

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1468

2005 HOUSE POLITICAL SUBDIVISIONS

HB 1468

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1468

House Political Subdivisions Committee

Conference Committee

Hearing Date February 10, 2005

Tape Number	Side A	Side B	Meter #
1		x	47.3 to end
2	x		0.3 to 7.9
Committee Clerk Signature <i>Saurabh Zide</i>			

Minutes: **Rep. Koppelman** opened the hearing on HB 1468, A Bill for an Act to create and enact a new section to chapter 28-32 of the North Dakota Century Code, relating to administrative rules committee review of existing administrative rules.

Rep. Devlin, representing District 23 and prime sponsor of the bill appeared in support of the bill

The purpose of HB 1468 is to give the Administrative Rules Committee the opportunity to look back on existing rules. Every so often a rule which has been in effect for years is suddenly negatively effects the citizens of North Dakota. We then are wondering why it was passed in the first place. We currently have now way to go back and take a look. We would not want to go back and raise havoc with an agency but there are times when we perhaps should go back and take a look and work with the agency. It may be that new legislation would be the answer to update what the rule is addressing.

Rep. N. Johnson How often does it come up that the administrative rules committee would want to go back?

Rep.Devlin Not that often but it does come up perhaps a couple of time every biennium.

Mr. Walstad stated that no rule have been voided in the past two years.

Rep. Ekstrom (53.8) How would the mechanics work in this -- would there be a public hearing process?

Rep.Devlin, I think that it more likely the committee would work with the agency to amend the rule; maybe void it or possibly look at new legislation.

End of Tape 1 Side B (55. 3)

Tape 2 Side A

Rep.Devlin continued.-- there were no further questions of Rep. Devlin.

There was no further testimony in support of the bill.

Opposition Testimony:

Ilona Jeffcoat Saco Executive Secretary to the Public Service Director appeared in opposition to the bill. A copy of her written remarks is attached.

A few question and answers followed.

Bruce Hicks (7.3) Assistant Director for the oil and gas division of the Industrial Commission appeared as neutral to the bill. It is his belief that the Administrative Rules Committee could start voiding rules --- perhaps this committee would not but future committees could.

There being no further testimony on HB 1468, **Rep.Devlin, Chairman** closed the hearing.

End (7.9).

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1468 b

House Political Subdivisions Committee

Conference Committee

Hearing Date February 11, 2005

Tape Number	Side A	Side B	Meter #
2		x	19.8 to 34.8
Committee Clerk Signature <i>Lauren B. Fide</i>			

Minutes: **Rep. Devlin, Chairman** in work session opened the discussion for action on HB 1468.

Rep. Koppelman briefly explained what the bill was designed to do.

Rep. Kaldor moved a 'Do Not Pass' motion for HB 1468. **Rep. Kretschmar** seconded the motion. On a roll call vote the motion failed to get a majority vote with **6 ayes 6 nays 0 absent**.

Rep. Koppelman moved a 'Do Pass' motion for HB 1468. **Rep. Herbal, Vice**

Chairman seconded the motion. On a roll call vote the motion failed to get a majority vote **6 ayes 6 nays 0 absent**. The committee sent the bill out without recommendation.

Rep. Maragos moved to sent the bill (HB 1468) out without recommendation. **Rep.**

Koppelman seconded the motion. On a roll call vote the motion carried **11 ayes 1 nays 0 absent**.

End of record (34.8) .

Date: February 11, 2005
 Roll Call Vote: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB1468

House POLITICAL SUBDIVISIONS Committee _____

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Rep. Kaldor Seconded By Rep. Kretschmar

Representatives	Yes	No	Representatives	Yes	No
Rep. Devlin, Chairman	✓		Rep. Ekstrom	✓	
Rep. Herbel, Vice Chairman	✓		Rep. Kaldor		✓
Rep. Dietrich		✓	Rep. Zaiser		✓
Rep. Johnson		✓			
Rep. Koppelman	✓				
Rep. Kretschmar		✓			
Rep. Maragos		✓			
Rep. Pietsch	✓				
Rep. Wrangham	✓				

Total (Yes) 6 No 6

Absent 0

Floor Assignment _____

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

Date: February 11, 2005
 Roll Call Vote: 2

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1468

House POLITICAL SUBDIVISIONS Committee _____

Check here for Conference Committee

Legislative Council Amendment Number Do Pass

Action Taken _____

Motion Made By Rep. Koppelman Seconded By Rep. Herbel

Representatives	Yes	No	Representatives	Yes	No
Rep. Devlin, Chairman		✓	Rep. Ekstrom		✓
Rep. Herbel, Vice Chairman		✓	Rep. Kaldor	✓	
Rep. Dietrich	✓		Rep. Zaiser	✓	
Rep. Johnson	✓				
Rep. Koppelman		✓			
Rep. Kretschmar	✓				
Rep. Maragos	✓				
Rep. Pietsch		✓			
Rep. Wrangham		✓			

Total (Yes) 6 No 6

Absent 0

Floor Assignment _____

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

Date: February 11, 2005
 Roll Call Vote: 3

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 1468b

House POLITICAL SUBDIVISIONS Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Send out without recommendation

Motion Made By Rep. Maragos Seconded By Rep. Koppelman

Representatives	Yes	No	Representatives	Yes	No
Rep. Devlin, Chairman	✓		Rep. Ekstrom	✓	
Rep. Herbel, Vice Chairman	✓		Rep. Kaldor	✓	
Rep. Dietrich	✓		Rep. Zaiser	✓	
Rep. Johnson	+	✓			
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos	✓				
Rep. Pietsch	✓				
Rep. Wrangham	✓				

Total (Yes) 11 No 1

Absent 0

Floor Assignment Rep. Koppelman

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

REPORT OF STANDING COMMITTEE (410)
February 11, 2005 3:24 p.m.

Module No: HR-28-2642
Carrier: Koppelman
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1468: Political Subdivisions Committee (Rep. Devlin, Chairman) recommends BE PLACED ON THE CALENDAR WITHOUT RECOMMENDATION (6 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING). HB 1468 was placed on the Eleventh order on the calendar.

2005 SENATE POLITICAL SUBDIVISIONS

HB 1468

SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1468

Senate Political Subdivisions Committee

Conference Committee

Hearing Date March 11, 2005

Tape Number	Side A	Side B	Meter #
1	X		1915 - 4851
Committee Clerk Signature <i>Shirley Borg</i>			

Minutes:

Chairman Cook opened the hearing on HB 1468 relating to administrative rules committee review of existing administrative rules. All members (6) present.

Representative Devlin, District 23, Finley, ND introduced HB 1468. The bill was introduced to correct problems that the committee has found occasionally that negatively affects the people of North Dakota. The committee has the authority to review all the administrative rules during a certain time frame to see if they meet legislative intent. However, we can not go back and look at an old rule that has created a problem. The situation can best be explained this way, a state agency has a rule in place that they have been enforcing the same way for many years, however a new person takes over the job and they enforce it differently and that change in enforcement negatively affects the people of North Dakota in regulating the community. We can not do anything about it until the next legislative session. I think if we had the authority to call up the old rule which would be rarely used but in that type of case we could call it back up and work

with the agency and see if we could get them to amend it within the frame work that the original language intended. We could legally void the rule but we have not voided the rule in years unless and agency asks. It isn't something the committee does. If we can not work with the original language intended we can then bring it to the next legislative session for a complete rewrite. I suspect based on some things in the house that you will have some state agencies telling you that the sky is falling if you pass this. We have heard those arguments before. To me I think just the reverse is happening, I think the sky is brightening just a little bit. What the citizens of the regulated community and the administrative rules committee are saying to us is, when the legislature creates a policy for the state we expect it to be followed. We don't expect the enforcement to be changed after the administrative rule time tables run out. Another benefit to this bill may be that an agency may find that a rule that they have been interpreting one way could have a positive impact on the citizen's and still be within the intent of the legislature.

Chairman Cook: When you refer to we, you are referring to the administrative rules committee, right.

Rep. Devlin: You are absolutely right.

Senator Triplett: can you just give us one or two examples of things that you perceive as a problem which require this bill to solve.

Rep Devlin: We have had some problems in the Department of Health where the hospital or whoever has had a problem and we look back and say, why is this being enforced this way? We can't get back to see how the legislature intended it to be enforced. We sit for a full two years before we can even address it.

Senator John Andrist, District 2, Crosby ND appeared to share with the committee a little bit about his perspective on administrative rules. This probably goes back about fifteen or twenty years ago, when people would say to me, "what kind of a stupid law is this anyway"? It seems like seventy five percent of the time, I found out that it wasn't a statute, it was something embedded in the administrative rules. This caused me to investigate a little to find out how extensive the administrative rule code is in North Dakota. Administrative rules of course have the force of law but they are law that is not enacted by the legislature. The process is something that we have given to the agencies to help define the law that we passed. I have been on the administrative rules committee for three or four interim's now and it has been an interesting evolution. We have strengthened the power of the administrative rules committee substantially in a number of ways. We have the power to eliminate a rule but it is virtually never exercised because if we have a problem with a rule we sort of negotiate with the agency and we have the ability to carry over a rule now and not make the decision right away. We say we would like to have this looked at a little bit and the agency will go back and come to us in the next meeting with a revision which better reflect what we feel, serves the agency quite well and most important of all serves the regulated community. It is my vision that the ability to call back an established rule would be just another little pressure point that would help the agency to be just a little bit more sensitive to criticisms and concerns. I have found that there has been a fundamental change in the agencies in that they understand more from the stand point that they are here to serve the public and not control the public. I think this would be one more tool to strengthen the hand of the administrative rules committee. It gives the legislature so much more negotiating power.

Representative Koppelman, District 13, West Fargo, ND testified in support of HB1468. He told the committee a couple of things about administrative rules which he thought would help your context if you are not familiar with them. First of all we have to ask ourselves, what are administrative rules in the first place? Constitutionally the branch of government that is given the authority to make law is the legislative branch of government. If you look at the definition of administrative rules, they carry the force and effect of law. So rule making authority in effect is law making authority. The legislature has delegated some of that authority to the executive branch. The legislature kind of builds the skeleton and the executive branch puts the meat on the bones. What HB 1468 would do is simply do what we already do with rules that come into effect but simply do them with the rules that are already there. In 1995, he sponsored a bill that gave the administrative rules committee the authority to void rules or amend rules if they do so in concert with the agency and in agreement with them. The voiding authority is under very tight specific language in the law that says if the rule is done contrary to legislative intent or if it is arbitrary and a few other things then the committee has the authority to void it. The intent was to bring a check and balance in the system.

No further testimony in support.

Testimony opposed to HB 1468 .

Rick Clayburg, Tax Commissioner, testified in opposition of HB 1468. (See attachment #1)

Senator Dever: Most of what we do here in the legislature is not adding new laws but changing existing laws your department. Does your department regularly reviews the administrative rules that apply to your department or considerate abandoning obsolete rules or changing existing rules?

Rich Clayburg: Regarding the tax department, yes we do and we also take rule promulgation very highly. We have not promulgated a rule in some time. We try to maintain what the intent of the legislature was and if the statute is very clear we do not need to promulgate rules but if we get into very complex areas we do promulgate rules and review those rules.

Illona A. Jeffcoat-Sacco, Executive Secretary and Director of the Public Utilities Division of the Public Service Commission testified in opposition of HB 1468. (See attachment #2)

Melissa Hauer, Attorney of Department of Human Services, testified in opposition to HB 1468. (See attachment #3)

Gary Gronberg, Assistant Superintendent of the Department of Public Instruction testified in opposition of HB 1468. (See attachment #4)

Mark Bohrer, Manager for the Oil and Gas Division, North Dakota Industrial Commission. Testified not in opposition but as an administrative agency we are concerned about the implication that the administrative rules committee could review any existing rule at any time. Furthermore we are concerned about the implication to the regulated community about rules that are void.

No further testimony on HB 1468.

Chairman Cook closed the hearing on HB 1468.

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1468

Senate Political Subdivisions Committee

Conference Committee

Hearing Date March 24, 2005

Tape Number	Side A	Side B	Meter #
1		X	4883 - 4980

Committee Clerk Signature *Shirley Borg*

Minutes:

Chairman Cook opened the discussion and action on HB 1468. All member (6) present.

Senator Dever moved a Do Not Pass.

Senator Fairfield seconded the motion.

Discussion: None

Roll call vote; Yes 6 No 0 Absent 0

Carrier: **Senator Fairfield**

Date: 3-24-05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1468

Senate Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Senator Dever Seconded By Senator Fairfield

Senators	Yes	No	Senators	Yes	No
Senator Dwight Cook, Chairman	X				
Senator Nicholas P. Hacker, VC	X				
Senator Dick Dever	X				
Senator Gary A. Lee	X				
Senator April Fairfield	X				
Senator Constance Triplett	X				

Total Yes 6 No 0

Absent _____

Floor Assignment Senator Fairfield

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

REPORT OF STANDING COMMITTEE (410)
March 24, 2005 12:55 p.m.

Module No: SR-54-6024
Carrier: Fairfield
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1468: Political Subdivisions Committee (Sen. Cook, Chairman) recommends DO NOT PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1468 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

HB 1468

H.B. 1468

Presented by: Illona A. Jeffcoat-Sacco
Executive Secretary
Public Utilities Director

Before: House Political Subdivisions
Honorable William R. Devlin, Chairman

Date: 10 February 2005

TESTIMONY

Chairman Devlin and members of the House Political Subdivisions Committee, I am Illona A. Jeffcoat-Sacco, Executive Secretary and Director of the Public Utilities Division of the Public Service Commission. The Commission asked me to appear here today in opposition to H.B. 1468.

H.B. 1468 would authorize the Legislature's Administrative Rules Committee to call up for review any current, effective, administrative rule, which the Administrative Rules Committee can then void for any of the reasons mentioned in section 28-32-18. We have substantial concerns with this bill and appreciate an opportunity to share them with you.

Administrative rules have the force and effect of law because those rules are promulgated by following very stringent procedural requirements that include notice and opportunity for all affected or interested persons to participate. The procedural hoops ensure that these "laws" conform strictly

to the authority and parameters provided the agency by statute, and that participants have been afforded all constitutional and statutory protections before their government takes any action affecting them.

On the other side of the balance, rules which have the force and effect of law allow all those affected by a rule to rely on the content of that rule and act accordingly. Without that stability, those affected could not rely on a rule when choosing a course of action. H.B. 1468 upsets that balance by allowing previously effective rules to be called into question, and perhaps voided, by a committee meeting between legislative sessions, with notice to the agency but not to those affected by the rule.

We know the legislature is concerned with the impact of administrative rules on North Dakotans. This is the reason for both the takings assessment requirement, the small entity impact assessment and the regulatory analysis requirement in current law, among other provisions. The legislature has determined as a matter of public policy that great efforts should be taken to determine how a rule could impact the citizens of the state. Yet H.B. 1468 could negatively impact all North Dakotans who have relied on the existence of an effective rule and acted on that reliance—all

without any of the statutory protections afforded by the rulemaking process or the cost-benefit analyses required for rules proposed by an agency.

Certainty is a very important consideration in both business and personal decisions. H.B. 1468 calls the certainty of long standing administrative rules into question, without any of the protections offered citizens by either the legislative or administrative processes.

This completes my testimony. I would be happy to answer any questions you might have.



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**Rick Clayburgh
Commissioner**

**Testimony before the Senate Political Subdivision Committee
House Bill 1468**

March 11, 2005

Mr. Chairman, Members of the Committee, I am State Tax Commissioner Rick Clayburgh. I am here to testify in opposition to House Bill 1468.

During the legislative process, what appears to be black-and-white law is not always the case once the implementation process begins at the affected agency. Rules help agencies carry out the legislative intent within the scope of the law.

This is particularly the case at the Tax Department, where we administer very complex, technical areas of state law, in coordination with ever-changing federal law. Removing a rule that the Tax Department has carefully drafted may likewise remove our ability to ensure the state law is carried out.

Additionally, as part of our agency's promulgation of rules, we work closely with taxpayers, taxpayers' representatives (including CPA societies), and others who might be affected by our rules. We have mailing matrixes that allow parties to be notified of upcoming rules hearings.

Further, proposed Tax Department Administrative Rules have always been submitted for review and arrival to the Attorney General before promulgation. Additionally, subsequent to promulgation, there is a review conducted by the Administrative Rules Committee of the Legislature. It is at that point in the process that any objections noted may be fixed and the rule put into effect.

To my recollection, there has only been one objection made by the Administrative Rules Committee regarding Tax Department rules in the last twenty years. Therefore, this change in law is unnecessary.

(Over)

More to the point, I believe that enactment of this bill may be unconstitutional. It appears that it is not consistent with the separation of powers concepts throughout the state's Constitution.

Many of our forms and processes are also based on rules. A rule that may be voided would seriously hinder our ability to administer many of the taxes imposed under state law.

Furthermore, if this law is enacted, the Administrative Code may indeed diminish in size. However, the Century Code will then most likely become enormous, and perhaps unworkable. This would not likely simplify the administration of state laws or improve efficiency in state government.

The result may be that the Tax Department, like many state agencies, will determine that they must create more informal policies to address the application of tax law to specific instances. This eventual swing of the pendulum will undoubtedly prompt complaints from taxpayers because they have not been given any formal notice of new policies and policy changes and that they have no central location to find formal administrative policies. It was not very many years ago that many members of the legislature complained to administrative agencies that administrative policies needed to be formally memorialized to avoid these problems.

Additionally, voiding a rule would virtually bring to a standstill application of a given tax law until the next legislative session. If one of our previously approved rules is voided, there is the likelihood of a negative fiscal impact on the state that could not be cured until the next legislative session – if even then – if we are unable to collect a given tax. Voiding a rule may also open up the door to refunds for taxes collected under the (now) voided rule.

Finally, there is no appeal process built into this bill. If the Rules Committee voids an administrative rule, what is the agency's recourse?

Accordingly, Mr. Chairman, members of the Committee, I respectfully urge you to give this bill a Do Not Pass recommendation. I would be happy to answer any questions. Thank you.

H.B. 1468

Presented by: Illona A. Jeffcoat-Sacco
Executive Secretary
Public Utilities Director

Before: Senate Political Subdivisions
Honorable Dwight Cook, Chairman

Date: 11 March 2005

TESTIMONY

Chairman Cook and members of the Senate Political Subdivisions Committee, I am Illona A. Jeffcoat-Sacco, Executive Secretary and Director of the Public Utilities Division of the Public Service Commission. The Commission asked me to appear here today in opposition to H.B. 1468.

H.B. 1468 would authorize the Legislature's Administrative Rules Committee to call up for review any current, effective, administrative rule, which the Administrative Rules Committee can then void for any of the reasons mentioned in section 28-32-18. We have substantial concerns with this bill and appreciate an opportunity to share them with you.

Administrative rules have the force and effect of law because those rules are promulgated by following very stringent procedural requirements that include notice and opportunity for all affected or interested persons to participate. The procedural hoops ensure that these "laws" conform strictly

to the authority and parameters provided the agency by statute, and that participants have been afforded all constitutional and statutory protections before their government takes any action affecting them.

On the other side of the balance, rules which have the force and effect of law allow all those affected by a rule to rely on the content of that rule and act accordingly. Without that stability, those affected could not rely on a rule when choosing a course of action. H.B. 1468 upsets that balance by allowing previously effective rules to be called into question, and perhaps voided, by a committee meeting between legislative sessions, with notice to the agency but not to those affected by the rule.

We know the legislature is concerned with the impact of administrative rules on North Dakotans. This is the reason for both the takings assessment requirement, the small entity impact assessment and the regulatory analysis requirement in current law, among other provisions. The legislature has determined as a matter of public policy that great efforts should be taken to determine how a rule could impact the citizens of the state. Yet H.B. 1468 could negatively impact all North Dakotans who have relied on the existence of an effective rule and acted on that reliance—all

without any of the statutory protections afforded by the rulemaking process or the cost-benefit analyses required for rules proposed by an agency.

Certainty is a very important consideration in both business and personal decisions. H.B. 1468 calls the certainty of long standing administrative rules into question, without any of the protections offered citizens by either the legislative or administrative processes.

This completes my testimony. I would be happy to answer any questions you might have.

TESTIMONY BEFORE THE
SENATE POLITICAL SUBDIVISIONS COMMITTEE
REGARDING HOUSE BILL 1468
MARCH 11, 2005

Chairman Cook and members of the Committee, my name is Melissa Hauer. I am an attorney for the Department of Human Services. I am here today to testify on behalf of the Department in opposition to House Bill 1468.

The bill would give the Administrative Rules Committee the power to void any existing administrative rule regardless of how long the rule has been in existence. Chapter 28-32 of the North Dakota Century Code contains stringent requirements for how administrative rules are developed. It currently requires agencies to: publish notice in all official County newspapers; in certain circumstances, prepare a regulatory analysis, small entity regulatory analysis, small entity economic impact statement, and takings analysis to determine the impact of the rules on the regulated public; consider all oral and written comments from interested parties; secure an analysis of legality by the Attorney General; and file the rules with Legislative Council for publication. The agency is also required to appear before the Administrative Rules Committee to report on the substance of the rules. This process gives the public an opportunity for input into the rulemaking process – something that this bill would remove if any rule can be voided at any time.

The Department understands that the Legislature is concerned with the impact that administrative rules can have on people and businesses. That is the reason for the stringent process already in place to ensure that agencies consider the input of the public and that they have the authority to adopt the rules that they do. In addition, the Legislature itself has the authority to change any administrative rule it chooses by enacting a law.

Any person interested in a rule also has the right under current law to petition an agency for reconsideration or amendment of a rule. Further, the Administrative Rules Committee already has the authority to void all or part of a rule within ninety days of the rule being published. To extend that authority beyond the initial ninety days to allow the Committee to strike down a rule at any time it chooses would mean a lose of stability and certainty on the part of the people, entities, or agencies that rely on the rules without any of the statutory requirements that currently afford input into the process.

The Legislature as a whole delegates authority to administrative agencies to deal with the sometimes massive and complex issues that arise when a law is executed. This bill would give that authority to one legislative committee and allow it to substitute its own judgment for the judgment of the whole Legislature and that of the agency to which such authority has been delegated. The power to delay, void or negotiate changes to administrative rules is the power to make law. As a result, one committee is given the power to make law and to govern how the executive branch does its business.

For these reasons, the Department requests that this committee consider a do not pass recommendation for HB 1468. I would be happy to try to answer any questions the committee members may have. Thank you.

TESTIMONY ON HB 1468
SENATE POLITICAL SUBDIVISIONS COMMITTEE
Honorable Dwight Cook, Chairman
March 11, 2005
Department of Public Instruction

Mr. Chairman and members of the committee:

My name is Gary Gronberg and I am an assistant superintendent of the Department of Public Instruction. On behalf of the DPI, I am here to speak in opposition to HB 1468.

The Administrative Rules Committee has authority under existing law to find a rule void if the committee acts within a window of time. [NDCC 28-32-18] HB 1468 would expand the committee's authority to declare an existing rule void at any time. The committee could declare the rule void without public input and particularly without input from persons affected by the rule.

Persons and organizations who are affected by rules rely on the certainty that now exists when a rule completes the rulemaking process. An example from the Department is the credentialing rules. School administrators, counselors, librarians, remedial math and remedial reading teachers, and drivers education teachers all must hold a credential in addition to their teaching license. A credential is generally valid for 5 years. Once persons attain the credential, they commonly start right away working on the renewal credential. This is a substantial investment of time, energy and money. People plan for the future based on the predictability of rules and

having notice and opportunity to be heard when rules are changed. These factors would be lost if HB 1468 is passed.

Current law provides many steps that must be followed for a rule to be adopted. HB 1468 would undermine protections for the public that now exist.

Mr. Chairman, that concludes my testimony. I would be happy to answer any questions the committee may have.

Cook, Dwight C.

From: Glenn Elliott [ge-nodak@gcentral.com]
nt: Thursday, March 17, 2005 2:08 AM
o: Cook, Dwight C.
Subject: HBs 1421 and 1468 - Administrative Rules

Dwight:

As I promised (or warned), here are some thoughts regarding House Bills 1421 (administrative or "admin" rule effective date) and 1468 (legislative review of existing admin rules). Forward this on, or print it and pass it around, if and as you wish.

01. Summary:

a. The legislature is the "big cheese" on lawmaking. Administrative rulemaking is lawmaking by delegation of the legislature. The legislature can say "no" to a rule like any other law, meaning IT'S "NO!" AND THAT'S IT!

b. Having the admin rules committee examine existing admin rules is not a new or strange concept. Others thought of it.

c. The rulemaking procedure doesn't give agencies the same closeness to the public as the legislature has.

d. Agencies defer to the legislature and don't try to get around it. Anyone thinking "or else what?" better not.

e. There's no reason that legislative review has to gum up the administrative rulemaking works. Idea: While the Attorney General reviews a proposed rule, so does the admin rules committee.

02. As a citizen, I believe that the supreme law-making body is the legislature. Both the executive (including administrative agencies) and the judiciary defer on that basis. The North Dakota Constitution seems to agree (Article III, Section 1, first sentence). Put simply, if it smells like a law, it's in the legislature's bailiwick and nobody says otherwise.

03. "Administrative law deals with officers and agencies exercising *delegated* powers and not with the exercise of the constitutional powers of the executive" (2 Am Jur 2d "Admin Law" [2004] Sec. 1; have Senator Triplett explain this if you're curious). Who delegated those powers? The legislature did, and what it giveth it can taketh away.

04. "An administrative agency cannot promulgate rules and regulations that contravene the will of the legislature..." (2 Am Jur 2d "Admin Law" [2004] Sec. 132). Which is better suited to determine the legislature's will -- the agency or the admin rules committee?

05. From the comments by those from "the tower," the idea of having a legislative committee reviewing existing admin rules is at least novel and at worst outlandish, and perhaps same for even having that committee. Not so, kemo sabe. The 1981 version of the Model State Administrative Procedure Act allows for a (legislative) admin rules committee (MSAPA Section 3-203) and that the committee may selectively review possible, proposed, *or adopted* rules (MSAPA Sec. 3-204(a)) or recommend a rule to an agency (MSAPA Sec. 3-204(e)).

06. Those from the tower also made much about the care and protections in the rulemaking process. However:

a. The major (perhaps only) participants in that process are the regulator and those regulated. The regulators probably don't hear that often from the public.

b. The agencies also have an interest in effective and efficient administration, or

at least what they consider it to be, so this may temper their concerns for the public.

07. I believe Rick Clayburgh said that an effect of HB 1468 would be to encourage agencies to go more to policy statements instead of rules.

a. Frankly, "them's fightin' words." If the admin agencies pull that crap, I as a citizen would expect the legislature to do a major "smackdown" on the tower for trying that dodge. We have the ND Administrative Code as a way of bringing all these out into the light as public standards. Policy statements would seem to go the other way.

b. From American Jurisprudence Second Series, in Title 2 under the "Administrative Law" topic:

(1) On page 153, above Section 149, policy statements are grouped together with procedural rules instead of with legislative rules (formed by agency under its authority) or interpretive (of statute) rules. To me, this indicates that policy statements are not on the same level as "substantive" rules.

(2) From Section 149: "Procedural rules generally deal with an agency's method of operation and are not intended to change the agency's basic regulatory standards."

(3) According to Section 150, federal agency policy statements are said to lack "the firmness of a prescribed standard, and are generally considered not to be substantive rules or subject to rule-making requirements." [NOTE: Not subject to rule-making requirements, as may be expected for state agency policies.]

(4) From Section 151: "[State agency] policy statements may not have to be promulgated as rules under state law. However, rules which govern administrative regulations may apply to an administrative agency policy which has the effect of a regulation."

8. I don't know if anyone said this, but I think that the agencies really don't want the legislature in "their" business. However:

a. I learned in Command and General Staff Course (your taxes at work) that senior leaders (like the legislature?), while they shouldn't micromanage their subordinates, are not prevented and are in fact required to give particular instructions, even on "minor" matters, if they believe that the instructions are important to mission success.

b. The legislature may not want the public in their business either, but the ND Constitution says the public has the right to do so (initiative, referendum). It may be unwise for the public to do so, but it's their call. Same on administrative rules: It may be unwise for the legislature to void or alter a rule, or to override it by statute, but it is the legislature's prerogative.

09. I think the gentleman from DPI brought up that the agencies make a number of rules to implement Federal directives, and the admin rules committee could mess this up if it voids a rule or wants amendment.

a. If an admin rule implements a Federal directive, then refer to the Federal law, rule, or order in the state admin rule so anyone (rules committee included) can read and understand that.

b. I don't know why the admin rules committee would mess with a rule that it knows is implementing a Federal directive, but if this is that much of a concern, then amend NDCC Chapter 28-32 to state that the administrative rules committee cannot void or request amendment of any state administrative rule that specifically implements any federal directive which unconditionally orders such implementation, or requires it as a condition of receiving federal funds or participating in a federal program under which federal funds are expected to be available. If anyone says this idea is nuts, tell them to see 2 Am Jur 2d "Admin Law" (2004) Sec. 22 (Senator Triplett knows where that is).

10. Concern was raised on both bills about time and uncertainty added to the admin rulemaking process by committee review.

a. I overheard Doug Barr saying that a proposed rule could go to the admin rules committee when it goes to the Attorney General. I say it could also be submitted before that as a draft so the committee can confirm the final proposal and rule not long after the AG's review is done, as the committee is (about) quarterly but AG review could be done in 30 days.

Common concerns could be discussed between the AG and someone from the committee or Legislative Council.

b. Stability in the law is valued, but nobody is entitled to a legal status quo. There is no more risk that the legislature (itself or the admin rules committee) could change or void an administrative rule than that the courts could decide that a rule or law is unconstitutional, that a rule is superseded by another statute, or that a rule or law is unworkable because of a conflict of law.

11. One more bit of legal wisdom: "Confining delegated lawmaking authority within its intended bounds helps to assure that ultimate control over policymaking rests with the legislative branch of government rather than with unelected administrative officials" (2 Am Jur 2d "Admin Law" [2004] Sec. 54).

-- End (finally) --