

# ADMINISTRATIVE RULES COMMITTEE

The Administrative Rules Committee is a statutory committee deriving its authority from North Dakota Century Code (NDCC) Sections 54-35-02.5, 54-35-02.6, 28-32-17, 28-32-18, and 28-32-18.1. The committee is required to review administrative agency rules to determine whether:

1. Administrative agencies are properly implementing legislative purpose and intent.
2. There is dissatisfaction with administrative rules or statutes relating to administrative rules.
3. There are unclear or ambiguous statutes relating to administrative rules.

The committee may recommend rule changes to an agency, formally object to a rule, or recommend to the Legislative Council the amendment or repeal of the statutory authority for the rule. The committee also may find a rule void or agree with an agency to amend or repeal an administrative rule to address committee concerns, without requiring the agency to begin a new rulemaking proceeding.

The Legislative Council delegated to the committee its authority under NDCC Section 28-32-10 to distribute administrative agency notices of proposed rulemaking and to approve extensions of time for administrative agencies to adopt rules and its responsibility under Section 28-32-42 to receive notice of appeal of an administrative agency's rulemaking action.

Committee members were Representatives William R. Devlin (Chairman), LeRoy G. Bernstein, Randy Boehning, Duane DeKrey, Mary Ekstrom, Rod Froelich, Pat Galvin, Ronald A. Iverson, Kim Koppelman, Jon O. Nelson, Sally M. Sandvig, Margaret Sitte, Blair Thoreson, and Dwight Wrangham and Senators John M. Andrist, Dennis Bercier, Richard L. Brown, April Fairfield, Tom Fischer, Layton W. Freborg, Jerry Klein, Gary A. Lee, and Constance Triplett.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2006. The Council accepted the report for submission to the 60th Legislative Assembly.

## ADMINISTRATIVE AGENCY RULES REVIEW

Administrative agencies are those state agencies authorized to adopt rules under the Administrative Agencies Practice Act (NDCC Chapter 28-32). A rule is an agency's statement of general applicability that implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency. Properly adopted rules have the force and effect of law. Each rule adopted by an administrative agency must be filed with the office of the Legislative Council for publication in the North Dakota Administrative Code.

Under NDCC Section 54-35-02.6, it is the standing duty of the Administrative Rules Committee to review administrative rules adopted under Chapter 28-32. This continues the rules review process initiated in 1979.

For rules scheduled for review, each adopting agency is requested to address:

1. Whether the rules resulted from statutory changes made by the Legislative Assembly.
2. Whether the rules are related to any federal statute or regulation. If so, the agency is requested to indicate whether the rules are mandated by federal law or to explain any options the agency had in adopting the rules.
3. A description of the rulemaking procedure followed in adopting the rules, e.g., the time and method of public notice and the extent of public hearings on the rules.
4. Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to the rules. Each agency is asked to describe any such concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint and to summarize the comments of any person who offered comments at the public hearings on these rules.
5. The approximate cost of giving public notice and holding hearings on the rules and the approximate cost (not including staff time) used in developing and adopting the rules.
6. The subject matter of the rules and the reasons for adopting the rules.
7. Whether a written request for a regulatory analysis was filed by the Governor or an agency, whether the rules are expected to have an impact on the regulated community in excess of \$50,000, and whether a regulatory analysis was issued. If a regulatory analysis was prepared, a copy is to be provided to the committee.
8. Whether a regulatory analysis or economic impact statement of impact on small entities was prepared as required by NDCC Section 28-32-08.1. If a small entity impact assessment was prepared, a copy is to be provided to the committee.
9. Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. If a constitutional takings assessment was prepared, a copy is to be provided to the committee.
10. If the rules were adopted as emergency rules under NDCC Section 28-32-03, the agency is to provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support the declaration and a copy of the Governor's approval of the emergency status of the rules.

During committee review of the rules, agency testimony is required and any interested party may submit oral or written comments.

## Current Rulemaking Statistics

The committee reviewed 1,353 rules sections and 1,920 pages of rules that were changed from December 2004 through October 2006. The number of sections affected and the number of pages of rules were substantially fewer than the comparable numbers from the previous biennial period. Table A at the end of this report shows the number of rules amended, created, superseded, repealed, reserved, or redesignated for each administrative agency that appeared before the committee.

Although rules differ in length and complexity, comparison of the number of administrative rules sections affected during biennial periods is one method of comparing the volume of administrative rules reviewed by the committee. The following table shows the number of North Dakota Administrative Code (NDAC) sections amended, repealed, created, superseded, reserved, or redesignated during designated time periods:

Time Period	Number of Sections
November 1986-October 1988	2,681
November 1988-October 1990	2,325
November 1990-October 1992	3,079
November 1992-October 1994	3,235
November 1994-October 1996	2,762
November 1996-October 1998	2,789
November 1998-November 2000	2,074
December 2000-November 2002	1,417
December 2002-November 2004	2,306
December 2004-October 2006	1,353

For committee review of rules at each meeting, the Legislative Council staff prepares an administrative rules supplement containing all rules changes submitted for publication since the previous committee meeting. The supplement is prepared in a style similar to bill drafts, with changes indicated by overstrike and underscore. Comparison of the number of pages of rules amended, created, or repealed is another method of comparing the volume of administrative rules reviewed by the committee. The following table shows the number of pages in administrative rules supplements during designated time periods:

Time Period	Supplement Pages
November 1992-October 1994	3,809
November 1994-October 1996	3,140
November 1996-October 1998	4,123
November 1998-November 2000	1,947
December 2000-November 2002	2,016
December 2002-November 2004	4,085
December 2004-October 2006	1,920

## 2005 Rules Review Changes

Passage of 2005 House Bill No. 1421 revised rulemaking procedures and rules review by the Administrative Rules Committee. Under prior law, administrative rules were published and in effect before they were reviewed by the Administrative Rules Committee. If rules review resulted in amendment, repeal, or voiding of a rule, that rule would be in effect for a short time and then be changed or eliminated.

Administrative Rules Committee members expressed concerns that this made it difficult for the public to rely on rules until after completion of rules review. In discussion of these concerns with agency representatives, they generally agreed it would make sense to delay the effectiveness of rules until completion of the rules review process. However, agency representatives expressed concern that the statutory procedure for administrative rulemaking already required a substantial amount of time to put a rule in place, and adding an additional delay until completion of rules review by the Administrative Rules Committee would greatly increase the time required to put a rule in place. House Bill No. 1421 provided that nonemergency rules will become effective after they have been reviewed by the Administrative Rules Committee and reduced the time requirements to put a rule in place under the rulemaking process. The bill reduced from 30 to 20 days the time that must elapse after publication of notice of rulemaking before the public hearing may be held. The bill reduced the comment period after a rulemaking hearing from 30 to 10 days. The bill established a quarterly schedule of effective dates for administrative rules to replace the previous schedule of rules becoming effective on the first day of the month following publication. The bill required the Administrative Rules Committee to meet and consider rules not later than the 15th day of the month before the rules are scheduled to become effective. If a rule is carried over for consideration by the Administrative Rules Committee, that rule is delayed in becoming effective until the first day of the calendar quarter after the meeting at which the rule is reconsidered. The following table illustrates the rule filing dates, deadlines for committee meetings, and effective dates of rules under the new procedures established by House Bill No. 1421:

Filing Date	Committee Meeting Deadline	Effective Date
August 16-November 15	December 15	January 1
November 16-February 15	March 15	April 1
February 16-May 15	June 15	July 1
May 16-August 15	September 15	October 1

## Voiding of Rules

Under NDCC Section 28-32-18, the committee may void all or part of a rule if that rule is initially considered by the committee not later than the 15th day of the month before the date of the Administrative Code supplement in which the rule change appears. The committee may carry over consideration of voiding administrative rules for not more than one additional meeting. This allows the committee to act more deliberately in rules decisions and allows agencies additional time to provide information or to work with affected groups to develop mutually satisfactory rules. The committee may void all or part of a rule if the committee makes the specific finding that with regard to the rule there is:

1. An absence of statutory authority;
2. An emergency relating to public health, safety, or welfare;

3. A failure to comply with express legislative intent or to substantially meet the procedural requirements of NDCC Chapter 28-32 for adoption of the rule;
4. A conflict with state law;
5. Arbitrariness and capriciousness; or
6. A failure to make a written record of an agency's consideration of written and oral submissions respecting the rule under NDCC Section 28-32-11.

Within three business days after the committee finds a rule void, the office of the Legislative Council is required to provide written notice to the adopting agency and the chairman of the Legislative Council. Within 14 days after receipt of the notice, the agency may file a petition with the chairman of the Legislative Council for Legislative Council review of the decision of the committee. If the adopting agency does not file a petition, the rule becomes void on the 15th day after the notice to the adopting agency. If within 60 days after receipt of a petition from the agency the Legislative Council has not disapproved the finding of the committee, the rule is void.

### **Obsolete Rule Repeal**

Under NDCC Section 28-32-18.1, an agency may amend or repeal a rule without complying with the normal notice and hearing requirements relating to adoption of administrative rules if the agency initiates the request to the committee, the agency provides notice to the regulated community of the time and place the committee will consider the request, and the agency and the Administrative Rules Committee agree the rule amendment or repeal eliminates a provision that is obsolete or no longer in compliance with law and that no detriment would result to the substantive rights of the regulated community.

### **Agency Rules Analysis**

Under NDCC Section 28-32-08, an agency is required to issue a regulatory analysis of a proposed rule if a request for the analysis is filed by the Governor or a member of the Legislative Assembly or the proposed rule is expected to have an impact on the regulated community in excess of \$50,000. A regulatory analysis is required to identify persons who will be affected by the proposed rule and to address economic impact, implementation and enforcement costs, and consideration of alternative methods for achieving the purposes of the proposed rule.

Under NDCC Section 28-32-09, an agency is required to prepare an assessment of constitutional takings implications of a proposed rule that may limit the use of private property. The agency must assess the likelihood that the proposed rule may result in a taking or regulatory taking, identify the purpose of the proposed rule, explain the necessity of the proposed rule to substantially advance the purpose of the rule, examine any alternative action that could achieve the agency's goals while reducing impact to private property owners, estimate potential cost to the government if a court determines that the rule constitutes a taking or

regulatory taking, identify the source within the agency's budget for payment of compensation that might be ordered, and certify that the benefits of the proposed rule exceed the estimated compensation costs.

Under NDCC Section 28-32-08.1, an agency analysis is required for rules affecting small entities. This section requires agency consideration of the impact of proposed rules on small entities, including a small business, small nonprofit organization, or small political subdivision. The agency must consider methods of reducing the impact of proposed rules on small entities, including establishing less stringent compliance or reporting requirements for small entities, establishing less stringent schedules or deadlines for compliance or reporting for small entities, consolidating or simplifying compliance or reporting requirements for small entities, establishing performance standards for small entities to replace design or operational standards required by the rule, and exemption of small entities from all or any part of the proposed rule. This section does not apply to rules mandated by federal law, to any occupational or professional licensing agency, or to 17 specifically listed agencies.

## **COMMITTEE ACTION ON RULES REVIEWED Obsolete Rules Repeal**

The Department of Human Services conducted a review of all Administrative Code provisions adopted by the department. The review process resulted in updating or eliminating many rules. The department obtained approval of the Administrative Rules Committee for repeal of NDAC Chapter 75-01-01, which provided an overview of programs and services and contact information for the department. Department representatives said it is very difficult to keep the information in the chapter current and it is more effective to provide this information to the public on the department's web site and in other publications. The department received approval of the committee for the repeal of NDAC Chapter 75-02-11, relating to the food stamp program, and NDAC Chapter 75-03-26, relating to aging services community programs. Department representatives testified that food stamp program rules were obsolete because the rules duplicate federal food stamp regulations and the aging services program rules were obsolete because they duplicate the federal Older Americans Act.

### **Rules Amendments by Committee Approval**

The Department of Human Services received approval of the Administrative Rules Committee for an additional amendment to substance abuse treatment program rules adopted by the department. A department representative said providers of substance abuse treatment programs expressed concerns that the rules as adopted prohibited treatment of adolescents in a group with adults and smaller treatment programs find it necessary to combine adolescent and adult groups. The additional amendment makes clear the department may issue a designation for treatment in an adolescent and adult combined program. The department received

approval from the committee for amendment of rules governing assessment of child abuse and neglect reports. Committee members expressed concern that the rules provision did not match the statutory requirement that the department is required to advise the subject of a report of suspected child abuse or neglect of the specific complaint or allegations made against the person at the time of initial contact with the person. Committee members also pointed out the statutory provision governing assessments contains the specific statement that the program is to protect the legal rights and safety of children and families. The department proposed amendments to address the committee concerns and the committee approved the adoption of the amendments.

The Superintendent of Public Instruction adopted a substantial body of rules changes governing school accreditation standards. Representatives of the North Dakota School Boards Association, the North Dakota Council of Educational Leaders, and the North Dakota Education Coalition expressed concerns and opposition regarding some of the rules changes. One of the concerns was that the rules changes would take effect at the beginning of a new contract cycle for school districts and possibly would force nonrenewals of some teacher and principal contracts. Another concern was a rules requirement that health education be provided in both seventh grade and eighth grade, rather than being provided in either seventh grade or eighth grade. The committee carried over consideration of the accreditation rules and urged the Superintendent of Public Instruction to meet with concerned groups regarding the issues raised. At the subsequent meeting of the committee, Superintendent of Public Instruction representatives described discussions with concerned groups on the issues in controversy and recommended further amendments to the rules, including delaying the effective date of some rule changes until October 2006 or July 2007 to avoid impact on the current cycle of school district teacher and principal contract renewal decisions. One aspect of the rules that did not result in agreement between department representatives and representatives of education groups was the requirement that health education be taught in both seventh grade and eighth grade. A memorandum from the Attorney General's office concluded that statutory interpretation would support the rule as adopted by the Superintendent of Public Instruction requiring health education in both seventh grade and eighth grade. The committee approved adoption of the additional amendments proposed by the Superintendent of Public Instruction.

The Attorney General adopted rules changes governing operation of the North Dakota lottery. Committee members expressed concern about some aspects of the rules changes and carried over consideration of the rules to a subsequent meeting. At the subsequent meeting, the committee agreed with the Attorney General to eliminate three amendments that would have removed language prohibiting lottery material that degrades a person who does not buy a ticket, allowed a member of the immediate family of a

lottery employee to receive a gift from a licensee or vendor, and allowed the director of the lottery to waive application of any lottery rule.

The State Board of Accountancy adopted rules allowing unlicensed accountants to use the title "accountant" or "accounting" in describing their services if a specific disclaimer was included in the advertising and use of the terms. Representatives of unlicensed individuals providing accounting services expressed opposition to the disclaimer required because the length of the required disclaimer would prohibit certain forms of advertising. The committee carried over consideration of the rule as adopted and, at the subsequent meeting, the committee agreed with the State Board of Accountancy on a further amendment to require a substantially shorter disclaimer. It was the understanding of the committee that the adoption of the amendment would result in the dismissal of the pending lawsuit filed against the state by unlicensed individuals providing accounting services.

Workforce Safety and Insurance adopted several rules changes governing coverage. Workforce Safety and Insurance requested and the committee approved an additional amendment to specify the occasions when Workforce Safety and Insurance may conduct retrospective reviews of medical services and subsequently reimburse medical providers when it is later determined that a treated individual was entitled to Workforce Safety and Insurance coverage.

In several instances, the committee carried over consideration of administrative rules and received information from the relevant agency at the subsequent meeting which satisfied the committee's concerns. Rules of the Agriculture Commissioner, the State Board of Architecture, the State Department of Health, the Department of Human Services, and the Superintendent of Public Instruction which were carried over for consideration were the subject of no further committee action after information and explanations were provided by agency representatives.

The Secretary of State adopted rules to govern mixed fighting style competition. One of the rules adopted provides that a ticket to mixed fighting style competition may not be sold for more than the price printed on the ticket. The committee carried over consideration of this rule to its December meeting because it appears similar to legislation considered but not approved by the Legislative Assembly.

### **Committee Voiding of Agency Rules**

Workforce Safety and Insurance adopted a rule allowing an injured worker coverage for a branded equivalent of a generically available medication only after prior approval by the organization and when documentation exists that the injured worker had an adverse response to the generic medication. Committee members expressed concern that this requirement unduly interferes with a treating physician's discretion and that a similar provision under the Department of Human Services medical assistance program resulted in legislative debate and compromise relating to prior authorization for medication. Representatives of the North Dakota Medical Association expressed opposition

to the Workforce Safety and Insurance rule and pointed out that North Dakota law allows prescribers to require brand name medication by handwriting the words "brand necessary" on the prescription form, under NDCC Section 19-02.1-14.1. The committee considered a motion to void the rule amendment adopted by Workforce Safety and Insurance but the motion failed.

The State Board of Funeral Service adopted rules governing funeral service practice, including a requirement for continuing education for funeral practitioners. Funeral practitioners expressed opposition to the aspect of the rule requiring approval by the State Board of Funeral Service of continuing education

courses and an organization providing continuing education. Funeral practitioners said the rules as adopted provide no guidance on what courses or organizations would be approved and decisions of the board could be completely arbitrary. The committee approved a motion to void the State Board of Funeral Service continuing education rules on the grounds that the rules are arbitrary and capricious.

## **CONCLUSION**

The committee makes no recommendation regarding changes to statutes relating to administrative rules.

TABLE A

STATISTICAL SUMMARY OF RULEMAKING									
December 2004 Through October 2006				Supplements 306 Through 322					
Title	Supplement No.	Agency	Amend	Create	Supersede	Repeal	Special	Reserved	Total
2	06 APR 320	Abstracters' Board of Examiners	2	10					12
3	05 JUL 313	State Board of Accountancy	1						1
	06 APR 320	State Board of Accountancy	1	1					2
6	05 SEP 315	Aeronautics Commission	1						1
7	05 JUN 312	Agriculture Commissioner	5						5
8	05 FEB 308	State Board of Architecture	40	27					67
10	06 APR 320	Attorney General	35	4		7			46
20	06 APR 320	State Board of Dental Examiners	10	3					13
20.5	06 JAN 319	Board of Dietetic Practice	4						4
24	04 DEC 306	State Electrical Board	18						18
25	05 APR 310	State Board of Funeral Service	7	6					13
30	06 APR 320	Game and Fish Department	49	16		10			75
32	05 DEC 318	State Board of Cosmetology	30			2			32
33	04 DEC 306	State Department of Health	7	13		8			28
	05 APR 310	State Department of Health	6						6
	05 FEB 308	State Department of Health	15	2		1			18
	06 JAN 319	State Department of Health	4	7					11
	06 OCT 322	State Department of Health	3	1			6		10
37	06 JAN 319	Department of Transportation	6	9		12			27
43	06 JAN 319	Industrial Commission	17						17
45	05 SEP 315	Insurance Commissioner	16	1					17
	06 JAN 319	Insurance Commissioner	28	2	1	9	2		42
48	06 JUL 321	State Board of Animal Health	6			1			7
49	05 JAN 307	Board of Massage	7						7
50	05 JUN 312	State Board of Medical Examiners		1					1
	06 APR 320	State Board of Medical Examiners	2						2
54	05 AUG 314	Board of Nursing	9						9
55	05 NOV 317	State Board of Examiners for Nursing Home Administrators	2						2
61	05 JAN 307	State Board of Pharmacy	12	3		1			16
	06 JAN 319	State Board of Pharmacy	1	1		1			3
61.5	06 APR 320	Board of Physical Therapy	13	4					17
67	06 APR 320	Department of Public Instruction	69	8		5			82
	06 JUL 321	Department of Public Instruction	2	8					10
67.1	06 APR 320	Education Standards and Practices Board	22	3					25
69	05 MAY 311	Public Service Commission	8	10		3			21
70	06 JAN 319	Real Estate Commission	10						10
	06 JUL 321	Real Estate Commission	1						1
71	06 JUL 321	Public Employees Retirement System	47	3		2			52
72	06 JUL 321	Secretary of State	6	1					7
	06 OCT 322	Secretary of State		25					25
74	05 JAN 307	State Seed Department	6			6			12
	06 JUL 321	State Seed Department	47			1			48
75	05 JUN 312	Department of Human Services	21	103		88			212
	05 DEC 318	Department of Human Services	2			6			8
	06 JUL 321	Department of Human Services	59	16		1			76
81	06 APR 320	Tax Commissioner	33	3		2			38
87	04 DEC 306	State Board of Veterinary Medical Examiners	2						2
89	06 JUL 321	State Water Commission	4						4
92	06 JUL 321	Workforce Safety and Insurance	22	13		26			61
93	05 MAY 311	Private Investigative and Security Board	14	1					15
96	06 JAN 319	Board of Clinical Laboratory Practice		2					2
99	06 OCT 322	State Gaming Commission	62	1					63
105	06 JAN 319	State Board of Respiratory Care	7	12					19
108	06 JAN 319	Department of Commerce		19					19
109	06 JUL 321	Peace Officer Standards and Training Board	9	3					12
<b>Sections affected</b>			810	342	1	192	8	0	1,353
<b>Grand total all sections</b>									1,353