

2021 HOUSE JUDICIARY

HB 1385

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary

Room JW327B, State Capitol

HB 1385

2/2/2021

Relating to the attorney general review of proposed administrative rules
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Chairman Klemin called the hearing to order at 8:30 AM.

Present: Representatives Klemin, Karls, Becker, Buffalo, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter.

Discussion Topics:

- Legislative intent of administrative rules

Rep. Becker: Introduced the bill.

Mary Kae Kelsch, Office of Attorney General: Testimony # 4704

Additional written testimony: # 4843

Chairman Klemin closed the hearing at 9:02.

DeLores D. Shimek
Committee Clerk

HOUSE JUDICIARY COMMITTEE
FEBRUARY 2, 2021

TESTIMONY OF MARY KAE KELSCH
OFFICE OF ATTORNEY GENERAL
HOUSE BILL NO. 1385

Mr. Chairman, members of the Committee.

I am Mary Kae Kelsch, Assistant Attorney General, and I appear on behalf of the Attorney General in opposition to House Bill 1385.

This bill would have the Attorney General's office reject a rule if the rule is contrary to legislative intent. Subsection 3 would prevent the proposal of any bill within four years after the legislative assembly failed to pass a bill is substantially similar to the rule it is contrary to legislative intent.

- NDCC 28-32-18(1)(c) already allows the Administrative Rules committee to find all or any portion of a rule void if there is a specific finding that there is "a failure to comply with express legislative intent."
- North Dakota case law states that the failure of a measure is not indicative of legislative intent. Public policy is declared by the action of the legislature—not by its failure to act.
- Sometimes measures fail because the legislature determined it was a matter better served by the rulemaking procedure.
- Legislative intent is not always clear. Measures fail because people disagree.
- Legislative history is not the same as legislative intent.

- If the Legislature does not want an agency to pass rules on a particular subject then it has the ability to take away an agency's authority to make such rules.
- Section 3 is overly broad. It is unclear what would be considered "substantially similar" to a failed bill.

I would be happy to answer any questions.

TESTIMONY – Support of HB 1322

By LeAnn Harner
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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.

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Judiciary

Room JW327B, State Capitol

HB 1385

2/3/2021

Relating to the attorney general review of proposed administrative rules
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Chairman Klemin called the hearing to order at 3:57 PM.

Present: Representatives Klemin, Karls, Becker, Buffalo, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter.

Discussion Topics:

- Legislative intent
- Bill passage

Rep. Becker: Went over the bill. 3:58

Rep. Vetter: motion do pass

Rep. Christensen: Seconded

Roll Call Vote

Representatives	Vote
Chairman Klemin	N
Vice Chairman Karls	N
Rep Becker	Y
Rep. Christensen	Y
Rep. Cory	N
Rep T. Jones	Y
Rep Magrum	Y
Rep Paulson	Y
Rep Paur	Y
Rep Roers Jones	N
Rep B. Satrom	N
Rep Vetter	Y
Rep Buffalo	N
Rep K. Hanson	N

7-7-0 Motion tied

Rep. Vetter: Motion Without committee recommendation

Rep. Satrum: seconded

Roll Call Vote

Representatives	Vote
Chairman Klemin	Y
Vice Chairman Karls	Y
Rep Becker	Y
Rep. Christensen	Y
Rep. Cory	Y
Rep T. Jones	Y
Rep Magrum	Y
Rep Paulson	Y
Rep Paur	N
Rep Roers Jones	Y
Rep B. Satrom	Y
Rep Vetter	Y
Rep Buffalo	Y
Rep K. Hanson	Y

Motion carried 13-1-0

Rep. Vetter: floor assignment

Chairman Klemin: adjourned 4:14 PM

DeLores D. Shimek
Committee Clerk
By Anna Fiest

REPORT OF STANDING COMMITTEE

HB 1385: Judiciary Committee (Rep. Klemin, Chairman) recommends **BE PLACED ON THE CALENDAR WITHOUT RECOMMENDATION** (13 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1385 was placed on the Eleventh order on the calendar.