

2021 HOUSE JUDICIARY

HB 1322

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary

Room JW327B, State Capitol

HB 1322

1/26/2021

Relating to the attorney general's review of proposed administrative rules and the authority of the administrative rules committee to object to or void an administrative rule.

Vice Chairman Karls called the hearing to order at 3:30 PM.

Discussion Topics:

- Attorney General rules
- Rule definitions

Representatives	Attendance
Representative Lawrence R. Klemin	A
Representative Karen Karls	P
Representative Rick Becker	P
Representative Ruth Buffalo	A
Representative Cole Christensen	P
Representative Claire Cory	P
Representative Karla Rose Hanson	P
Representative Terry B. Jones	P
Representative Jeffery J. Magrum	P
Representative Bob Paulson	P
Representative Gary Paur	P
Representative Shannon Roers Jones	P
Representative Bernie Satrom	P
Representative Steve Vetter	P

Rep. B. Koppelman: Introduced the bill. Testimony #3557

LeAnn Harner: Testimony #3484 3:50

Mary Kae Kelsch: State & Local Division of Attorney General's Office: Testimony #3412 4:00

Vice Chairman Karls closed the hearing at 4:20.

DeLores D. Shimek
Committee Clerk by Donna Whetham

HB 1322

Rep. Ben Koppelman- Testimony

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to introduce HB 1322 to you today.

I introduced this bill to protect the administrative rules process by ensuring that rules follow legislative intent both in the affirmative and the unfavorable as well as hold rulemaking to a standard of reasonable and necessary. This is safeguarded by allowing the Administrative Rules Committee the tools necessary to void a rule or portion of a rule if it is determined to be too burdensome.

In North Dakota, we have delegated our policy making authority to various agencies, boards, and commissions within the executive branch. However, with that delegation comes oversight by the legislative branch, as it should, through the Administrative Rules Committee. The Administrative rules committee is a standing statutory committee made up of legislators which meets quarterly or as often as is necessary.

Currently the Administrative Rules Committee can void rules if there is:

- 1) An absence of statutory authority
- 2) An emergency relating to public health, safety, and welfare
- 3) A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for the adoption of the rule
- 4) A conflict with state law
- 5) Arbitrariness and Capriciousness
- 6) A failure to make a written record of its consideration of written and oral submissions respecting the rule under section 28-32-11.

Traditionally, I had always thought that Arbitrariness and Capriciousness was the "catch-all" for objections by the committee due to overregulation. However, there has been some disagreement as to whether those terms would truly be able to be used to overturn such regulation. Here are the definitions that I could find for those terms.

According to USLegal.com, ***'A rule is arbitrary if it is not supported by logic or necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational'.***

Black's Law Dictionary defines **Arbitrary**: *'Willful and unreasoning action, without consideration and regard for facts or circumstances presented...bad faith or failure to exercise honest judgement'* and defines **Capricious**: *'Subject to whim; impulsive and unpredictable'* and defined **Arbitrary and Capricious**: *'A willful and unreasonable action without consideration or in disregard of facts or law or without determining principle'*.

TheLawDictionary.org defines arbitrary as *'Not supported by fair, solid, or substantial cause, and without reason given'*; it goes on to define capricious as *'Given to sudden and unaccountable changes of mood or behavior'*.

One problem could be that rules may be arbitrary but not capricious. Another could be that the rules have been promulgated using one set of facts without weighing out the consequences of such regulations to figure out if the harm the rule may cause would outweigh the benefit. So, in order to figure out a solution, I worked with legislative council to come up with easily understandable terms that could be used by the Administrative Rules Committee for this purpose or safeguarding the public against overregulation. That is why I am seeking to add the following to the list:

- 1) An absence of necessity
- 2) An absence of reasonableness.

Many of you may have heard of the SCOTUS case *North Carolina State Board of Dental Examiners v. Federal Trade Commission* where the court emphasized the need for the legislative branch to exercise oversight over those it delegated its policy making authority to. In North Dakota, this is the Administrative Rules Committee. In order to properly oversee those activities, the committee needs these tools.

I have also included an amendment for your consideration that may further clarify the authority of the Administrative Rules Committee to void a rule based on it being contrary to legislative intent based on past legislative action.

Mr. Chairman and members of the committee, I request that you give the amendment fair consideration and give this bill a Do-Pass recommendation. I would be happy to answer any questions that you may have.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1322

Page 3, line 6, overstrike "or" and insert immediately thereafter ". For purposes of this subdivision, a failure to comply with express legislative intent includes the proposal of a rule by an administrative agency after the legislative assembly has failed to pass a bill that is substantially similar, in whole or in part, to the proposed rule.

d. A failure"

Page 3, line 8, overstrike "d." and insert immediately thereafter "e."

Page 3, line 9, overstrike "e." and insert immediately thereafter "f."

Page 3, line 10, overstrike "f." and insert immediately thereafter "g."

Page 3, line 12, replace "g." with "h."

Page 3, line 13, replace "h." with "i."

Renumber accordingly

TESTIMONY – Support of HB 1322

By LeAnn Harner
Oliver County, ND
701-516-0707
goat@harnerfarm.net

I support HB 1322 as much needed clarification to the Administrative Rules code.

As a volunteer for the ND Food Freedom organization, I receive many phone calls, emails and other contacts from cottage food producers. During the 2019 Session, when some legislators were working with the Department of Health to restrict cottage foods, I was constantly asked “why is this happening? Didn't we go through this when the bill was passed in 2017?” I explained that this is part of the process and legislators and citizens had the right to ask for changes in law – even when we didn't always agree. We just needed to work through the process and talk to our elected representatives. We did and were successful.

Then the Department of Health decided to write rules – which were nearly word-for-word what the Legislature defeated earlier that year. Now I was asked, “How can they do this? Will it never stop?” I told our people to have faith in the process and especially the Legislature's Administrative Rules Committee. I explained that the reason for the committee was to make sure agencies did not pass rules contrary to legislative intent.

When we got to the committee I was shocked to hear attorneys state that when a piece of legislation is defeated it cannot be considered legislative intent.

I ask you – if an agency supports a bill and it fails – are our elected representatives going to allow the agency to make the rules – with the effect of law – on their own? If that's true, why do we have a Legislature?

We were fortunate that the Institute of Justice was willing to sue on our behalf and was successful.

If HB 1322 had been part of Century Code, that would have allowed the Attorney General to determine the rules were indeed not lawful and saved the State the cost of rulemaking and a lawsuit. It would have saved time for every member of the Administrative Rules Committee. It would also have saved our citizens – hardworking people trying to supplement their incomes – from a year of not being able to sell certain items and a whole lot of stress and stomach acid.

More importantly – it would have kept the faith with your constituents that it is the Legislature – our elected representatives – who determines what is lawful and what is not. We wonder why citizens don't participate in the process and then when they do – this happens.

HB 1322 is much, much larger than one issue. Every day you vote on bills downstairs. How many times do you hit the red button? What would you think if more of those ideas that you voted against – that could not meet the requirement of a majority of the Legislature in support – were effectively passed by agencies via rules?

I'll quote from the lawsuit:

“The Department does not cite to any legal authority establishing or even suggesting that if the Legislature fails to pass a law an agency wants, the agency can then enact the law on its own through the back door with rulemaking.”

We talk about election integrity. 1322 deals with lawmaking integrity. I implore you to pass legislation that closes this loophole.

ADDENDUM:

Background and Information on court case: <https://ij.org/case/north-dakota-food-freedom/>

Actual ruling by the court: <https://ij.org/wp-content/uploads/2020/12/Order-Granting-Pls.-JOP.pdf>

Quote from the ruling:

[¶16] Interpretation of the Cottage Food Act as allowing the broad sale of homemade foods is also consistent with the Legislature's repeated refusal to enact the Department's requests to restrict cottage food sales. The Department quite relentlessly pursued the challenged rules/restrictions regarding cottage foods for three years. *Docket Number 40 (Amended Complaint)* at ¶¶ 31-36. The Department tried to impose the restrictions in three ways: through HB 1433, through its failed rules in 2018, and through SB 2269. *Id.* Over the course of three years, the Department strongly persisted in its efforts to enact the restrictions on cottage foods, despite opposition. *Id.*

[¶17] The Legislature's refusal to adopt the Department's proposed amendments to H.B. 1433 in 2017 and to pass S.B. 2269 in 2019, both of which would have banned exactly the same homemade foods that the challenged rules now ban, reveal that the Legislature did not intend to so restrict cottage food sales. Therefore, the Department's interpretation of the Cottage Food Act clearly does not effectuate the Act's purpose, and is contrary to the Legislature's stated intent. Adopting the Department's interpretation of the Cottage Food Act would enact restrictions on cottage food sales that the Legislature has already rejected twice. Further, the Department does not cite to any legal authority establishing or even suggesting that if the Legislature fails to pass a law an agency wants, the agency can then enact the law on its own through the back door with rulemaking. Allowing such an end run directly undermines the clear Legislative intent.

HOUSE JUDICIARY COMMITTEE
1/26/2021

TESTIMONY OF MARY KAE KELSCH
OFFICE OF ATTORNEY GENERAL
HOUSE BILL NO. 1322

Mr. Chairman, members of the House Judiciary Committee.

I am Mary Kae Kelsch, Director of the Attorney General's State and Local Division. I appear on behalf of the Attorney General in opposition to House Bill 1322.

By law, agencies must submit proposed rules to the Attorney General's office for review before final adoption. Section 1 of the bill proposes that a rule is not legal if it is contrary to legislative intent, including the defeat of a legislative measure.

This proposed language is contrary to the principles of statutory construction. N.D.C.C. § 1-02-05. In ascertaining the meaning of a statute, we look first to the language of the statute as a whole, construing the words in their plain, ordinary, and commonly understood sense. Zueger v. North Dakota Workers Comp. Bureau, 584 N.W.2d 530. When a statute is clear and unambiguous, we look only to the face of the statute to determine legislative intent, and when the statute is clear and unambiguous, we cannot disregard it under the pretext of pursuing legislative intent. The late U.S. Supreme Court Justice Anthony Scalia argued that the temptation to use legislative history should be avoided because of the tendency to manufacture statements for favorable interpretations.

It is also contrary to settled case law to require a review of a defeated legislative measure to ascertain legislative intent. The fact that a bill or measure was defeated does not indicate any intent on the part of the legislature. James v. Young, 77 N.D. 451 (1950); Warner v. Solberg, 634 N.W.2d 65 (2001). A failed bill has no statutory power or authority. Public policy is declared by the action of the legislature not by its failure to act. Id.

The rulemaking process is one that must strike a careful balance between the branches of government. The standard of review is whether an administrative agency's rulemaking decision is arbitrary and capricious. This is a recognizable legal standard backed by case law. Little v. Traynor, 565 N.W.2d 766 (1997).

The Attorney General objects to the addition of the words “unnecessary” and “unreasonable” to Sections 2 and 3 because they are discretionary terms without any legal meaning and without any guidance on their application to proposed rules. The Legislature cannot delegate complete discretion to a committee, in this case, to the Administrative Rules Committee to determine whether a rule is “unnecessary” or “unreasonable” without any guidelines whatsoever on what the terms mean. To do so would lead to a clear separation of powers issue as found in the recent case of N.D. Legislative Assembly v. Burgum, 916 N.W.2d 83. The Court in the Burgum case stated that the law must set forth reasonably clear guidelines to enable the appropriate body to ascertain the facts.

This language also creates an additional separation of powers issue between the legislative and executive branches of government. While the legislature makes

the law, the executive branch is tasked with administering the laws pursuant to the parameters set forth in the statutes. One of those administrative tasks is the drafting of administrative rules to effectuate the law. While chapter 28-32 of the Century Code provides necessary standards and safeguards to ensure that there is not uncontrolled discretion with the agency, the addition of discretionary language for the Administrative Rules Committee is indicative of the Legislature drifting from a safeguard, ensuring that the administrative rules are within the parameters set by law, to infringing upon the execution of a law, which is an inherently executive branch function.

This relationship was explored in depth in a 1987 North Dakota Supreme Court case called Trinity Medical Center v. North Dakota Bd. Of Nursing, 399 N.W.2d 835. This case discusses that the Legislature sets standards for rule-making in the statute, in this specific case rulemaking authority for the board of nursing to set eligibility requirements for nursing schools. The court goes on to hold: “It is acceptable for the Legislature to allow plaintiff to promulgate reasonable eligibility requirements by rule, rather than fixing them by statutory provision. These requirements are the kind of ‘details’ which are properly delegated to an administrative agency . . .” Id. at 845. The case further goes on to say that the appropriate way for the Legislature to retract or reduce an agency’s rule-making authority is for the Legislature itself to make the statute more specific, not by delegating discretionary authority to the Administrative Rules Committee to override the executive agency’s application of the law. The determination of

whether or not a rule is necessary is a determination made by the executive agency in its execution of the laws; it is not a legislative function.

Due to the significant legal and constitutional issues facing this bill, the Attorney General's office recommends a do not pass. Thank you for your time and consideration.

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary

Room JW327B, State Capitol

HB 1322

2/3/2021

Relating to the attorney general's review of proposed administrative rules and the authority of the administrative rules committee to object to or void an administrative rule.

Chairman Klemin called the meeting to order at 2:46 PM.

Representatives	Attendance
Representative Lawrence R. Klemin	P
Representative Karen Karls	P
Representative Rick Becker	P
Representative Ruth Buffalo	P
Representative Cole Christensen	P
Representative Claire Cory	P
Representative Karla Rose Hanson	P
Representative Terry B. Jones	P
Representative Jeffery J. Magrum	P
Representative Bob Paulson	P
Representative Gary Paur	P
Representative Shannon Roers Jones	P
Representative Bernie Satrom	P
Representative Steve Vetter	P

Discussion Topics:

- Proposed amendments to the bill on Line 15
- Clarification of authority of the Administrative rules committee

Do Not Pass Motion: **Rep. Satrom**

Seconded by **Rep. Roers Jones**

Roll Call Vote:

Representatives	Vote
Chairman Klemin	Y
Vice Chairman Karls	Y
Rep Becker	N
Rep. Christensen	N
Rep. Cory	Y
Rep T. Jones	N
Rep Magrum	N
Rep Paulson	N
Rep Paur	Y
Rep Roers Jones	Y

Rep B. Satrom	Y
Rep Vetter	N
Rep Buffalo	Y
Rep K. Hanson	Y

Motion carries 8-6-0.

Rep. Roers Jones: Carrier.

Chairman Klemin closed the hearing 3:56 PM.

DeLores D. Shimek by Donna Whetham
Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1322: Judiciary Committee (Rep. Klemin, Chairman) recommends **DO NOT PASS** (8 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING). HB 1322 was placed on the Eleventh order on the calendar.