in Medicaid is also a basis for denial or termination of participation in Medicare, the State must advise the facility that—

(1) The appeals procedures specified for Medicare facilities in part 498 of this chapter apply, and

(2) A final decision entered under the Medicare appeals procedures is binding for both programs.

(h) *Special rules: Adverse action by HCFA.* If HCFA finds that an NF is not in substantial compliance and either terminates the NF's Medicaid provider agreement or imposes alternative remedies on the NF (because HCFA's findings and proposed remedies prevail over those of the State in accordance with § 488.452 of this chapter), the NF is entitled only to the appeals procedures set forth in part 498 of this chapter, instead of the procedures specified in this subpart.

(i) *Required elements of hearing.* The hearing must include at least the following:

(1) Opportunity for the facility—

(i) To appear before an impartial decision-

maker to refute the finding of noncompliance on which the adverse action was based;

(ii) To be represented by counsel or other representative; and

(iii) To be heard directly or through its representative, to call witnesses, and to present documentary evidence.

(2) A written decision by the impartial decision-maker, setting forth the reasons for the decision and the evidence on which the decision is based.

(j) *Limits on scope of review.* Civil money penalty cases. In civil money penalty cases—

(1) The State's finding as to a NF's level of noncompliance must be upheld unless it is clearly erroneous; and

(2) The scope of review is as set forth in § 488.438(e) of this chapter.

[Amended at 59 FR 56232, Nov. 10, 1994, 61 FR 32348, June 24, 1996, 62 FR 43931, Aug. 18, 1997, 64 FR 39934, July 23, 1999]

§ 431.154 Informal reconsideration for ICFs/MR.

(a) If the State decides to provide the opportunity for an evidentiary hearing required by § 431.153(a) only after the effective date of a denial, or nonrenewal of participation, the State must offer the facility an informal reconsideration, to be completed before the effective date.

(b) Written notice to the facility of the denial, termination or nonrenewal and the findings upon which it was based;

(c) A reasonable opportunity for the facility to refute those findings in writing, and

(d) A written affirmation or reversal of the denial, termination, or nonrenewal

[Amended at 59 FR 56233, Nov. 10, 1994, 61 FR 32348, June 24, 1996]

Subpart E—Fair Hearings for Applicants and Recipients

SOURCE: 44 FR 17932, Mar. 29, 1979, unless otherwise noted.

General Provisions

§ 431.200 Basis and purpose.

This subpart implements section 1902(a)(3) of the Act, which requires that a State plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly. This subpart also prescribes procedures for an opportunity for hearing if the Medicaid agency takes action to suspend, terminate, or reduce services. This subpart also implements sections 1819(f)(3), 1919(f)(3), and 1919(e)(7)(F) of the Act by providing an appeals process for individuals proposed to be transferred or discharged from skilled nursing facilities and nursing facilities and those adversely affected by the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

[57 FR 56505, Nov. 30, 1992]

§ 431.201 Definitions.

For purposes of this subpart:

Action means a termination, suspension, or reduction of Medicaid eligibility or covered services. It also means determinations by skilled nursing facilities and nursing facilities to transfer or discharge residents and adverse determinations made by a State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

Adverse determination means a determination made in accordance with sections 1919(b)(3)(F) or 1919(e)(7)(B) of the Act that the individual does not require the level of services provided by a nursing facility or that the individual does or does not require specialized services.

Date of action means the intended date on which a termination, suspension, reduction, transfer or discharge becomes effective. It also means the date of the determination made by a State with regard to the preadmission screening and annual resident review requirements of section 1919(e)(7) of the Act.

De novo hearing means a hearing that starts over from the beginning.

Evidentiary hearing means a hearing conducted so that evidence may be presented.

Notice means a written statement that meets the requirements of § 431.210.

Request for a hearing means a clear expression by the applicant or recipient, or his authorized representative, that he wants the opportunity to present his case to a reviewing authority.

[44 FR 17932, Mar. 29, 1979, as amended at 57 FR 56505, Nov. 30, 1992]

§ 431.202 State plan requirements.

A State plan must provide that the requirements of §§ 431.205 through 431.246 of this subpart are met.

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE
REGARDING HOUSE BILL No. 1455
February 5, 2001

Chairman DeKrey and members of the House Judiciary Committee, my name is Melissa Hauer. I am the Director of the Legal Advisory Unit for the Department of Human Services. I appear before you today to testify regarding House Bill 1455. The Department is opposed to this bill and urges the Committee to give it a do not pass recommendation.

Current law, found at NDCC 54-57-03, specifies which agencies must use an administrative law judge provided by the office of administrative hearings to preside over their appeals. NDCC 28-32-13 provides that if the agency head, or another person authorized by the agency head or by law to issue a final order is not presiding over the appeal, the person presiding (the administrative law judge) shall issue recommended findings of fact, conclusions of law and a recommended order. The Department is concerned that that there may be some who mistakenly assume that the right or duty to preside over an administrative appeal is the same as the right or duty to render a final decision in such an appeal.

Of concern to the Department is section three of the bill. Subsection three on page five of the bill states that all agencies required to have their administrative proceedings conducted by the office of administrative hearings must also accept the administrative law judge's determination in that appeal as final. The current statute exempts several agencies from the requirement of using the office of administrative hearings to provide an administrative law judge to preside over administrative appeals. The Department is not listed as one of the exempt agencies. When this statute was originally passed, the Department did not oppose the requirement of

having an administrative law judge preside over its hearings and issue findings and orders so long as their findings and orders were recommended and not final (as currently required by NDCC 28-32-13). That is so because the federal laws and regulations governing several of our programs require that the agency make the final determination in an administrative appeal. If we do not fulfill this requirement, we will be in violation of federal statute and will risk losing millions of dollars of federal money.

This bill, if passed, would create problems with the following programs administered by the Department:

1. The federal law governing the Medicaid program states that the "State plan for medical assistance must provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." (42 U.S.C. section 1396a(a)(3)). This means that the responsibility to make a final determination cannot be delegated outside the agency.

2. The Food Stamp program requires that the hearing authority is the person designated by the state agency to render a final administrative decision. (7 C.F.R. 273.15(n)).

3. The Vocational Rehabilitation Act of 1998 allows states the option of review of an administrative law judge's decision by the head of the agency. North Dakota chose that option and it is contained in section 4.16(b)(2) of our state Vocational Rehabilitation plan. The requirements of this bill would mean that the state would have to seek federal approval to amend its Vocational Rehabilitation plan and would risk losing federal funds until that process were completed.

If the bill goes forward and the office of administrative hearings is to be the final authority in administrative appeals, the Department would request consideration of an amendment to page four, line sixteen to include the Department in the list of agencies that are exempt from the requirement of having their appeals conducted by the office of administrative hearings. That in turn would mean that the amendments contained on page five starting at line 4 which would require the administrative law judge's decision to be final would not apply to the Department. Otherwise, the State will be in violation of federal law and will risk losing a great deal of federal money in its Medicaid, Food Stamp and Vocational Rehabilitation programs.

For these reasons, the Department urges a do not pass recommendation on House Bill 1455. I would be happy to try to answer any questions the Committee members may have. Thank you.

Presented by:

Melissa Hauer, Director
Legal Advisory Unit
ND Dept. of Human Services

TESTIMONY
BY
CALVIN N. ROLFSON
SPECIAL ASSISTANT ATTORNEY GENERAL
NORTH DAKOTA BOARD OF NURSING
REGARDING
ENGROSSED HOUSE BILL 1455

My name is Cal Rolfson. I am the Special Assistant Attorney General for the North Dakota Board of Nursing. I appear on behalf of the Board to express its serious concern regarding Engrossed House Bill 1455.

There are two provisions in this Engrossed Bill that would be adverse to the interests of the Board's statutory responsibility. Each will be discussed separately below.

DE NOVO REVIEW

"De novo" means to hear or review "anew." As I interpret this provision (as found on page 4, lines 12 and 13, and on page 5, lines 2 and 3 of the Engrossed Bill) a party aggrieved by the decision of the administrative law judge may seek a new review, which may include an entirely new full-fledged evidentiary hearing, before the district court. Aside from adding to the significant cost burden of the district court in doing so, there is absolutely no reason to require a second hearing or "review" once a full administrative "on the record" hearing has been conducted before the administrative law judge.

Having a de novo review possibility will create significant additional cost to the Board of Nursing, which will, of course, necessarily need to be passed on to the 12,000+ nurse licensees in the state of North Dakota in the form of increased license

fees. The Board of Nursing conducts dozens of nursing investigations each year and holds numerous formal administrative hearings before an administrative law judge each year. Those hearings are expensive, albeit necessary to protect the health and safety of the public which is the legislative policy directed to the Board and specifically set out by statute in NDCC 43-12.1-01.

There is no demonstrated necessity for this Bill. It will adversely affect in the same fashion a host of other administrative agencies that do not desire this legislation.

If you add the dozens of administrative agencies whose administrative hearings will be subject to a de novo review under this proposed legislation, it may be safe to assume that the additional cost to administrative agencies and thus passed on to the licensees, will be significant state-wide. Why should the few respondents or one administrative agency, through this proposed legislation, cause potential financial hardship to the vast majority of licensees who are not brought to administrative hearing?

FINALITY OF ADMINISTRATIVE LAW JUDGE'S ORDER

The second provision of this proposed legislation to which the North Dakota Board of Nursing has serious concern is generally found on page 6, lines 3-18 of the Engrossed Bill.

The particular provision of concern (found on page 6, lines 3-7) is contrary to decades of responsible due process presently utilized by the Board and apparently the vast majority of all other administrative agencies governed by this proposed

legislation. Currently the Board designates an administrative law judge to conduct hearings and to issue recommended findings of fact, conclusions of law and a recommended order. The Board is free to modify such recommendations, but seldom does. I am aware of only one case in which the Board had modified the findings and order of the administrative law judge following a hearing.

It is important to note that it is the Board of Nursing, and not an administrative law judge, to which the legislative public policy of North Dakota is directed to protect the health and safety of the public by regulating the practice of nursing. (Again, see NDCC 43-12.1-01, a copy of which is attached for your easy reference.) To require an administrative law judge to supplant the authority of the Board in regulating the practice of nursing may amount to an ambiguous conflict with NDCC 43-12.1-01. That section of the law is the very reason why the legislature has seen fit to require a broad-based board to regulate nursing practice and discipline nurses, not an administrative law judge with whose decisions the Board may or may not agree. To supplant that authority of a gubernatorily appointed board with that of a single administrative law judge appears to be imprudent public policy.

If this portion of Engrossed House Bill 1455 passes, the Board will be left with the option to hold all administrative hearings in front of the full nine-member Board with an administrative law judge service merely as the procedural hearing officer. Not only will that increase the cost to the Board through extended bi-monthly Board hearings to accommodate administrative law cases, but will duplicate costs of administrative law hearing by having both the Board and an ALJ present.

CONCLUSIONS

The remaining portions of Engrossed House Bill 1544 are not of concern to the Board. However, for the reasons set out above, I urge the Committee to give a DO-NOT-PASS recommendation to Engrossed Bill 1455 or to amend out the objectionable provisions set out above.

On behalf of the Board, I express my sincere appreciation for being able to present these views for the benefit of the committee.

Calvin N. Rolfson
Special Assistant Attorney General
North Dakota Board of Nursing

43-12.1-01. Statement of policy. The legislative assembly finds that the practice of nursing is directly related to the public welfare of the citizens of the state of North Dakota and is subject to regulation and control in the public interest to assure that qualified, competent practitioners and high quality standards are available. The legislative assembly recognizes that the practice of nursing is continually evolving and responding to changes within health care patterns and systems and recognizes the existence of overlapping functions within the practice of nursing and other providers of health care.

Source: S.L. 1977, ch. 400, § 1; 1991, ch. 453, § 1; 1995, ch. 403, § 2.

Effective Date.
The 1995 amendment of this section by section 2 of chapter 403, S.L. 1995 became effective July 1, 1995, pursuant to N.D. Const., Art. IV, § 13.

Note.
Section 18 of chapter 403, S.L. 1995, provides: "**Transition.** Rights and duties that have matured, penalties that were incurred, and proceedings that were commenced before August 1, 1995 remain valid under the law in effect at the time of the occurrence. Any person holding a license or registration to practice nursing that is valid on August 1, 1995 is deemed to be licensed or registered under the provisions of this Act and is eligible for renewal of the license or registration under the conditions and standards prescribed in this Act. Any person holding a lapsed license or registration on August 1, 1995 may become licensed or registered by applying for reinstatement according to the standards prescribed in this Act."

43-12.1-02. Definitions. In this chapter, unless the context or subject matter otherwise requires:

1. "Advanced practice registered nurse" means a person who holds a current license to practice in this state as an advanced practice registered nurse and either has a graduate degree with a nursing focus or has completed the educational requirements in effect when the person was initially licensed.
2. "Board" means the North Dakota board of nursing.
3. "Licensed practical nurse" means a person who holds a current license to practice in this state as a licensed practical nurse and either has an associate degree with a major in nursing or has completed the educational requirements in effect when the person was initially licensed.
4. "Nurse" means any person currently licensed as an advanced practice registered nurse, registered nurse, or licensed practical nurse.
5. "Nurse assistant" means a person who is authorized by the board to perform nursing tasks delegated and supervised by a licensed nurse.
6. "Nursing" means the performance of acts utilizing specialized knowledge, skills, and abilities for people in a variety of settings. Nursing includes the following acts, which may not be deemed to include acts of medical diagnosis or treatment or the practice of medicine as defined in chapter 43-17:
   a. The maintenance of health and prevention of illness.
   b. Diagnosing human responses to actual or potential health problems.
   c. Providing supportive and restorative care and nursing treatment, medication administration, health counseling and teaching, case finding and referra
   ing changes in the
   d. Administration, te
   of health and nurs
   e. Collaboration with
   mentation of the t
   health care regim
   licensed under titl
7. "Prescriptive practice
   nizing agents, or devi
   licensed pharmacist.
8. "Registered nurse" m
   practice in this stat
   baccalaureate degree
   educational requirem
   licensed.

Source: S.L. 1977, ch. 400, § 1, 516, § 1; 1989, ch. 519, § 1; 1991, § 2; 1991, ch. 454, § 1; 1995, ch. 40

Effective Date.
The 1995 amendment of this se

43-12.1-03. License re
who provides nursing care to
license or registration issued
practice nursing, offer to prac
or use any title, abbreviation
practicing nursing or assistin
that person is currently lic
currently licensed advanced
proved by the board; a curr
abbreviation "R.N."; a curre
abbreviation "L.P.N."; and a p
use the title identified by th
"nurse" or be referred to as a

Source: S.L. 1977, ch. 400, § 1, 403, § 4.

Effective Date.
The 1995 amendment of this se

43-12.1-04. (Effective from provisions of chapter

1. Persons who perform
   ter.
2. Students practicing nu
   education program.
3. Legally licensed nurses
   United States govern
   agencies.
4. A nurse licensed by a
   requires the nurse to n
   health care.

HB 1455 as it conflicts with implementation of the Medicaid Program.

The bill, as introduced, requires that the Office of Administrative Hearing ALJ assigned to hear an appeal would also be authorized to issue the final decision in most administrative cases, including DHS' appeals.

Under the federal regulations implementing the Medicaid Program, which the State of North Dakota is required to follow, the Department must make the final decision in cases appealing eligibility determinations. The regulations specifically provide:

> If other State or local agencies or offices perform services for the Medicaid agency, they must not have the authority to change or disapprove any administrative decision of that agency, **or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency.**

42 C.F.R. § 431.10(e)(3). Other federal Medicaid regulations requiring state agency hearings for adverse agency actions also anticipate the state agency will make the final decisions.

To the extent the Long Term Care Association has expressed an interest in this bill, it is a mistake. Appeals from the Department's rate setting for nursing facilities do not fall under N.D.C.C. § 28-32. The federal Medicaid regulations do not give nursing homes a right of appeal for rate setting decisions of a State agency. The North Dakota legislature did give them such a right at N.D.C.C. § 50-24.4-18, which specifically states that the Department makes the final decision. A change to chapter 28-32 will not affect LTC appeals.

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Tracie

Here is the
memo from Doug
Baker + Jean Mullen
regarding Medicaid + 1455

TESTIMONY ON HOUSE BILL 1455
SENATE JUDICIARY COMMITTEE
MARCH 14, 2001

Skilled nursing facilities in North Dakota are regulated largely by the North Dakota Department of Human Services. Any facility with residents receiving medicaid (medical assistance) benefits are subject to the rate setting process promulgated by the Department of Human Services. The Department interprets these rules, and establishes reimbursement rates for all nursing facilities. The rates established by the Department apply to all residents, regardless of the resident's medicaid status. The reimbursement rates effectively set the operating budget for each facility.

A facility may formally disagree with the rates established by the Department, by asking the Department to reconsider its rate determination. In nearly all cases, the Department has denied these requests.

A facility may appeal the Department's denial of reconsideration by submitting a notice of appeal to the Department. The Department requests the designation of an administrative law judge from the Office of Administrative Hearings.

The administrative law judge conducts a hearing. This is the first opportunity a nursing facility has to present "its side of the story" to an unbiased third party. At the hearing, the Department and the facility present evidence related to the manner in which the facility's rates were established. Typically, administrative law judges do not understand the ratesetting regulations, and have admitted, during a hearing, that the Department's interpretation is heavily relied upon. The administrative law judge considers the evidence and issues recommended findings of fact, recommended conclusions of law and a recommended order. These recommendations are then given back to the Department. The Department is permitted to amend or reject anything the judge has recommended. The final order after the hearing is issued by the Department, not the administrative law judge. An administrative law judge's recommendations which favor the facility can be overturned by the Department.

The facility is permitted to appeal to the district court and finally to the North Dakota Supreme Court. These courts defer to the Department's "expertise" in ratesetting matters, and give the Department's interpretation "appreciable deference". North Dakota Supreme Court cases are published and available

for review. In the last twenty years, a nursing facility has not succeeded in a ratesetting challenge against the Department.

Under the present law, North Dakota nursing facilities must challenge the Department's established rate through a process which weighs heavily against its success. Any challenge by a facility requires time, energy and frequently, the cost for an attorney to represent the facility. Nursing facilities have largely decided such efforts are futile. Valid and legitimate disputes over rates have gone unchallenged and unheard because the system is fundamentally unfair.

The North Dakota Long Term Care Association supports HB 1455. The changes proposed by HB 1455 protect both parties in an administrative hearing. HB 1455 would require an independent administrative law judge from the Office of Administrative Hearings to preside over an administrative appeal and to issue a final order. HB 1455, if passed, would remove the agency's unilateral authority to arbitrarily change or reject the decision made by the administrative law judge. HB 1455 does not limit or impair the agency's authority in any other sense. This bill allows both parties to an administrative appeal to present evidence in a forum which is fundamentally fair and unbiased.

Thank you for your thoughtful consideration of HB 1455. Your support of this bill is appreciated. I would be happy to answer any questions you might have at this time.

Leslie Bakken Oliver
N.D. Lobbyist # 386

North Dakota Long Term Care Association
Shelly Peterson, President
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MEMORANDUM

TO: Fifty-seventh Legislative Assembly
State of North Dakota
Senate Judiciary Committee

FROM: Allen C. Hoberg, Director
Office of Administrative Hearings

RE: House Bill No. 1455

DATE: March 14, 2001

The Office of Administrative Hearings did not seek to have this bill introduced. However, the matter of final decision-making authority by ALJs has been a subject of conversation and study on a national level lately, and it has recently been a subject of conversation and study with OAH's statutory advisory body, the State Advisory Council for Administrative Hearings, though the SAC has taken no position on it. I believe that this bill as introduced is a conceptually sound bill. But, you are probably going to hear some good arguments for and against this bill. However, this bill as amended is cause for concern.

The Office of Administrative Hearings appears today in support of the original bill for three reasons. (1) this bill goes one step further down the road toward fairness in all administrative hearings; (2) it should not cost state agencies,

including the office of administrative hearings, any additional monies to implement, and it may result in time and monetary savings for OAH and the agencies it serves; and (3) it avoids the need for the agency head to consult with attorneys and others about a decision, after a recommended decision is issued but prior to the issuance of a final decision.

OAH currently does issue final decisions for many state agencies, both for agencies within its mandatory jurisdiction and for agencies that voluntarily use its hearing officer services. OAH already issues final decisions for all Veterans Preference hearings, for all state employee grievance or job discipline hearings, for all DPI due process special education hearings, for all Bank of North Dakota Student Loan hearings, and for many other agency hearings when the agency head chooses to have OAH issue a final decision. All other decisions issued by OAH administrative law judges are recommended decisions for which the agency head issues the final decision. The agency head may accept, reject, or modify the ALJ's recommended decision. Under N.D.C.C. ch. 28-32, the only other option currently available to agencies that use OAH, besides the recommended decision/final decision format, is for the agency to request that the OAH ALJ serve only as procedural hearing officer. If this option is used, the agency head

must actually be present at the hearing. The hearing officer conducts the hearing but the agency head issues the final (the only) decision.

This bill as introduced requires all state agencies under the mandatory jurisdiction of OAH to request that OAH conduct the hearing and issue a final decision. However, it retains the option for boards and commissions to use a procedural hearing officer. Boards and commissions may not request a recommended decision from an OAH ALJ. No one under OAH's jurisdiction may any longer request that the designated OAH ALJ issue a recommended decision. However, every agency under OAH jurisdiction would have the right to appeal the final order issued by the ALJ to the courts.

This bill is in line with a recent trend developing nationwide to have independent hearing officers conduct the hearing and issue a final, rather than a recommended, decision. In South Carolina OAH ALJs now issue final decisions for all cases under OAH jurisdiction. Agencies may appeal the decision to the court system if they do not agree with it. The only exception in South Carolina is that in decisions for boards and commissions a party may appeal to the board or commission before appealing to the courts, but it is an appeal of a final decision to the board or commission, not a review of a recommended decision. South

Carolina's OAH has very broad jurisdiction over state agency administrative hearings.

In Maryland about 85% of the OAH ALJ's decisions for agencies are final decisions. [The Maryland OAH issues final decisions for Budget & Management, State Personnel, Department of Education, Gaming hearings, Health and Mental Hygiene Department hearings, Public Information Act hearings, Natural Resources Department hearings, Motor Vehicle Administration hearings (drivers license, suspension, etc.), Insurance Administration hearings, Correctional Department hearings (*e.g.*, inmate grievance), Human Resources Department (human services) hearings, and Housing & Community Development Department hearings.] Maryland's OAH has very broad jurisdiction over state administrative hearings.

In Oregon about 80% of the OAH ALJ decisions are final decisions. [The principal subject matters for the Oregon OAH issuing final decisions are unemployment insurance cases, implied consent (drunken driving cases), and social services (human services) cases.] Oregon's OAH has very broad jurisdiction over state agency administrative hearings.

In Minnesota OAH ALJs issue final decisions only for a portion of its agency caseload. [The Minnesota OAH issues final decisions for all Workers Compensation Bureau hearings, human rights claims, local government boundary/incorporation disputes, and for sex offender community notification classification appeals.] Minnesota is also a state with fairly broad jurisdiction over state agency administrative hearings. But, for most cases, OAH ALJs still issues recommended decisions.

In Washington OAH ALJs issue final decisions only for a small portion of the agencies' caseload. [The Washington OAH issues final decisions for Department of Labor & Industries (contractor registration hearings), Department of Social & Health Services (juvenile parole revocation hearings), Human Rights Commission (employment discrimination hearings), Superintendent of Public Instruction (special education, teacher certification, student transfer, bus driver, and food program hearings), and Washington State Patrol (drug forfeiture hearings).] Washington's OAH also has fairly broad jurisdiction over state agency administrative hearings. But, for most cases, Washington's OAH ALJs still issues recommended decisions.

California's OAH is the nation's oldest, but its jurisdiction is extremely small. Most state agencies are outside of its jurisdiction. For agencies in its jurisdiction, the California OAH issues only about 10% final decisions. [The biggest client agency for which it issues only final decisions is the Department of Developmental Disabilities.]

Massachusetts' Division of Administrative Law is also a central panel with limited jurisdiction. Within its jurisdiction it issues final decisions for some agencies. [The Massachusetts DAL issues final decisions for nursing home and medical service provider rate hearings, hearings on payments to special needs schools, hearings on construction contract disputes, hearings on transfers of the mentally retarded, hearings on veteran's benefits, and hearings on disputes about the prevailing wage.] However, by law, even when DAL ALJs issue a recommended decision, the agency must give "deference" to the findings of fact in the decision of the ALJ when reviewing it for a final decision, and must give "substantial deference" to findings of fact of the ALJ when they are based upon credibility determinations.

The South Dakota OAH is also a central panel with limited jurisdiction. It has final decision-making authority only for property tax appeal hearings. In all other hearings under its jurisdiction it issues recommended decisions.

In North Carolina, all the decisions of OAH ALJs are recommended decisions, but there are specific, strict statutory guidelines for agency review of recommended decisions.

In the remainder of the states having central panels like North Dakota's OAH, OAH ALJs primarily issue recommended decisions and the agency head issues the final decision. As of December 1, 2000, 26 states have central panels. Some of these states, as in North Dakota, give the option to the agency head to ask for a final decision on a case-by-case basis.

Currently, when an OAH ALJ issues a recommended decision on an agency matter and the agency head is required to issue a final decision, the agency head may seek the advice of a "staff assistant," usually program staff, agency attorneys, or other agency personnel, before making a final decision. However, it is forbidden by law for the agency head to talk to the ALJ or to the parties, or to the attorney who handled the matter at hearing for the agency, unless the agency

head holds a session where all the parties can again be heard before final decision is made. *See* N.D.C.C. § 28-32-12.1 which forbids ex parte contacts. Under this bill, if OAH ALJs issued a final decision, obviously the agency head would not have to issue a final decision. If the agency were a party in the hearing, the agency would then only have to decide whether to appeal the ALJ's decision to the courts. In discussions about appeals the agency attorney who handled the hearing could consult with the agency head. There should less involvement of agency personnel if an ALJ issues a final decision because the agency head does not have to issue any more final decisions and it will only be those decisions adverse to the agency with which the agency head and others will have to concern themselves regarding the question of whether to appeal.

It will not involve any more time or effort for an OAH ALJ to issue a final decision as opposed to a recommended decision. The process is the same.

The agency will still be officially responsible for notifying the parties about the final decision and for maintaining the record and sending it to the courts if there is an appeal because it is still an agency matter, but the actual notification of the parties about the final decision can be accomplished by the ALJ when the final decision is issued.

The most important element of final decision making is the question of fairness. With the passage of this bill as introduced, all the parties, including the agency when it is a party, will be on the same level. All must abide by the decision of the ALJ and each will only have the right to challenge the decision on appeal to the courts. The agency would no longer be able to disagree with the ALJ, state its reasons for disagreeing, and then issue different findings of fact and different conclusions of law in a final decision which either modifies or rejects the ALJ's decision. The other parties in a hearing do not have this option. The argument is that the agencies should not have it either.

Of course, agencies would still retain statutory and rulemaking authority. With the final decision-making authority, fact-finding would be the complete province of the ALJ. However, final decision-making authority would still be substantially influenced by statutes and rules, as well as prior case law from the courts.

Of concern to OAH is the amendment to N.D.C.C. § 28-32-19, which allows appellants of final administrative hearing decisions to request de novo review in the district court. The requesting appellant could be an agency or some other party. If a final decision is issued by an independent ALJ, it seem unnecessary

to allow any party the right to request de novo review in the district court, on appeal. I talk more about the possible impact of this amendment in the fiscal note I wrote after these amendments were passed.

Without the amendment to 28-32-19, OAH believes that this is a conceptually sound bill. It is another step toward complete fairness in administrative hearings.

Testimony on House Bill 1455
Senate Judiciary Committee
March 14, 2001
By Christine Hogan, Executive Director
State Bar Association of North Dakota

Chair Traynor and members of the Committee, my name is Christine Hogan, and I am speaking here today on behalf of the State Bar Association of North Dakota. The Legislative Committee and the Board of Governors of the Association opposes the amendments added to this bill in the House that inserted the concept of a de novo review by the district court in an appeal from a determination of an administrative agency.

The Bar Association has serious concerns about the impact that requests for de novo review in district court would almost certainly have on the judicial system. The bill offers *de novo review* as an alternative to the usual appeal *on the record* from an administration agency decision that we have now. But, as a practical matter, it would be the *only* alternative. There would be no reason for the losing party not to request a de novo review. Thus, in reality, you would be replacing the current appeal procedure set forth in § 28-32-19 and all the case law that has been developed to interpret it. In other words, every decision of an administration agency would be subject to de novo review in district court. That is a problem. There is no good public policy to create such a problem.

This bill would cause a significant increase in the number of cases appealed to district court and a corresponding increase in the burden on the court system. Under the current system, only a percentage of cases are appealed from administrative agency decisions. Many claimants feel they cannot meet the statutory standards of review to overturn an agency decision. That is because current law accords significant deference to agency decisions. (§ 28-32-19 N.D.C.C.)

But if de novo review were always an option on appeal, the losing claimant would have no reason not to take his or her chances in a new proceeding in district court. It would probably be malpractice for the claimant's attorney *not* to request a de novo hearing.

There is no good policy reason to change the current appeal procedure. Administrative agency decisions are accorded deference under the law because the agency has expertise in the subject matter. But more importantly, as a policy matter, there is no reason to encourage more court proceedings. Multiplying the number of hearings that a litigant may request as of right would not only strain limited judicial resources, it would also increase the costs and legal fees of the litigants—both private parties and public agencies. This would ultimately result in higher costs to the public in terms of higher agency budgets and the need for more court personnel to handle increased caseloads. No good public policy reasons have been advanced to justify making this change in the appeal procedure.

For these reasons, the State Bar Association opposes the de novo review concept in House Bill 1455.

Thank you . I would be pleased to answer any questions.

PEARCE & DURICK

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OF COUNSEL
HARRY J. PEARCE

March 14, 2001

Dennis Schulz, Secretary-Treasurer
North Dakota Real Estate Commission
314 East Thayer Avenue
Bismarck, ND 58501

Re: House Bill 1455 and amendments

Dear Dennis:

You asked me to review and comment on House Bill 1455, and the proposed amendments thereto, as this legislation would impact the North Dakota Real Estate Commission. House Bill 1455 would amend certain provisions of the Administrative Agencies Practices Act, Chapter 28-32 N.D.C.C. The provisions of this bill which would have the greatest impact on the Commission are: (1) allowing for de novo review of the Commission's Orders by the district court (Section 3); and, (2) requiring the Administrative Law Judge to issue the final order for the Commission if the ALJ conducts the hearing and prepares the findings of fact and conclusions of law and not allowing the ALJ to issue recommended findings of fact and conclusions of law to the Commission (Section 5, ¶3).

The proposed amendments to § 28-32-19 N.D.C.C. contained in Section 3 of the Bill would allow for de novo review of decisions by the Real Estate Commission in state district court. De novo review means that a complainant who is not satisfied with an order issued by the Commission could request a new hearing in district court. The matter would be re-litigated in its entirety and the district court would not be obligated to review or give any deference to the decision reached by the Commission. Under the current state of the law, as contained in § 28-32-19, when a district court reviews a decision of an administrative agency, the court only reviews the record of the agency proceedings. The court does not re-hear the case and does not substitute its judgment for the judgment of the agency on substantive matters. The court is required to affirm the decision of the administrative agency unless the order is contrary to law, violates the constitutional or due process rights of the complainant, the

findings of fact are not supported by a preponderance of the evidence, or the conclusions of law are not supported by the findings of fact.

If HB 1455 were to pass, any complainant receiving an adverse decision from the Commission could request that the matter be re-tried, in its entirety, before the district court. Such a procedure would make the administrative hearing procedures afforded by the Commission meaningless. The expertise of the real estate professionals on the Commission who initially heard and decided the complaint would be disregarded. Instead, this matter would be heard by a district court judge who has no particular expertise in real estate licensee law matters. Trying a complaint de novo in district court would significantly increase the cost of the complaint process. In addition, the final outcome of any action by the Commission would likely be delayed by several months. The amendments to Section 28-32-19 contained in Section 3 of HB 1455 seem to be counter to the underlying goals of the Administrative Agencies Practices Act of providing a speedy, relatively inexpensive resolution to a dispute, with the determination being made by persons with expertise in that particular profession.

The amendments contained in Section 5 of HB 1455 pertain to the role of the administrative hearing officer in adjudicative proceedings. If the hearing officer conducts the hearing and makes findings of fact and conclusions of law, the hearing officer, and not the agency, would be required to issue the final order. An agency could no longer use a hearing officer to issue recommended findings and conclusions, as is the case under the current law. HB 1455 would permit the Commission to continue its current usual practice of using a hearing officer for procedural matters only with the Commission preparing its own findings of fact, conclusions of law and order. However, HB 1455 would take away the option of using a hearing officer to issue recommended findings and conclusions, with the Commission making the final determination as to whether or not to adopt the hearing officer's recommendations. I can certainly envision circumstances when it might be desirable to use an ALJ to make recommended findings and conclusions for the Commission. If HB 1455 were to pass, and the Commission wanted to use a hearing officer to conduct the hearing and make findings of fact and conclusions of law, then the hearing officer, and not the Commission, would issue the final order. In such a case, the hearing before the Commission, which is required by section 43-23-11.1(3) N.D.C.C. before a licensee can be disciplined, would be meaningless. While section 43-23-11.1(1) N.D.C.C. currently provides that the Commission has the authority to investigate complaints and discipline its licensees for violations of the statutes and regulations governing real estate licensees, under HB 1455 such authority would be taken away from the Commission and given to the hearing officer in those cases in which the ALJ conducts the hearing and makes findings of fact and conclusions of law.

In summary, I believe HB 1455 potentially could have a significant adverse impact on the Commission's statutory authority to investigate consumer complaints, conduct hearings, and discipline licensees. Passage of HB 1455 would likely increase the cost of the complaint procedure, delay the final resolution of complaints, and essentially render the administrative complaint procedure meaningless. I believe the Commission should strongly oppose the passage of HB 1455.

If you have any questions or comments regarding any of the matters discussed in this letter, please let me know. Thank you.

Very truly yours,

PEARCE & DURICK, P.L.L.P.

BY David E. Reich
David E. Reich
Special Assistant Attorney General to the
North Dakota Real Estate Commission

DER/lf

Engrossed House Bill No. 1455

Fifty-seventh Legislative Assembly
Before the Senate Judiciary Committee
March 14, 2001

Testimony of Brent J. Edison
North Dakota Workers Compensation

Mr. Chairman, Members of the Committee:

My name is Brent Edison. I am the Vice President of Legal and Special Investigations for North Dakota Workers Compensation (NDWC) and I am here to testify in opposition to sections 3 and 4 of 2001 Engrossed House Bill No. 1455.

The Workers Compensation Board of Directors adopted a neutral position on the original bill but opposes the amendments engrossed as sections 3 and 4. Those sections would allow the district courts to provide *de novo* review of administrative agency decisions. The parameters of *de novo* review, and the resulting burden on the district courts, are uncertain because the bill does not define or limit the phrase "*de novo* review." NDWC is concerned that any benefits of *de novo* review would be substantially outweighed by the uncertainties and costs associated with another layer of litigation at the district court level.

North Dakota case law suggests that, at a minimum, *de novo* review would include the ability to hear testimony from new witnesses and receive exhibits that were not part of the proceedings before the agency. It may be construed more broadly, however. For example, Black's Law Dictionary defines "*hearing de novo*" as follows:

> ***"Generally, a new hearing or a hearing for the second time, contemplating an entire trial in same manner in which matter was originally heard and a review of previous hearing. On hearing "de***

novo" court hears matter as court of original and not appellate jurisdiction."

As pointed out in the fiscal note submitted by the Director of the Office of Administrative Hearings, allowing litigants a hearing *de novo* in the district courts would "have the potential for substantial fiscal impact on numerous other state agencies, local governments or agencies, and the court system." The fiscal impact would arise from the need for additional lawyer time, judge time and support staff time to handle *de novo* trials or hearings in the district courts. In addition, uncertainties over the parameters of *de novo* review, and when *de novo* review is available, would likely foster litigation and increase costs for litigants and the court system.

The increased fiscal demands of *de novo* review will not yield a corresponding benefit for litigants because courts reviewing agency decisions will still be limited to the six grounds for reversal set forth in Section 28-32-19 of the Century Code. A review of those grounds for reversal, specifically paragraphs 5 and 6, indicates that the scope of review contemplated by the law is inconsistent with *de novo* review in the district courts. In addition, the North Dakota Supreme Court has repeatedly stated that it reviews the decision of the agency, and not the decision of the district court, further indicating that *de novo* review is inconsistent with the scope of review for administrative appeals.

After resolving a substantial back log of cases from the mid-90's, NDWC is committed to making further improvements in the timeliness of its claims handling and litigation procedures. NDWC fears, however, that the addition of a layer of litigation in the form of *de novo* review in the district courts is counterproductive to that effort. Accordingly, NDWC opposes sections 3 and 4 of Engrossed House Bill No. 1455. That concludes my testimony. I will be happy to respond to any questions you may have at this time.

North Dakota State
Board of Medical Examiners

ROLF P. SLETTEN
Executive Secretary and Treasurer

LYNETTE LEWIS
Administrative Assistant

TO: MEMBERS OF THE SENATE JUDICIARY COMMITTEE

FROM: JOHN M. OLSON, SPECIAL ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE BOARD OF MEDICAL EXAMINERS

RE: HOUSE BILL NO. 1455

DATE: MARCH 14, 2001

The North Dakota Board of Medical Examiners opposes House Bill 1455 for the following reasons:

1. Section 3 of the bill (Page 4, Line 12) provides that, "A notice of appeal may include a request for de novo review by the district court....". In other words, the respondent in a disciplinary action before the Board of Medical Examiners would suddenly be given not one but two hearings on the merits of the case. The result would be completely redundant, prohibitively expensive (the cost of prosecuting a disciplinary action against a physician often runs into the tens of thousands of dollars and sometimes into the hundreds of thousands of dollars), and wholly impractical. Not even in criminal law, where the due process requirements are most stringent, does the accused have the right to have two hearings on the merits of the allegations. If this bill passes, the Board will be required to prove its case twice while the respondent need only prevail once. The respondent will be able to use the first hearing as a sort of preliminary hearing whose only function will be to force the Board to show all its cards. The "real" hearing will then come in the district

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court.

2. Section 5 (Page 6, Line 8-13) provides that, "...boards and commissions may request an administrative law judge to be designated to preside over the entire administrative proceeding or adjudicative proceeding and to issue the final order of the agency under subsection 6 of section 28-32-08.5, or they may request an administrative law judge to be designated to preside only as the procedural hearing officer under subsection 5 of section 28-32-08.5....".

This amendment totally subverts the Board's ability to use the Office of Administrative Hearings in any workable way, it radically changes the complexion of our hearings and it has a tremendous impact on what it means to accept an appointment to the Board of Medical Examiners. If this bill is passed into law, then instead of employing a hearing officer to conduct the Board's disciplinary hearings and to write proposed Findings of Fact, Conclusions of Law, and a proposed Order for the Board's consideration, the Board would be reduced to choosing between the two new options: The ALJ can preside over the entire proceeding and issue the final order. In other words, we can abdicate our authority and turn our disciplinary function over to the ALJ thereby abandoning one of our two main functions (licensing and discipline). Unfortunately, under this bill the only other choice doesn't work either.

Section 28-32-08.5, NDCC, provides that, "If the hearing officer is presiding only as a procedural hearing office, the agency head must be present at the hearing...". Section 28-

Rep. Weisz - Chairman (233) Would this also apply to somebody stealing gas out of your tank at the farm?

Rep. DeKrey: I should hope so.

Rep. Weiler: I represent District 30. I cosponsored this bill. I ask your support. With the increased price of gasoline --- has dramatically increased the number of gas thefts at the pump.

Cal Rolfson: I am an attorney here in Bismarck. I represent the ND Petroleum Marketers Association. I will go through the bill and give some of the philosophical ideas supporting the bill.

I also have the amendments referred to by Representative DeKrey. I will distribute copies. Copies of these amendments are attached. The bill addresses anyone who leaves a retail establishment selling gas and not paying for it are subject to sanctions. The amendments will provide this type of theft would be a class B misdemeanor. After a second voolation the DOT could suspend driving privileges for up to 6 months and for a third and subsequent convictions up to a year. The goal of the Petroleum Marketers is to reduce theft and to aid law enforcement and reduce the problems for prosecutors.

Rep. Ruby: (675) What is the penalty for stealing gas now?

Cal Rolfson: It is a class b misdemeanor if he steals less that $250 worth of gas.

Rep. Weisz - Chairman (724) With your amendments in here -- the only really change in here is that the drivers license could be suspended -- How is the DOT supposed to be notified?

Cal Rolfson: Keith Magnusson will be here to explain how this has been worked out with his department They do have some concerns and recommendations..

Rep. Mahoney: (849) Prosecution of a theft is a little easier and I wonder if that isn't why that

was put there as an infraction -- because you don't have the problem of having a jury find guilt for a crime -- so it makes it an easier offense to prosecute on the first offense -- do you suppose?

Cal Rolfson: I believe that is correct. The purpose was to start gradually and not make it so onerous initially for first offenses. The whole issue was to have a separate statute so that the petroleum markers who loose thousands of dollars and because it is so difficult to deal with that they would be able to bring that to the attention of the public by posting it at the gas pump.

Russ Hanson: I am President of the ND Petroleum Marketers Association. I have written testimony for your reference. A copy of Mr. Hansons remarks are attached.

Rep. Weisz - Chairman (1786) In the 11 states that have enacted similar legislation do they all suspend drivers license?

Russ Hanson: In most of the legislation I looked at that is the key.

Rep. Kelsch: (1841) I am not a big advocate of putting more laws on the books than we already have -- Couldn't you have accomplished the same thing by enforcing the laws we already have? Just put your stickers on the pumps and let people know that it is illegal to steal gas?

Russ Hanson: I appreciate your concern and that is a definite policy decision you will have to make but we don't feel that we have a strong enough message without this bill.

Rep. Thoreson: (2059) If it is a first offense -- do they go to court -- how is that?

Russ Hanson: I will defer to our legal guys.

Rep. Ruby: (2106) couldn't pick one of the penalties in the list of class B misdemeanors and put that on your stickers -- now -- without this bill?

Russ Hanson: Perhaps we could -- the thought behind this is that driving is a privilege that

people don't want to lose.

Cal Rolfson: To address Representative Thoreson's question -- It would depend upon the gas station owner pretty much how he wanted to proceed if it was one of his regular customers --if they did decide to prosecute then they would have to go to court. Once there they have to prove intent. There are some good protections.

Rep. Mahoney: (2447) I am trying to remember if there is a 'strict intent' provision -- culpablility -- I am not sure on that.

Cal Rolfson: You may be right about the strict intent interpretation --

Rep. Mahoney: I probably is better to leave it as an infraction ---?

Dave Froelich: I represent Missouri Valley Petroleum, Mandan -- first in response to Rep. Mahoney -- in talking with the states attorneys that section has changed and there is a tracking issue in that somebody could have 5 or 6 infractions and it would never get to the level of a second offense. Our company operates 5 retail out lets in the state -- in the past 5 years we have lost probably about $10,000 due drive offs -- we feel posting the consequences at the pump will be a deterrent -- we ask your support with this problem. We may have to resort to the what they do in bigger cities and that is prepay before you fill.

Rep. Weisz - Chairman (2838) do you have any idea who the normal customer is that drives off - is it the younger people -- or habitual criminals ?

Dave Froelich: We all have a little different operations so it could vary but I believe it is the younger people and then there is the habitual criminal who can spot a semi-truck and park behind it out of sight, fill up and drive away. It is not the first timers but repeater professionals.

Rep. Ruby: (2932) For those repeat offenders, do you think this is enough to curb that?

Dave Froelich: Its a start.

Rep. Kelsch: (2993) Would it help have the newer pumps that use credit cards for purchases?

Dave Froelich: Yes it helps -- as far as freeing up the cashiers time so they can be more watchful -- but there are problems when they think their credit card is authorized and start pumping -- then they drive off.

Rep. Thorpe: (3124) What kind of evidence are you going to be able to give to prosecutor and law enforcement to enforce this if it is law?

Dave Froelich: Presently we try to get a license plate number -- usually the hose and nozzle are laying on the ground -- that is a strong indication that it was intentional --

Rep. Thorpe: (3274) It really is your word against their word -- but what about camera back-up ---

Dave Froelich: again the whole basis of our whole bill is deter -- deter --- deter

Rep. Thorpe: (3436) You could probably do that now with these picture on the postings on the pump --

Rep. Schmidt: (3512) lost $10,000 in five years -- when gas was 60 cents a gallon -- do you foresee that you could lose twice that with the price going up and more thefts because the price is so high?

Dave Froelich: Yes sir -- that is why we have a growing concern.

Lorraine Hawkenson: I am the area supervisor for Sta Marts in ND. I have tried stickers with

the current penalties posted at the pump at all three stores in Bismarck- Mandan this last year and I have not seen that it made any difference -- I think we need this stronger law to post -- the loss of your license -- to share some other information with you -- at 8 location in ND we lost $6456 due to drive offs -- that is gas and $4996 in diesel thefts, -- there were 381 thefts -- more than 1 a day. The average loss is $17.69 per days -- we had 32 diesel thefts last year -- nearly one per week with average of $117.76 per theft. In the Bismarck-Mandan area at the east Bismarck location we paid $135 .57 in gas tax -- $634 per day in December loss in gas equal to $20.46 per day and diesel loss was $317 per theft and the reason was the one big loss we experienced which you probably read about. We train our people yet we have the problems. StaMart supports passage of this bill.

Rep. Mahoney: (3982) Do you have any success at all in catching these offenders and in prosecuting them?

Lorraine Hawkenson: I can only speak for Bismarck-Mandan -- I would say maybe 1 out of 20.

Rep. Ruby: (4254) Do you or have you tried video monitoring?

Lorraine Hakwenson: Yes in the Bismarck-Mandan area we have video cameras -- I sorry a can't relate any feeling about the success rate.

Matt Bjornson: May family is in the petroleum business out of Cavalier, I am Chairman of the Petroleum Marketers Association. Our 149 members have over $46,000 a year in losses. We want
to deter thieves.

Rep. Kelsch: (4401) How much do you think this will help -- will it decrease the thefts by one half ?

Matt Bjornson: All that we can go by is the experience in other states and they have been very

successful.

Rep. Weisz - Chairman (4547) Do they have those percentages?

Matt Bjornson: I don't have those figures but the report from the state of Virginia said that this has been the best thing they have done in years.

Rep. Ruby: (4894) With the amount of money you are losing would it pay to buy video monitoring equipment and then putting a sign on the pumps that advises you are being watch - wouldn't that work?

Matt Bjornson: Depending on the size of the location would determine whether you could afford this equipment.

Keith Magnusson: I am Director of Driver and Vehicles Services for the ND DOT. We are neither for nor against this bill. We do have couple of concerns - 1 specific that Mr. Rolfson has already talked about and another general one. First I want to answer the Chairman's question about how does the Dept. Find out about these convictions. You first have to have a record of the conviction -- the specific concern we have is with section 2 -- it one of those -- we don't think the bill needs the very specific direction to suspend the license on a second offense--- also in section 2 we are not exactly sure what the effect could be -- we don't know if that effects other parts of the code -- the motor vehicle code is finely tuned like the IRS code and some changes in one area can cause problems in others. We don't think we need section- the actual authority because we have that now. With section 1 we would ask that you delete section 2. The other concern is a general one and that of using the drivers license as the magic bullet to force compliance. Driver license is supposed to reflect driving ability. Normally you suspend someone's license it is for points.

Rep. Weisz - Chairman (5567) How will it work will the courts or the DOT track the offenses under this?

Keith Magnusson: Just how we are going to do that will have to be worked out.

OPPOSITION TESTIMONY - (5794)

John Olson: I represent the States Attorney Association and also the ND Peace Officers Association. It is hard to testify against a bill like this -- and it does have a lot of support. The States Attorneys were concerned about the infractional language. If you look at Chapter 12.1-20-03 the first provision in there deals with the consolidation o f a whole lot of offenses and categorizes them, -- that general code was passed in 197.s and again in 1975 -- we wanted to consolidate the code, have them all in one place and treat them equitably. This bill takes several steps away from that goal. Just because we have a rule on consolidation would not be sufficient reason to not pass this bill but there are reasons for not going outside that code to enforce this bill and tracking it -- and a number of other inconveniences. It is already a crime -- I was impressed with some of the testimony particularly that given by StaMart -- I believe they do have a problem and that they have tried to address it.

TAPE 1 SIDE B

John Olson: continued --- With this bill you would have two sections of the code to address and you would have to elect which section of the code you were going to charge a violator with---we also see as an evidence problem in trying to prosecute these cases.

Rep. Mahoney: (161)You talk about the proof problem -- as you know in any case you have to have enough evidence --- to invoke the criminal statutes --- beyond a reasonable doubt -- or the prosecutor or even the court is not going to go ahead with it. So, what is different here?

John Olson: What you say is -- you are absolutely correct. It is always going to be a proof problem and this will not change that.

Rep. Mahoney: (314) sometimes it seems like there is a feeling of this is going to be more work for us as prosecutors -- that is kind of behind us -- I don't see this as bringing in more cases but it is going to be just as difficult to prosecute with or without this --

John Olson: Let's say this -- we as prosecutors want the work we want something so we can prosecute these offenders -- we would want the evidence we need -- so let there be no mistake where we stand on that -- we are against crime --

Rep. Mahoney: (468) You now that certain offenses are taken out of the -- like theft of cable services, -- some of those things are in separate sections as offenses that is already being done.

Rep. Thorpe: (514) What I read here is they wish to legitimize the sticker by threatening the loss of their drivers license -- could we make this so that instead of losing their license they could go to the crow bar hotel, the threat of jail time would be more intimidating to me --

John Olson: I guess that is the point we are trying to make -- if offenders are that wise about the code -- the criminal laws and they will realize that they get one free attempt under the current bill and they are not going to be suspended from driving until the second one -- I done think that is that much of a deterrent.

Marvin Mariner: I am from Minot (? And apparently representing himself) I don't think the state should have to pay for catching them after leaving the gas pump- - I just got back from the state of Oregon and there you can't fill your own tank -- their is and attendant there to fill your tank -- and if they tried to drive away they can get the license number and you have a witness.

I don't think having someone there should increase the cost of gas because the last fill up in

Oregon -- gas was $1.44 a gallon - a lot less than here.

Rep. Jensen: (792) Oregon law requires there be an attendant at the pumps.

There being no one else wishing to appear on HB 1459 we will close the hearing. (837)

TAPE 2 SIDE A (4751)

Rep. Thorpe: (5805) As Keith Magnusson sugested, I move that we remove "section 2 ".
Rep. Mahoney: I second.
On a voice vote the motion carried.
Discussion loosely amended Rep. Thorpe to include the several amendments recommended by Keith Magnusson and Rep. Mahoney consented and agreed. The voice vote was repeated and carried.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1459 B

House Transportation Committee

☐ Conference Committee

Hearing Date February 15, 2001

Tape Number	Side A	Side B	Meter #
1		X	22
			End 895

Committee Clerk Signature Laurene B. Funk

Minutes: Rep. Weisz - Chairman opened the discussion for action on HB 1459.

Rep. Weisz - Chairman advised that a number of people including the North Dakota Petroleum Council and Dealers had some objections to the bill as drafted and that several amendments were being proposed. It appears that the amendments meet with everyone's approval. It was now up to the committee. What the amendments would do first of all is to take the proposed law out of section 39 of the Code and put it into theft penalties and convictions sections of the code and the courts may suspend the drivers license. This takes the DOT out of the picture for tracking Convictions, etc. Also the strict liability construction under section 39 was eliminated by the move the new section as intent would have to be proved. Both sides appear to be happy with the proposed amendments as it will allow the petroleum dealers to post the stickers that says your drivers license may be suspended and that you can be convicted. It doesn't put any additional burden on law enforcement, the DOT, or the courts. The courts under multiple conviction may if they want can suspend the drivers license.

Following discussion;

Rep. Schmidt: (655) I move approval of the amendment.

Rep. Hawken: I second the motion.

On a voice vote the motion carried.

Rep. Hawken: (727) I move a "Do Pass as Amended" for HB 1459.

Rep. Jensen: I second the motion.

On a roll call vote the motion carried: 14 yeas 0 nays 0 absent.

Rep. Ruby was designated to carry HB 1459 on the floor.

END (895)

VK
2/15/01

13314.0101
Title.0200

Prepared by the Legislative Council staff for
House Transportation
February 14, 2001

HOUSE AMENDMENTS TO HB 1459 HOUSE TRN 2-16-01

Page 1, line 2, remove "; to amend and reenact subsection 1 of section 39-06-32 of"

Page 1, remove line 3

Page 1, line 4, remove "suspend driving privileges"

Page 1, replace lines 8 through 21 with:

"**Nonpayment for motor fuels - Penalty.**

1. For a theft offense in violation of chapter 12.1-23 which involves a person who leaves the premises of an establishment at which motor fuel is offered for retail sale after motor fuel was dispensed into the fuel tank of a motor vehicle that that person drove away without having made due payment or authorized charge for the motor fuel dispensed, the court may:

   a. Upon a person's second conviction, order the suspension of the person's driving privileges for six months; and

   b. Upon a person's third or subsequent conviction, order the suspension of the person's driving privileges for one year.

2. As used in this section, "conviction" means a final conviction without regard to whether sentence was suspended or deferred or probation was granted after the conviction. Forfeiture of bail, bond, or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, is equivalent to conviction."

Page 1, remove lines 22 and 23

Page 2, remove lines 1 and 2

Renumber accordingly

Date: 2/15
Roll Call Vote #:

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1459

House Transportation Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass as Amended

Motion Made By Rep Hawken Seconded By Reps Jensen

Representatives	Yes	No	Representatives	Yes	No
Robin Weisz - Chairman	✓		Howard Grumbo	✓	
Chet Pollert - Vice Chairman	✓		John Mahoney	✓	
Al Carlson	✓		Arlo E. Schmidt	✓	
Mark A. Dosch	✓		Elwood Thorpe	✓	
Kathy Hawken	✓				
Roxanne Jensen	✓				
RaeAnn G. Kelsch	✓				
Clara Sue Price	✓				
Dan Ruby	✓				
Laurel Thoreson	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Reps. Ruby

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1459: Transportation Committee (Rep. Weisz, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1459 was placed on the Sixth order on the calendar.

Page 1, line 2, remove "; to amend and reenact subsection 1 of section 39-06-32 of"

Page 1, remove line 3

Page 1, line 4, remove "suspend driving privileges"

Page 1, replace lines 8 through 21 with:

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2. As used in this section, "conviction" means a final conviction without regard to whether sentence was suspended or deferred or probation was granted after the conviction. Forfeiture of bail, bond, or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, is equivalent to conviction."

Page 1, remove lines 22 and 23

Page 2, remove lines 1 and 2

Renumber accordingly

2001 SENATE TRANSPORTATION

HB 1459

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1459

Senate Transportation Committee

☐ Conference Committee

Hearing Date 3-8-01;3-16-01

Tape Number	Side A	Side B	Meter #
1		x	1.5-13.2
3-16 1		x	11.8-17.9
Committee Clerk Signature			

Minutes: **HB 1459 relates to theft of motor fuels; relating to authority of the department of transportation to suspend driving privileges; and to provide a penalty.**

Rep.Duane De Krey: (District 14; Supports) This is kind of a new idea that has had some success in other states. Gas theft can get to be a big problem especially at today's gas prices. This has been amended since it left the House.

Rep. Dave Weller: (District 30: Supports) With recent gas price increases, theft of fuel has become bigger. There are a lot of small business people that are getting their gas stolen. I think this is one way that we can help alleviate the problem.

Russ Hanson: (President of ND Petroleum Marketers Association; Supports) See attached testimony. Also hands out written testimony from Matt Bjornson and Loren Dusterhoff.

Senator Trenbeath: How did you arrive at six months and a year?

Russ Hanson: That was the norm that we copied from other states.

Senator Trenbeath: The concern I have is the message we send. If you are driving under the influence of alcohol, you lose your license for three months. If you steal gas you lose it for six months. As I understand, the real/major reason for having this bill is to have warning on pumps or have the chilling effect on people who are inclined to pump and run.

Russ Hanson: That is exactly correct.

Cy Fix: (General Manager of Bis/Man Cenex and Sterling Truck Stop; Supports) We have lost $2724 in revenue, or approximately 1870 gallons of gas in 5 locations. We can't get it back. We can't even get the state or federal tax back. That amounts to another $700 that we are out. It's a concern for us.

La Rayne Hawkinson: (Area Supervisor for Bis/ Man Stamart Travel Centers; Supports) There are 8 ND locations. At some of our locations we have tried different deterrents such as putting an employee outside to record license plate numbers and such. Still, last year the 8 ND Stamart's lost over $10,000 in gas drive offs. The pressure on my clerks are a lot for anyone to handle. We handle 15,000-20,000 customers a week at the truck stop location in East Bismarck. Explains clerks many various hassled duties. We feel that making drive offs the true crime that they are will be a deterrent.

Senator Mutch: Are there any statistics on people caught driving off?

LaRayne Hawkinson: In the Bismarck/Mandan area last year, I believe it was only one. It's pretty grim statistics. Since we spoke a month ago today before the House Committee, the three Bis/Man Stamart locations incurred another 16 drive offs losing $256.12.

Hearing closed.

Committee reopened on HB 1459.

Discussion was held. Senator Espegard motions to Do Pass. Seconded by Senator Bercier. Roll Call taken. 3-3-0. FAILED.

Committee closed. Committee reopened on 3-16.

Discussion held. A verbal amendment is proposed by Senator Trenbeath. Senator Trenbeath motions to accept proposed verbal amendment. Seconded by Senator Espegard, Roll call taken. 3-2-1.

Senator Trenbeath motions to Do Pass as amended. Seconded by Senator Mutch. Roll call taken. 3-2-1. Floor carrier is Senator Trenbeath.

Committee closed.

Date: 3-8
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1459

Senate **Transportation** Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Espegard Seconded By Bercier

Senators	Yes	No	Senators	Yes	No
Senator Stenehjem, Chairman		X	**Senator O'Connell**		X
Senator Trenbeath, Vice-Chair	X		**Senator Bercier**		X
Senator Mutch	X				
Senator Espegard	X				

Total (Yes) 3 No 3

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

3-14

Date:
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1459

Senate **Transportation** Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number 15314.0201

Action Taken Move Adoption of Verbal Amendment

Motion Made By Trenbeath Seconded By Espegard

Senators	Yes	No	Senators	Yes	No
Senator Stenehjem, Chairman		X	**Senator O'Connell**		X
Senator Trenbeath, Vice-Chair	X		**Senator Bercier**		
Senator Mutch	X				
Senator Espegard	X				

Total (Yes) 3 No 2

Absent 1

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

3-14
2
Date:
Roll Call Vote #: 1459

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

Senate **Transportation** Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number 18314.0201

Action Taken Do Pass as Amended

Motion Made By Trenbeath Seconded By Mutch

Senators	Yes	No	Senators	Yes	No
Senator Stenehjem, Chairman		X	**Senator O'Connell**		X
Senator Trenbeath, Vice-Chair	X		**Senator Bercier**		
Senator Mutch	X				
Senator Espegard	X				

Total (Yes) 3 No 2

Absent 1

Floor Assignment Espegard Trenbeath

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1459, as engrossed: Transportation Committee (Sen. Stenehjem, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (3 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1459 was placed on the Sixth order on the calendar.

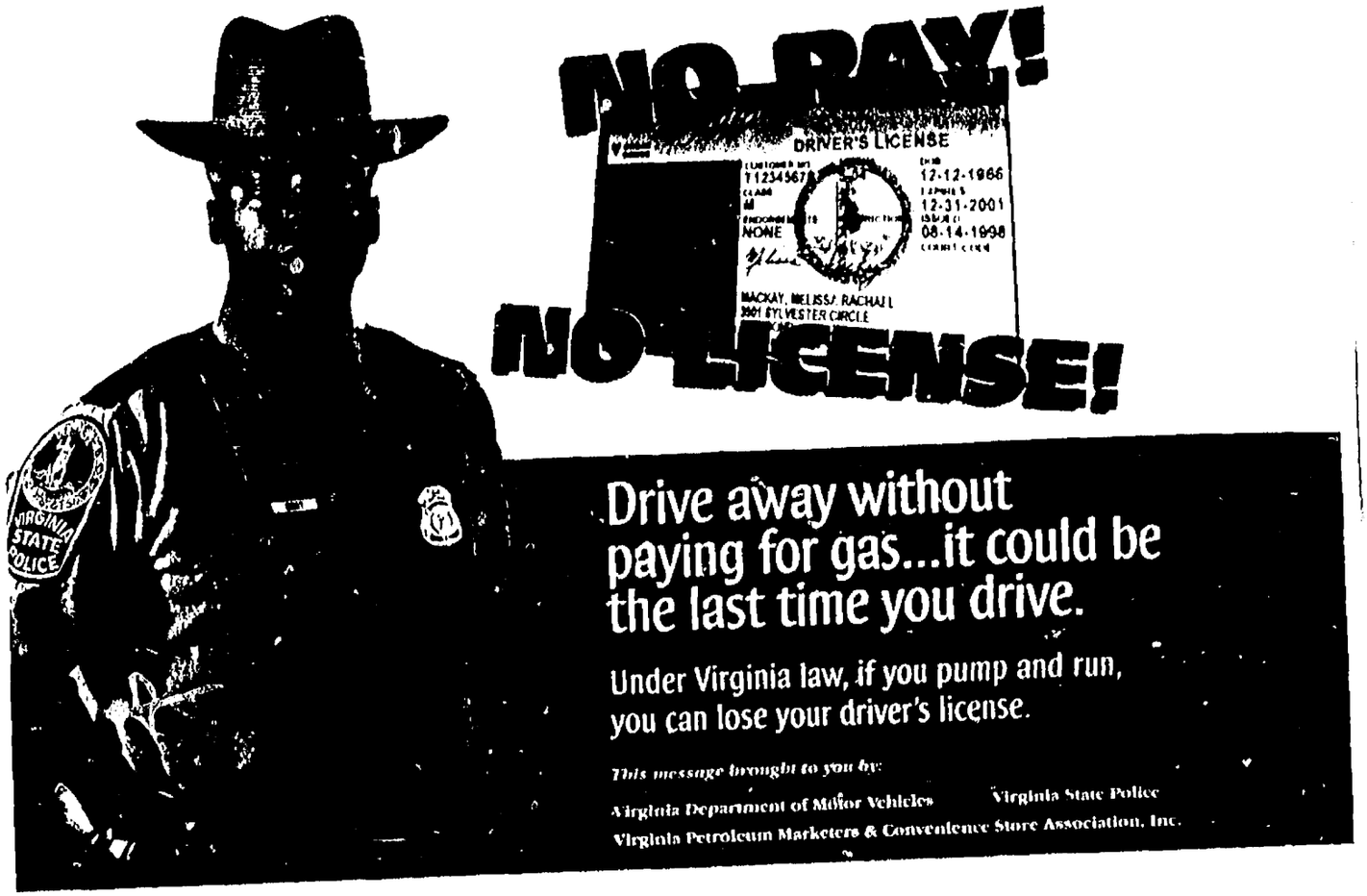
Page 1, line 13, replace "six" with "up to three"

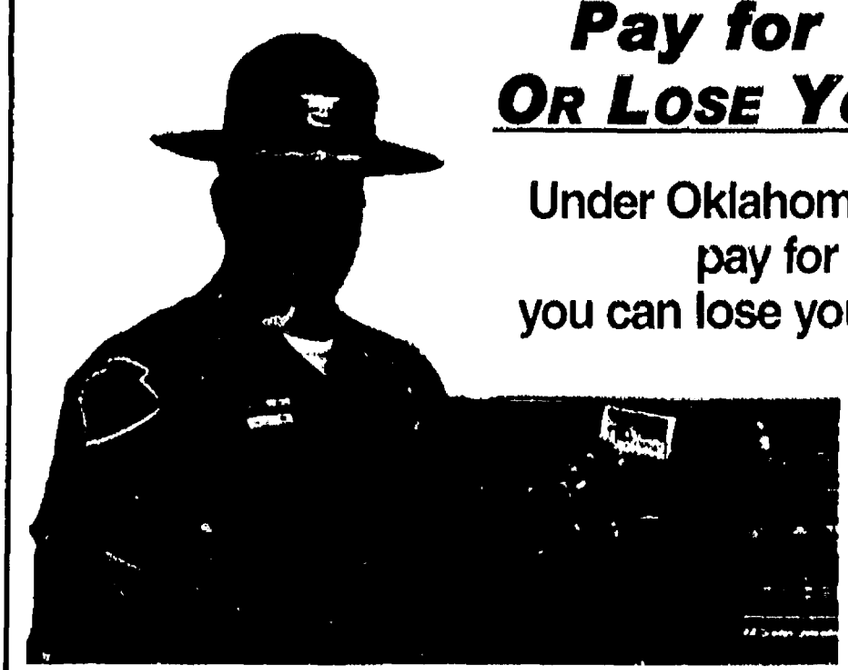
Page 1, line 15, replace "one year" with "up to six months"

Renumber accordingly

2001 TESTIMONY

HB 1459





Pay for Your Gas
OR LOSE YOUR LICENSE!

Under Oklahoma law, if you don't pay for your gas, you can lose your driver's license.

Drive-off without paying and it could be... your last time to drive.

So think before you pump, or you could be walking!

Oklahoma Statutes
Section 1740 of Title 21 "Pump Pirates Act"

This public service announcement was developed by the: Oklahoma Petroleum Marketers and Convenience Store Association.

Testimony --- HB 1459
February 8, 2001
House Transportation Committee

Mr. Chairman and members of the House Transportation Committee, my name is Russ Hanson, President of the North Dakota Petroleum Marketers Association (NDPMA). NDPMA is a statewide trade association representing 311 companies involved in petroleum marketing including service stations, convenience stores, truck stops, and bulk oil jobbers.

We appreciate the opportunity to appear before you in support of HB 1459.

NDPMA asked for introduction of this bill to offer petroleum marketers an avenue to address "drive off" or theft of petroleum products. Drive offs occur when a person fills ups his/her gasoline tank with fuel and leaves the premises without paying. As the price of petroleum products dramatically increased over the past couple of years – so have the number of instances of gas theft.

At present, there is little or no enforcement to stop gas theft, and we believe HB 1459 will act as a deterrent, warning would be offenders that if they leave without paying for their fuel, they could lose their driving privileges. Passage of this legislation will allow retailers to post signs, at the retailer's expense, that drive offs will not be tolerated and anyone caught driving away without paying for fuel will be prosecuted. Further, repeat offenders face the possibility of losing their driving privileges.

As in any retail industry, theft is addressed regularly by management. Theft in many instances has become a cost of doing business. Many People don't realize that theft becomes an overhead expense. The public is so sensitive to gas prices – losses due to theft are eaten by the business rather than passing them on to customers.

This is a problem that is being addressed across the nation. Twelve states have some type of gas theft law in place. This bill reflects legislation enacted in Kansas. Georgia, Oklahoma, Colorado, Alabama, Florida, Michigan, Mississippi, South Carolina, Tennessee, West Virginia, and Virginia are other states that have recently enacted gas theft laws. In addition, South Dakota, Montana, Minnesota, Wisconsin, Nebraska, North Carolina, and Arkansas are in the process of introducing legislation to address gas theft.

I visited with several colleagues that have gas theft laws in statute to assess opinions of whether the legislation achieved the goal of deterring gasoline theft. The most telling comment I received was from Mike O'Connor, President of the Virginia Petroleum Marketers Association. He states "since the law went into effect on January 1, 2001, we have distributed 25,000 stickers with the message "no pay, no license" and the members think that it is the greatest thing the association has done in the 52 years of existence."

In an effort to provide you with costs and instances of gas theft occurrences in North Dakota, NDPMA conducted a quick survey of our 311 members and concluded the following results:

1. 66 companies responded representing 149 retail locations.
2. The average number of gas thefts of those responding was 20 thefts per year with the average dollar loss of $15.66 per occurrence.
3. There are approximately 886 retail stations in North Dakota. While we won't attempt to compare the results of our survey to the number of total stations, but we do believe this illustrates that this is a significant problem with quite a fiscal impact to business.

Mr. Chairman and members of the committee, NDPMA believes this is proactive legislation that will address a major problem for petroleum retailers to deter would be offenders of gas theft. We believe this legislation will reduce the number of gas thefts and reduce the burden on law enforcement to have to deal with this issue. NDPMA would appreciate your favorable consideration. I would be happy to attempt to address any questions.

NORTH DAKOTA PETROLEUM MARKETERS ASSOCIATION

1025 N. 3rd St. • P.O. Box 1956 • Bismarck, ND 58502
Telephone 701-223-3370 • WATS 1-800-472-0512 • FAX 701-223-5004

REPRESENTING:
Bulk Oil Jobbers
Convenience Stores
Service Stations
Truck Stops

Memorandum

TO: House Transportation Committee

FROM: Russ Hanson – President Russ Hanson

DATE: February 15, 2001

SUBJECT: HB 1459 – Resource Material

Following the committee hearing last week, it was suggested that I research the impact the gas theft law has had in states with a similar law already in statute. Attached are responses from the Virginia, Tennessee, Oklahoma, and Kansas. I believe these statements indicate that the gas theft law in their respective states has a positive affect in deterring would be offenders of gas theft. I have highlighted particular statements I thought would be of interest.

Chairman Weisz indicates that an amendment will be drafted to change verbiage from the "shall" suspend to "may" suspend the licenses of repeat offenders of gas theft. We would like the record to indicate that NDPMA would fully support this amendment to ease the concerns of the State's Attorneys association. Our intent with this legislation is to deter gas theft and this amendment would not impact that objective.

We appreciate the opportunity to present this legislation to your committee, the thorough committee hearing, and subsequent discussion. We hope you are able to give HB 1459 your favorable consideration.

Thanks again for the opportunity to present this issue to the committee.

Enclosure

Virginia Petroleum Marketers & Convenience Store Association

6716 Patterson Ave., Ste. 100 Richmond, VA 23226
(804) 282-7534 • FAX (804) 282-7777
vapmacs@mindspring.com
Michael J. O'Connor, President
E.D. Catterton, Consultant Emeritus

February 13, 2001

Mr. Russell Hanson, President
North Dakota Petroleum Marketers Association
1025 N. 3rd Street
PO Box 1956
Bismarck, ND 58502

Dear Mr. Hanson Russ

On January 1, 2001 Virginia became the 10th state to increase penalties on those who drive off without paying for gasoline. This new law provides for a $100 penalty and a possible drivers license suspension for a first conviction and a $100 penalty and a mandatory one-month drivers license conviction for a second or subsequent conviction.

Working in conjunction with our local sheriffs and state police, we developed the attached drive away report that, in turn, we have furnished to more than 1,300 retail members across the state. These reports are designed to provide a tangible record of the theft, and to assist law enforcement investigations and subsequent prosecutions under the new law.

Since the law became effective, I have heard from a number of law enforcement personnel who have informed me that the law and the drive away report have provided them with a valuable new tool in fighting gasoline theft.

Since our state's law is only 44 days old, it is premature to determine what the precise deterrent effect of the law will be in Virginia. However, I can tell you that we have distributed more than 32,000 pump stickers with the message NO PAY - NO LICENSE and that public awareness of this crime has increased exponentially.

Sincerely,

Michael J. O'Connor

VAPMACS

dmv

DRIVE AWAY REPORT

SEE THE BACK FOR IMPORTANT INFORMATION

PLEASE PRINT IN INK

FT217 (01/00)

VEHICLE/TRAVEL INFORMATION

Tag Number	State	Year	Make (Ex. Ford)	Model (Ex. Ranger)	Color

Unusual Markings, Features, Dents, Primer Paint, etc.	Direction Traveled (Include name of street name or route number)

SUSPECT DESCRIPTION

☐ Male ☐ Female	☐ White ☐ Black ☐ Hispanic ☐ Other (Describe)	Weight	Height	Hair Color

Clothing (Describe - Use back of form if needed.)	Distinguishing Features (Describe - Use back of form if needed.)

INCIDENT INFORMATION

Date	Briefly describe what happened. (Use back of form if needed.)

Time ☐ AM ☐ PM

Type of Fuel ☐ Gasoline	☐ Regular ☐ Mid-Grade ☐ Premium ☐ Diesel	Number of Gallons	Value $	Pump Number

BUSINESS LOCATION INFORMATION

Name	Telephone Number ( )

Street Address	City/Town	County	Zip Code

Owner's Name	Manager's Name

REPORTING PERSON'S INFORMATION

Name	Home Telephone Number ( )

Home Address	City	State	Zip Code

Signature	Form Completed: Date & Time ☐ AM ☐ PM	Reported to Police: Date & Time ☐ AM ☐ PM

FOR LAW ENFORCEMENT USE ONLY

Law Enforcement Official's Name	Badge/Code Number	Report Taken: Date & Time ☐ AM ☐ PM

CRIME PREVENTION TIPS

ALWAYS STAY ALERT - Know who is inside the store and where they are. Be aware of people hanging around without buying anything and standing in places that are hard for you to see. Try to watch outside for suspicious activity also. Write down license numbers and descriptions of vehicles that you feel are suspicious.

TRUST YOUR INSTINCTS!!!!

MAKE IT EASY TO SEE - Make sure the windows are kept clear of material (displays, signs, etc.) that block the view from inside and out. Let the officer on patrol see you and the register area.

BE FRIENDLY - Try to speak to every customer and make eye contact. This will let the possible robber know you have at least seen them and know what they look like.

BE SEEN - Keep all foliage trimmed away from the building and windows. Make sure it does not block any lighting. Make sure your store is well lit. This means inside and outside. Replace burnt out bulbs immediately.

DRIVE AWAYS - Please complete this form as soon as it happens and call 911 to report the theft. Do NOT leave the store in any situation to catch any violator

Use this space, if needed, to provide additional information.

TOMA TENNESSEE OIL MARKETERS ASSOCIATION

MESSAGE SENT VIA FAX, ONE PAGE, INCLUDING THIS ONE.

Russell Hanson
North Dakota Retail/Petroleum Marketers Association
P. O. Box 1956
Bismarck, ND 58502

Dear Russ:

As you know, the Tennessee "Drive Off" law went into effect on July 1, 2000. At this point we do not have hard statistics as to whether the law and the decals have lowered the number of persons stealing gasoline and diesel. What we do have is anecdotal evidence that the decals are a deterrent to the crime. Many of our marketer and retail members have called to say that they feel the number of drive-offs has decreased.

The Tennessee Oil Marketers Association has distributed over 25,000 of the decals, and if nothing else, it has raised public awareness of the problem. One of the points that we have tried to emphasize is that the cost to this problem is greater than the public and the Legislature realized. From a survey that we conducted, we estimated that each retail station was the victim of 2-3 drive-offs per week. At an average loss of $15, that can amount to a theft of about $2,300 per store per year. Added up over the state, the total is in the millions, and adds to the cost of gasoline for everyone. The publicity surrounding the decals has also helped the public understand that this is not just a theft problem, it can also be a fire and environmental hazard when people drive off without returning the nozzle to the pump.

TOMA has received numerous calls from law enforcement officers enquiring about getting the decals for stations in their patrol area. Based on these calls, we feel that many local police officers think that the decals do work as a deterrent to drive-offs. Since one of the complaints that we heard most often from our marketers was that police often did not want to bother with what they viewed as a "minor" crime, we have been very pleased with the increase in police interest in gasoline theft.

Although it has been a short period of time since the law went into effect in Tennessee, we are happy with the results and feel that it was worth the effort.

Please do not hesitate to contact me if I can be of further service in this regard.

Sincerely,

Marylee Booth, Executive Director

P. O. Box 101334 • Nashville, TN 37224 • 615-242-4377
430 Enos Reed Drive • Nashville, TN 37210
FAX 615-254-8117 • E-Mail: TNOMA@compuserve.com

OKLAHOMA Petroleum Marketers Association
Association of Convenience Stores

5115 N. Western • Oklahoma City, OK 73118 • 405/842-6625 • 800/256-5015 • FAX 405/842-9564

OPMA • OACS

February 12, 2001

Mr. Russ Hanson
North Dakota Petroleum Marketers Association
P O Box 1956
Bismarck, ND 58502

Dear Russ:

Reference: Driver-Off Legislation and Decals

Our legislation was passed two years ago by an urban legislator that was having trouble with drive-offs in his district. We found out about the bill after it was filed and helped him pass the Pump Pirates Bill. We saw the Florida decal and visited with them about the effectiveness. They said the decal with the state trooper holding the drivers' license and the possibility of losing it got the attention of many people. OPMA-OACS has distributed more of these than any other promotion we have had since I have been here. We like to think the decal has been a deterrent to drive offs, but I don't have any statistics. They are very noticeable, and I have had many comments about the decal.

Sincerely,

Vance McFarland

Executive Director

PMCA
of Kansas

February 12, 2001

Mr. Russell Hanson
President
North Dakota Petroleum Marketers Assn
P.O. Box 1956
Bismark, North Dakota 58502

Dear Russ:

Kansas passed "gas theft" legislation last year, that would remove the drivers license of an individual driving off without paying for gas for up to one year. The legislation passed unanimously in both chambers and most, if not all, legislators felt that they were really helping the retail industry.

Gas theft has slowed a little. I don't get the calls like I was before the legislation was passed. However, we are experiencing the same problem other states are having of law enforcement not reacting to a drive-off like they should. The membership was elated that we passed this legislation but to take it a step further. I've been told that the reason the police fail to react to a gas theft is largely due to a retailers reluctance to prosecute. All too often when a law enforcement officer responds to a call from a retailer, they ask "what do you want to do with the person that has driven-off?" The retailer usually responds that all they really want is their "$15.00" that was stolen. Law enforcement has told me that they do not want to be bill collectors and that unless there is a guarantee that charges will be filed, there will be little interest to respond to the call.

In my opinion, to make gas-theft legislation really work, we only need one or two cases to be prosecuted, and won, for this legislation to be really effective.

As for the decals, they act as an "anti-theft" policy that has been somewhat helpful in slowing the drive-offs in Kansas. I don't have a dollar figure that I can forward to you that would impact this legislation, but I go by phone calls. Before we passed the legislation I received calls every week. After the legislation my phone has been pretty quiet.

I hope this helps! If you need additional information, give me a call.

Sincerely,

Thomas M. Palace
Executive Director
PMCA of Kansas

Petroleum Marketers and Convenience Store Association of Kansas
201 NW Highway 24 • Suite 320 • PO Box 8479
Topeka, KS 66608-0479
785-233-9655 Fax: 785-354-4374

Testimony --- HB 1459
March 8, 2001
Senate Transportation Committee

Mr. Chairman and members of the Senate Transportation Committee, my name is Russ Hanson, President of the North Dakota Petroleum Marketers Association (NDPMA). NDPMA is a statewide trade association representing 311 companies involved in petroleum marketing including service stations, convenience stores, truck stops, and bulk oil jobbers. We appreciate the opportunity to appear before you in support of HB 1459.

NDPMA asked for introduction of this bill to offer petroleum marketers an avenue to address "drive off" or theft of petroleum products. Drive offs occur when a person fills ups his/her gasoline tank with fuel and leaves the premises without paying. As the price of petroleum products dramatically increased over the past couple of years -- so have the number of instances of gas theft.

At present, there is little or no enforcement to stop gas theft, and we believe HB 1459 will act as a deterrent, warning would be offenders that if they leave without paying for their fuel, they could lose their driving privileges. Passage of this legislation will allow retailers to post signs, at the retailer's expense, that drive offs will not be tolerated and anyone caught driving away without paying for fuel will be prosecuted. Further, repeat offenders face the possibility of losing their driving privileges.

As in any retail industry, theft is addressed regularly by management. Theft in many instances has become a cost of doing business. Many People don't realize that theft becomes an overhead expense. The public is so sensitive to gas prices – losses due to theft are eaten by the business rather than passing them on to customers.

This is a problem that is being addressed across the nation. Twelve states have some type of gas theft law in place. Kansas, Georgia, Oklahoma, Colorado, Alabama, Florida, Michigan, Mississippi, South Carolina, Tennessee, West Virginia, and Virginia are other states that have recently enacted gas theft laws. In addition, South Dakota, Montana,

Minnesota, Wisconsin, Nebraska, North Carolina, and Arkansas are in the process of introducing legislation to address gas theft.

I visited with several colleagues that have gas theft laws in statute to assess opinions of whether the legislation achieved the goal of deterring gasoline theft. The most telling comment I received was from Mike O'Connor, President of the Virginia Petroleum Marketers Association. He states "since the law went into effect on January 1, 2001, we have distributed 25,000 stickers with the message "no pay, no license" and the members think that it is the greatest thing the association has done in the 52 years of existence." In addition, I have attached testimonials from the executives of the Tennessee, Kansas, and Oklahoma petroleum marketers to give you an illustration of the effectiveness of this law. We anticipate similar success in ND with the enactment of HB 1459.

In an effort to provide you with costs and instances of gas theft occurrences in North Dakota, NDPMA conducted a quick survey of our 311 members and concluded the following results:

1. 66 companies responded representing 149 retail locations.
2. The average number of gas thefts of those responding was 20 thefts per year with the average dollar loss of $15.66 per occurrence.
3. There are approximately 886 retail stations in North Dakota. While we won't attempt to compare the results of our survey to the number of total stations, but we do believe this illustrates that this is a significant problem with quite a fiscal impact to business.

Mr. Chairman and members of the committee, NDPMA believes this is proactive legislation that will address a major problem for petroleum retailers to deter would be offenders of gas theft. We believe this legislation will reduce the number of gas thefts and reduce the burden on law enforcement to have to deal with this issue. NDPMA would appreciate your favorable consideration. I would be happy to attempt to address any questions.

WRITTEN TESTIMONY
MARCH 8, 2001
HB 1459

Matt Bjornson
Chairman, North Dakota Petroleum Marketers Association

Mr. Chairman and Members of the Senate Transportation Committee. The theft of petroleum products from retail dispensers is a real problem in many areas of the State of North Dakota. Our own business has experienced what we consider to be a significant loss to gas theft. The problem has become worse in the recent past. In looking for an answer to deter these thefts, NDPMA has communicated with other states that have addressed the problem with legislation similar to what we propose today. We are told that the threat of loss of license is a key deterrent that is reducing gas theft in other areas.

NDPMA believes that passage of this legislation will be beneficial for law enforcement. If the deterrence factor works as it has in other states, the number of reports to law enforcement about gas thefts should be reduced. For those people that are habitual gas thieves, we believe that loss of their license is an appropriate component of their punishment. If they can't drive, they can't steal gas.

On behalf of the North Dakota Petroleum Marketers I would like to thank you and ask for your positive consideration of HB 1459.

BJORNSON OIL COMPANY INC.
P.O. BOX 250
CAVALIER, ND 58220

Dusterhoft Oil Inc.
Loren Dusterhoft
4315 Demers Ave.
Grand Forks, ND
March 7, 2001

Senator Bob Stenehjem
Senate transportation Committee
State Capital
Bismarck, ND

Senator Stenehjem:

In regards to bill 1459, the gasoline theft bill, I have some interest in getting this bill passed. I am an owner of four gasoline stations in Grand Forks. Each year we have hundreds of dollars worth of gasoline thefts at all of the locations. The police are reluctant to do anything about it even though it is a misdemeanor with a fine of up to $1000. I have never heard of anyone getting prosecuted for this in Grand Forks. I feel if we gave the judge the authority after a second offense to suspend a violators driving priveleges for a period of time, it may prevent some of the thefts. Also, if we could gets signs posted on the pumps stating the consequences of gasoline theft it may make the public more aware that violators will be prosecuted.

Loren Dusterhoft

32-01(3), NDCC, provides that the term, "agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by law.

The law says that the final decision in a disciplinary action prosecuted by the Board of Medical Examiners must be made by those members of the Board who weren't involved in the investigation of the case. In other words, six members of the Board of Medical Examiners must be physically present during the entire hearing and during every disciplinary proceeding.

Although most cases are settled without a hearing and most hearings can be concluded within a day or two, that is not necessarily the case. A hearing can run much, much longer than that, perhaps several weeks. It is difficult to believe that many physicians will be willing to serve on the Board of Medical Examiners if they might be summoned across the state at any time to sit in on a hearing that might take them away from their patients and their practices for days at a time. The impact on their patient populations is impossible to calculate. The cost to the Board of Medical Examiners for additional per diem, mileage, meals, and hotel rooms is a complete waste of money that is better spent in providing fair and efficient hearings that serve the Board and the respondent physicians very well.

The really discouraging part of all this, is that the current system works very well. We don't need to "fix" it. The Office of Administrative Hearings provides excellent service to the Board of Medical Examiners.

H. B. 1455

Presented by: **Illona Jeffcoat-Sacco**
Public Service Commission

Before: **Senate Judiciary Committee**
Honorable Jack Traynor, Chairman

Date: **14 March 2001**

TESTIMONY

Mr. Chairman and committee members, I am Illona Jeffcoat-Sacco, director of the Public Service Commission's Public Utilities Division. The Commission asked me to appear here today to oppose the provisions of H.B. 1455 which concern de novo review of agency appeals.

The Commission did not testify on the original version of H.B. 1455. However, as amended by the House, H.B. 1455, specifically Section Three governing appeals from decisions of administrative agencies, raises substantial concerns. The Commission believes that the de novo review provided for in the engrossed bill will unduly burden both administrative agencies and the parties who appear before them.

We are concerned that the investment of resources required for appellate de novo review will handicap other regulatory efforts without substantial benefits to litigants or the public generally. The requirement will also be unduly costly to those who participate in Commission cases. If an electric rate increase decision is subject to de novo appellate review, the Commission, the electric company and any intervenors will have to essentially duplicate their cases on appeal. The same holds true for any adjudicative proceeding before the Commission, whether it be a utility matter, a mining

reclamation case, or a grain complaint. This duplication is directly opposed to the efforts of government to do business efficiently and in a user friendly fashion. In addition, a similar burden will be imposed on the judiciary.

The cases heard by the Commission are often complex and of a highly technical nature. It is not unusual for a case to require the expert testimony of accountants, engineers, environmental scientists or economists. This expert testimony can be provided by Commission employees or outside consultants. The de novo review requirement could mean that an expert witness who investigates a case, prepares documentation and testifies at the agency level might be required to reproduce the same work for the appellate court, doubling the time and expense invested in the case and doubling the cost to the Commission.

When Commission employees are impacted in this way, the resources of the agency are directed away from other agency business to the "second hearing" in the appeal of the case. When the Commission retains outside consultants due to limitations on in-house expertise, the added expense of retaining these consultants for the appeal could be prohibitive, causing the Commission to forego retaining the required experts at all, rather than risk an appeal without the required witnesses.

Despite imposing a substantial cost on agencies and the parties who appear before them, the de novo review requirements do not appear to result in any additional benefits or protections for agency litigants. The current appeal standards in the law, which can be found in Section Three of the engrossed bill, provide complete protection for anyone aggrieved by an agency decision. These standards address any errors that an agency may potentially make, both legal and factual. The de novo review

requirements will add another layer of work for all involved but will not add any new or expanded protections.

Our resources are limited, as are those of other agencies and the judiciary. I believe you all recognize that we are continually trying to do more with less. The provisions in engrossed H.B. 1455 for de novo review on appeal could hinder the Commission's ability to carry out its legislative mandate and deflect Commission resources from other important business without good reason.

Thank you for allowing me to appear here today. This completes my testimony. I would be happy to answer any questions you may have.

NORTH DAKOTA BOARD OF NURSING

919 S 7th St., Suite 504, Bismarck, ND 58504-5881

Web Site Address: http://www.ndbon.org
Telephone # (701) 328-9777
Nurse Advocacy # (701) 328-9783
Fax # (701) 328-9785

JUDICIARY COMMITTEE

TESTIMONY RELATED TO HB 1455

Chairperson Traynor and members of the Judiciary Committee, my name is Dr.Constance Kalanek, Executive Director of the North Dakota Board of Nursing.

On behalf of the board, I wish to offer testimony in strong opposition to HB 1455. The North Dakota Board of Nursing strongly opposes this engrossed bill relating to the finality of decisions of administrative law judges.

The concerns identified by the Board of Nursing include the following:

1. Boards are prohibited form requesting that an administrative law judge make recommended findings of fact, conclusions of law and order under NDCC 28-32.08.5.
   - Currently the BON has requested the recommendation from the ALJ. This is a great benefit to the board because the ALJ completes all the findings and conclusions necessary to support the decision. Yet, the board is still able to choose to adopt or not to adopt the ALJ's recommendation. For example, in several cases the board has adopted some and rejected some recommendations made by the ALJ.

2. If HB 1455 was to become law, the board would either delegate all of their authority to make a decision to the ALJ or would be required to hear all the evidence and make its own finding, conclusions, and order. The first alternative would leave a board no recourse if it believed the ALJ's decision was wrong. The second alternative would cause the board to expend more time and incur more cost, and would deprive the board of the ALJ's expertise in these cases.

With the above rationale, the board of nursing strongly opposes this bill.

NORTH DAKOTA INDUSTRIAL COMMISSION

OIL AND GAS DIVISION

Lynn D. Helms
DIRECTOR

http://explorer.ndic.state.nd.us

Bruce E. Hicks
ASSISTANT DIRECTOR

Engrossed House Bill 1455
Senate Judiciary Committee
Testimony By
Lynn D. Helms
Director
Oil and Gas Division
North Dakota Industrial Commission

Mr. Chairman and members of the committee, my name is Lynn Helms and I am the Director of the Oil and Gas Division of the North Dakota Industrial Commission (NDIC).

I appear in opposition to Sections 3 and 4 of Engrossed House Bill 1455.

The NDIC is the oil and gas regulatory commission for the state of North Dakota. The Oil & Gas Division is the agency that provides the technical expertise needed for creating and enforcing statutes, rules, regulations, and orders of the Commission pertaining to geophysical exploration, drilling, development, production of oil and gas, disposal of oil field brine, and plugging and reclamation of abandoned wells. Many oil and gas development and exploration activities are subject to state review and approval. The process is usually formal.

We hold hearings once a month and hear about twenty cases each month. Most of these cases are very technical, involving testimony from petroleum landmen, geologists, and engineers. The testimony might involve such things as calculating the location, extent, and future potential of oil and gas deposits; evaluating the porosity, hydrocarbon saturation, and permeability of oil bearing zones; and interpreting 3-D seismic analyses.

My technical staff, which is composed of geologists and engineers, evaluates the evidence presented at the hearings. Such an evaluation requires a great deal of specialized training, experience, and computer software. Upon this review a recommendation is made and an order of the Industrial Commission is issued. Resolving the many highly technical matters inherent in regulating the oil and gas industry is best left in the hands of geologists and engineers.

If the standard of judicial review is changed, the rules governing the industry will become less predictable and the costs of doing business in the state will rise. Neither result would benefit North Dakota's oil and gas industry.

600 E Boulevard Ave Dept 405 Bismarck North Dakota 58505-0840 Phone(701)328-8020 Fax(701)328-8022

Testimony before the Senate Judiciary Committee – House Bill 1455

March 14, 2001

Mr. Chairman, members of the Senate Judiciary Committee, my name is Daniel L. Rouse. I am Legal Counsel to the North Dakota State Tax Commissioner. I am here to express the deep concerns of our office with HB 1455, in any of its versions. We echo strongly the competent observations of Judge Graff and Counsel for the Governor's Office. However, Mr. Chairman, members of the committee, our concerns rise above those stated by everyone in opposition to this bill and we are compelled to inform you of them.

The office of State Tax Commissioner is a constitutional office. In other words, it is an executive branch position specifically provided for in the North Dakota Constitution. The authority vested in this office to fix and make final tax assessments, inherent in Title V of the State Constitution and clearly provided throughout Title 57 of the North Dakota Century Code, is unmistakably restricted to the Office of State Tax Commissioner. This bill, if enacted in any form, would run contrary to those provisions.

Thank you. I would be happy to try to respond to any questions.

March 14, 2001

House Bill No. 1455

Presented By: Joe Ibach
President, North Dakota Real Estate Appraiser Qualifications & Ethics Board

On March 2, 2001, the North Dakota Real Estate Appraiser Qualifications & Ethics Board (Appraisal Board) met via a conference call to discuss HB1455. The Appraisal Board voted unanimously to **oppose** the bill.

This proposed bill will undoubtedly result in considerably more time spent by the agency attorneys and agency representatives and their witnesses. More time translates into more costs which, therefore, translates into possibly increasing member dues. (It is ironic that just three weeks ago, I was here testifying to a bill that would have limited member due increases.) Specifically, Section 3 allows for a "de novo" review by the district court. This method of appeal could be costly and cause undue delays in our court system. Most appealing parties will undoubtedly ask for a de novo hearing. The case was heard once, the party was not successful, the party now knows the mistakes made the first time, and now they feel confident that appealing the matter will avoid these mistakes. This de novo process will allow the party to tell the story to the "new guy", a real judge. The result, from the Appraisal Boards perspective, is that it will place considerably more pressure into an already taxed court system. Instead of scheduling an administrative hearing under the present system which takes a couple of hours to one-half day, the judge will have to schedule sufficient time to hear all the witnesses and arguments again. This hearing could easily take one to several days.

The entire purpose of the Administrative Hearing Process now used was to provide the court system some relief, speed up the appeal process, and reduce costs. It is the Appraisal Board's contention that this bill would do a good job of "gutting" those objectives. The only reason to pass the bill is because the present system is not working. The Appraisal Board takes exception to this observation. The present system is working!

Senate Judiciary Committee
March 14, 2001
House Bill No. 1455

TESTIMONY OF JOHN W. MORRISON

Chairman Traynor, members of the Senate Judiciary Committee, my name is John Morrison. I am a lawyer in Bismarck and my primary practice area is oil and gas law. I am appearing before you today as a member of the North Dakota Oil and Gas Association.

The oil and gas industry in North Dakota is a heavily regulated industry. The primary regulator is the Oil and Gas Division of the North Dakota Industrial Commission, although our industry is also affected by decisions of the Public Service Commission, the State Engineer, and the Health Department. To a lesser degree, we are affected by decisions of local government bodies, such as planning and zoning commissions. As such, we are opposed to Sections 3 and 4 of the House Bill No. 1455, which provide for a "request for de novo review" on appeals from administrative agencies and local governing bodies.

Under present law, these appeals are "on the record." On any appeal, the Court reviews the testimony and exhibits presented to the administrative agency or the local governing body and determines whether the agency followed the law in making its decision.

Administrative hearings are a way of life for the oil and gas industry in North Dakota. During the boom years in the 1980s, the Industrial Commission held hearings 2 days a month and probably handled 30-40 cases in each day of hearings. Even in recent times, with only 10-15 active rigs running, there are probably 15-30 hearings in a typical month. Appeals are fairly infrequent events. In my 20 years of handling Industrial Commission hearings for a broad range of clients, I have probably been involved in no more than 10-15 appeals. I believe that providing for a "de novo" review would have a strong adverse impact on our industry for the following reasons:

1. <u>Increased costs of appeal.</u> Oil and gas hearing typically involve the testimony of one to as many as five or six or more expert witnesses in the fields of geology, engineering and land practices. Most of these experts are from out-of-state - Denver, Houston, Dallas and other large cities. It is already an expensive proposition to bring them to North Dakota for the administrative hearing. Bringing them back for a de

novo appeal would be an expensive proposition. De novo appeals would also increase attorneys' fees and all other costs.

2. Increased delay as a result of appeal. Because appeals typically involve only the preparation of briefs and possibly oral argument, they are resolved fairly quickly. In most cases, a decision is made in the district court within 3-4 months after the record is filed with the court. In a de novo review, I doubt that most cases would be resolved in anything less than a year to eighteen months. The uncertainty resulting from these delays will have an adverse impact on oil companies wanting to do business in North Dakota.

3. Increased frequency of appeals. Most parties recognize that, while they may not agree with the decision of the agency, agencies do usually follow the law and make their decisions based upon evidence in the record. Most administrative appeals are not successful. If courts are allowed to substitute their judgment for the judgment of an agency, parties may be more likely to pursue appeals.

4. Lost advantage of expertise of agencies. Most agencies have highly-trained experts and they rely, to some extent, on the expertise of their staff in making decisions. The Oil and Gas Division of the Industrial Commission has a geologist and a number of engineers on its staff. These technical experts are frankly more capable of making an informed decision on a technical spacing or unitization matter than a judge, who may have little, if any, experience or expertise in oil and gas matters. The same can be said of the Health Department, the Public Service Commission, the State Engineer's office, and other agencies.

The oil and gas industry is not always pleased with the decisions made by its regulators. There are certainly times when we wish a court would step in and decide a matter differently. However, we also recognize that a certain amount of discretion is required on the part of administrative agencies, and that agencies should be allowed to exercise their discretion. If they don't follow the law, or don't make their decisions on the basis of the evidence before them, the current law allows for review by the courts. We strongly oppose the uncertainty, added expense, and added delay that would result from Sections 3 and 4 of House Bill No. 1455.

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NORTH DAKOTA DEPARTMENT OF AGRICULTURE
LEGISLATIVE TESTIMONY

Testimony of Roger Johnson
Agriculture Commissioner
House Bill 1455
March 14, 2001
10:00 a.m.
Senate Judiciary Committee
Fort Lincoln Room

Chairman Traynor and members of the committee, my name is Pat O'Neil. I am appearing on behalf of Roger Johnson, the Agriculture Commissioner of North Dakota. I am here to testify in opposition of HB 1455, more specifically Section 3 relating to "de novo" review and Para. 2 of Section 5 concerning hearings before administrative judges.

The proposed amendment to Section 28-32-19 of the NDCC would be detrimental to the administrative hearing procedure in that it would increase the length of time and the costs associated with resolving disputes. Most of the hearings generated in the Ag Department relate to pesticide cases. The time factor is already critical and this

amendment could lead to an extended period needed to reach a resolution in any one case.

In addition, each case appealed on this basis would result in much higher costs due to personnel requirements. In the vast majority of cases, at least one inspector, and sometimes more, has to prepare, attend and testify at a hearing. The necessity of preparing, attending and testifying at a second hearing would be extremely costly.

The common practice for our agency is to request an Administrative Law Judge to hear the case, issue findings of fact and conclusions of law and recommend a final order. The Commissioner of Agriculture issues the final order. In all cases the Commissioner has followed the recommendation of the Administrative Law Judge.

On occasion, the Commissioner has had a conflict or a potential problem has arisen and every time that has happened, the Administrative Law Judge has been asked to issue a final order.

The adoption of this bill would lead to practices that would require additional resources. This agency is represented by the office of the Attorney General. If appeals were requested "de novo" as this bill would allow, the assigned attorney would have to prepare for a second hearing which could be a full blown trial. A full trial takes much more time to prepare for than an administrative hearing. Please keep in mind that the vast majority of our cases involve penalties ranging from $50.00 to $300.00.

No Commissioner of Agriculture, since 1989, has served as a presiding officer in an administrative hearing involving the Department of Agriculture. However, we believe the Commissioner should be able to issue the final order after a hearing held by an Administrative Law Judge. For this reason we oppose House Bill 1455.

The current Administrative Hearing process is not fundamentally flawed. There is already an appeal process available and it has worked in the past and will be more than adequate for the future.

HOUSE BILL NO. 1455

Presented by: Charles E. Johnson
General Counsel
North Dakota Insurance Department

Before: Senate Judiciary Committee
Senator Jack Traynor, Chairman

Date: March 14, 2001

TESTIMONY

Good morning, Mr. Chairman and members of the committee.

My name is Chuck Johnson and I am the General Counsel for the North Dakota Insurance Department. The Insurance Department opposes Engrossed House Bill No. 1455.

This bill allows a district court to order a new hearing on an appeal of an administrative agency decision. The new hearing will create a new record, thereby rendering the agency hearing and its decision meaningless.

This bill will force the agency to double the time, effort, and expense involved in litigating an issue. If a party falls at the agency level, it will certainly try again in the district court. This bill will allow a party two chances to litigate an issue. Courts refer to this as allowing a party "two bites at the apple."

There appears to be no good reason for this change. District courts themselves allow litigants only one chance to litigate their issues. All appeals after the decision of the trial court are based on the record developed in front of the trial court.

The administrative hearing process should follow the same procedures as those of the district court. That is, there should be one opportunity to present witness and develop a record. Reviews thereafter should be based solely on the record developed at the initial hearing. It serves no useful purpose to allow a party a second "bite at the apple" in the administrative process when that opportunity is not allowed in the normal court process.

The Insurance Department urges a "Do Not Pass" recommendation.

I'll be happy to answer any questions that you might have. Thank you.

NORTH DAKOTA
HOUSE OF REPRESENTATIVES

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COMMITTEES:
Appropriations

Testimony on House Bill 1455
before the Senate Judiciary Committee
3-14-01

Good Morning, Chairman Traynor and Members of the Senate Judiciary Committee. For the record, I am Rep. Kim Koppelman and I represent District 13. I appear before you today in support of House Bill 1455.

This is a bill which grew out of the realization that there is an unlevel playing field in the Administrative Hearings process. The majority leaders of both the Senate and the House share my concern about this and, as you'll note, are co-sponsors of this bill.

The Office of Administrative Hearings was created some years ago, as a ostensibly fair, impartial means of adjudicating disagreements between agencies of government and the people they regulate or the general public. Prior to its creation, grievances could be heard in an internal hearing, conducted by the agency involved in the matter. Obviously, this smacked of a lack of fairness and objectivity in deciding these matters.

This prompted the advent of administrative hearings, conducted by administrative hearing officers, as they were then known, or "administrative law judges", as they are now called. These folks hear cases and render make recommendations. This creation created the perception of greater objectivity in administrative hearings.

The only problem is that the decisions are binding upon the public, but not upon the government agency involved. The agency can choose to either accept the ALJ's recommendation, or set it aside and substitute its own.

How would you feel, if you went to court, only to learn that your adversary could decide whether or not he or she liked the judge's decision and choose to accept or reject it, but that you would be required to abide by it, whether you liked it or not. That, Mr. Chairman and members of the committee, is essentially the system we've created for the citizens of our state, when they're a party to an administrative hearing. Obviously, the perception may be one of fairness, but the actual process falls fall short of that standard.

These matters can be pursued in court, but the court's review is limited to whether the hearing was properly conducted, rather that being based upon the facts of the case.

This fact prompted Rep. Klemin to amend the bill in the House Judiciary Committee to include de novo review by the court. You may have since heard from some folks who believe this goes to far and would result in new trials on every matter taken to court. I have heard conflicting analysis on this point and am not an attorney, so I cannot tell you all the ramifications of Rep. Klemin's amendments. I do understand some of the concerns raised and would simply point out that de novo review was not a part of the original bill.

I believe that the Attorney General's office will be offering an amendment which I have reviewed. While I concur with the spirit of the amendment, I would appreciate the Committee's indulgence in offering a substitute amendment after you hear the testimony of the Attorney General's office.

Mr. Chairman and members of the Committee, I urge your favorable consideration of House Bill 1455 and would be happy to attempt to answer any questions you might have.