

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.

In addition to its statutory duties, the Legislative Council assigned two studies to the committee. House Bill No. 1479 (2007) directed a study of the appropriateness of each agency exemption from the Administrative Agencies Practice Act (AAPA). Senate Bill No. 2060 (2007) directed a study of penalties imposed by law for violation of occupational and professional laws and rules.

Committee members were Senators Tom Fischer (Chairman), John M. Andrist, Layton W. Freborg, Jerry Klein, and Tracy Potter and Representatives Randy Boehning, Chuck Damschen, Duane L. DeKrey, David Drovdal, Mary Ekstrom, Rodney J. Froelich, Chris Griffin, Kim Koppelman, Jon Nelson, Louise Potter, Blair Thoreson, and Dwight Wrangham.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2008. The Council accepted the report for submission to the 61st Legislative Assembly.

STUDY OF AGENCY EXEMPTIONS FROM THE ADMINISTRATIVE AGENCIES PRACTICE ACT

From 1941 until 1981, the AAPA defined administrative agency to include any entity having state-wide jurisdiction and authority to make any order, finding, determination, award, or assessment which has the force and effect of law and which by statute is subject to review in the courts of this state. During the 1979-80 interim, the Legislative Council's Administrative Rules Committee studied the definition of administrative agency and requested information from numerous

boards and commissions about the status of rulemaking and court review of agency decisions. The committee recommended a bill to redefine administrative agency to include every administrative unit of the executive branch of state government, with a listing of agencies specifically exempted from the definition. The recommended legislation was enacted in 1981 and contained a list of 25 agencies excluded from the definition.

Since 1981 agencies have been added to or removed from the list of agencies exempted from the definition of administrative agency under NDCC Section 28-32-01. However, there has not been a comprehensive review of the rationale for each exemption.

Each agency having an exemption under the AAPA was invited to appear before the committee to address the following questions:

1. Whether the AAPA exemption for the agency is still appropriate to the functions of the agency, with a discussion of why or why not.
2. Whether the AAPA exemption for the agency has been the subject of a court case or opinion of the Attorney General, with an explanation of any case or opinion.
3. Whether the AAPA exemption for the agency relates primarily to rulemaking or adjudicative proceedings of the agency.
4. Whether the agency suggests any changes to the AAPA exemption for the agency.

None of the agencies interviewed recommended any change in the exemptions that apply to them. It appears committee members agreed that exemptions under current law are still appropriate for each agency that has an exemption.

Conclusion

The committee makes no recommendation regarding the study of agencies exempt from the AAPA.

OCCUPATIONAL AND PROFESSIONAL LAWS AND RULES VIOLATION PENALTIES STUDY

Senate Bill No. 2060 directs a Legislative Council study of laws providing criminal penalties for violation of the state's laws and administrative rules regulating occupations and professions. The bill requires the study to include consideration of whether it is the desired public policy of this state to have laws that create criminal penalties applicable to entire chapters of the North Dakota Century Code and rules contained in the North Dakota Administrative Code regulating occupations and professions.

The State Board of Plumbing introduced Senate Bill No. 2060 to increase meeting compensation for members of the board and to increase penalties for violation of plumbing laws, rules adopted by the board, or the State Plumbing Code. Before introduction of Senate Bill No. 2060, NDCC Section 43-18-24 provided that a violation of any provision of Chapter 43-18 or the State Plumbing Code is an infraction. The bill as

introduced by the State Board of Plumbing would have added the penalty to violation of rules adopted by the board as well as the plumbing laws and plumbing code and increased the penalty from an infraction to a Class B misdemeanor. During discussion of the penalty provision, members of the standing committees considering the bill expressed concern about the lack of specific statutory provisions for which a violation would be punishable and about adding rules adopted by the board and making them punishable under the proposed criminal penalty. Ultimately, the bill was enacted with specific statutory provisions listed for which a violation would be a Class B misdemeanor. References to rules adopted by the board and the State Plumbing Code were eliminated from the penalty provision. The study language was added to Senate Bill No. 2060 after a brief review of occupational and professional laws and rules and penalty provisions. The expressed hope was that an interim study would provide the opportunity to examine such provisions for uniformity and clarity and to determine whether penalties should apply to statutory provisions, rules provisions, or both.

The Administrative Rules Committee identified 44 separate occupational and professional licensing boards or commissions having statutory provisions for penalties for violations of law. Each of these boards or commissions was invited to review its statutory and rules provisions and to consider the following:

1. Whether penalty provisions under laws and rules administered by the board or commission could be more specific in terms of identifying prohibited behavior.
2. If rules violations are subject to penalties, whether it is appropriate to move the prohibition to statutory status by introducing legislation.
3. Whether the culpability standard for violations subject to penalties should be for intentional, reckless, willful, or negligent behavior or no culpability standard should be applied.
4. Whether the penalty provisions under laws and rules administered by the board or commission should be uniform with penalties that apply for other occupations and professions and, if not, what special circumstances exist to justify different penalties for the laws and rules that apply to this occupation or profession.

The committee received specific suggestions for statutory changes from 12 occupational and professional licensing boards or commissions.

Recommendation

The committee recommends House Bill No. 1024 to incorporate suggestions received from occupational and professional licensing boards or commissions to make statutory language specific as to the conduct that constitutes a violation under certain occupational and professional licensing laws.

ADMINISTRATIVE AGENCY RULES REVIEW

Administrative agencies are those state agencies authorized to adopt rules under the AAPA (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 Legislative Council office 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 1,194 rules sections and 1,663 pages of rules that were changed from January 2007 through October 2008. The number of sections affected and the number of pages of rules were substantially fewer than the comparable numbers from the previous biennial period. Because of the change to publication of rules supplements on a quarterly basis, rules that would have been published in November and December 2006 were published in January 2007. 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 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
January 2007-October 2008	1,194

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
January 2007-October 2008	1,663

Rule Review Schedule

The following table illustrates the rule filing dates, deadlines for committee meetings, and effective dates of rules under NDCC Section 28-32-15:

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

During the interim, the committee found that when a substantial volume of rules is submitted at the filing deadline, a problem exists for the Legislative Council staff to process the rules and send them to committee members far enough in advance of the committee meeting to allow committee members to adequately review the rules proposals.

Recommendation

The committee recommends Senate Bill No. 2026 to advance the filing deadline for agency rules by 15 days to allow more time for preparation and delivery to committee members of proposed rules. This will allow sufficient time for delivery of proposed rules to committee members for adequate study before the meeting at which the rules will be considered. The change will not delay the effective date of rules.

COMMITTEE ACTION ON RULES REVIEWED Repealing Obsolete Rules

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.

The committee agreed with the Labor Commissioner on repeal of an obsolete rule provision establishing a state minimum wage rate. The rule became obsolete when House Bill No. 1454 (2007) became effective on the effective date of an increase in the federal minimum wage.

The committee agreed with the Office of Administrative Hearings on repeal of an obsolete rule, superseded by Senate Bill No. 2265 (2007). The bill removed a requirement that in an adjudicative proceeding, a party must first show good cause by written petition and get written approval from the hearing officer before obtaining discovery from an administrative agency. The rule contained a corresponding requirement that became obsolete when the statutory provision was eliminated.

Voiding 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 Legislative Council office 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.

Rules Carried Over or Amended by Committee Approval

The committee carried over consideration of rules of the Board of Dental Examiners providing fee increases attributed to significant increases in the budget of the board. After receiving further information from the board, the committee took no further action regarding the rules.

The committee carried over consideration of rules of the State Department of Health imposing fee increases for food and lodging facilities because of concerns that the increases were intended to fund inspection of tattoo and tanning facilities. The department provided further information indicating that the revenue from food and lodging facility fee increases would fund a new staff position and that staff position would be used for food and lodging facility inspections and approximately one-half of the time of the new staff position would be devoted to tattoo and tanning facility inspection. The committee took no further action regarding the rules change.

The committee agreed with the State Department of Health to eliminate a sentence from a proposed rule change relating to purchase of vaccines by the department to reduce the cost of vaccines for providers. The language was eliminated because during the time the rules change was pending, it was determined that the department was not able to purchase vaccines at any lower cost than private and public health care providers.

The committee carried over consideration of some of the rules provisions adopted by the State Lottery relating to definitions, authorization of raffles by the State Lottery, and reference to lottery promotions. The committee received further information from the Attorney General's office relating to the rules and agreed with the Attorney General's office and the Lottery Division to remove the word raffle from the games authorized to be conducted by the State Lottery.

The committee carried over consideration of rules adopted by the State Board of Accountancy relating to educational requirements for accounting students and compensation for members of the board. The committee agreed with the board on amendments retaining board member compensation daily limits and delaying changes in accounting educational requirements to avoid impacting students nearing graduation.

The committee carried over consideration of rules of the Office of Management and Budget Human Resource Management Services relating to the option of counties to opt-out of the state merit system by establishing their own merit systems. The rules established procedures for a county social service agency to establish a merit system and to be consistent with federal merit principles required by federal law. Representatives of Cass County took exception to the rules, primarily relating to "at will" or "for cause" status of county employees. Cass County requested an Attorney General's opinion, but the Attorney General declined to issue an opinion on the issue. The committee took no further action regarding the rules.

The committee agreed with the Board of Nursing on rules changes that the board decided were appropriate after the rules were submitted for publication. The changes were suggested by the board to clarify provisions relating to interstate compact compliance and interpretations used in other compact states.

At its final meeting before preparation of this report to the Legislative Council, the committee approved a motion to carry over consideration of Department of Mineral Resources Geological Survey rules to regulate in situ leach uranium mining. The motion to carry over consideration of the rules did not specify any particular concern other than committee members should have more time to review the large volume of comments received by or filed with the Geological Survey regarding the rules. The committee will reconsider the rules at its meeting in December 2008.

Rules Voided by Committee

The committee voided rules adopted by the Racing Commission relating to use of the breeders' fund. The committee received a substantial amount of testimony in

opposition to the rules. House Bill No. 1324 (2007) prohibited transfer of money among funds administered by the Racing Commission. One of the sponsors of the legislation said the intent of the legislation was to prohibit using breeders' fund money for enhancing racing purses which would have been allowed by the rules. The

committee also considered but did not approve two bill drafts to eliminate the Racing Commission and transfer its functions to the Attorney General and to require return of funds to the breeders' fund from the purse fund which had been paid out to enhance purses.

TABLE A

STATISTICAL SUMMARY OF RULEMAKING January 2007 Through October 2008 Supplements 323 Through 330									
Title	Supplement No.	Agency	Amend	Create	Supersede	Repeal	Special	Reserved	Total
3	08 APR 328	State Board of Accountancy	7	3		8			18
4	08 JUL 329	Office of Management and Budget	15	10					25
4.5	08 JAN 327	Board of Addiction Counseling Examiners	8			3			11
7	07 JAN 323	Agriculture Commissioner		10					10
10	08 APR 328	Attorney General	22	2					24
13	07 JAN 323	Department of Financial Institutions	15	48		13			76
	08 OCT 330	Department of Financial Institutions	2						2
17	08 JUL 329	State Board of Chiropractic Examiners	13	3					16
20	07 OCT 326	State Board of Dental Examiners	8			1			9
24	07 JAN 323	State Electrical Board	17						17
30	08 APR 328	Game and Fish Department	3	28		1			32
33	07 JAN 323	State Department of Health	19	4					23
	07 APR 324	State Department of Health	1						1
	08 JAN 327	State Department of Health	123	52		27	4		206
	08 JUL 329	State Department of Health	4						4
37	08 JUL 329	Department of Transportation	4	11					15
38	08 APR 328	Highway Patrol	14						14
43	08 JAN 327	Industrial Commission	19						19
	08 OCT 330	Industrial Commission	1	87					88
45	07 JAN 323	Insurance Commissioner		16					16
	08 JAN 327	Insurance Commissioner	29	18					47
46	08 OCT 330	Labor Department		11					11
48	07 JAN 323	State Board of Animal Health		16		26			42
54	07 APR 324	Board of Nursing		2					2
	08 JUL 329	Board of Nursing	46	14		2			62
56	08 JUL 329	State Board of Optometry	4						4
61	07 JUL 325	State Board of Pharmacy		3					3
	07 OCT 326	State Board of Pharmacy	3	1					4
66	07 APR 324	State Board of Psychologist Examiners	20						20
67	08 JAN 327	Department of Public Instruction	9			9			18
67.1	08 JUL 329	Education Standards and Practices Board	20	1					21
69	07 APR 324	Public Service Commission	6						6
	07 APR 325	Public Service Commission	1	1					2
	08 APR 328	Public Service Commission	1						1
	08 JUL 329	Public Service Commission	24	8		3			35
69.5	08 JAN 327	Racing Commission	57	4					61
70	08 APR 328	Real Estate Commission	8						8
71	08 APR 328	Public Employees Retirement System	24	1		1			26
72	08 APR 328	Secretary of State	1						1
74	07 JUL 325	State Seed Department	16	1					17
75	07 JUL 325	Department of Human Services	3	1					4
	08 APR 328	Department of Human Services	24	4					28
	08 JUL 329	Department of Human Services	1						1
	08 OCT 330	Department of Human Services	7						7
82	08 JUL 329	Board of Trustees of the Teachers' Fund for Retirement	7	1		1			9
86	08 APR 328	Department of Veterans Affairs	18			36			54
89	07 JAN 323	State Water Commission	2						2
	08 APR 328	State Water Commission	15	8					23
92	07 JUL 325	Workforce Safety and Insurance	2						2
	08 JAN 327	Workforce Safety and Insurance	10	5					15
93	07 JUL 325	Private Investigative and Security Board	2	1					3
96	08 JAN 327	Board of Clinical Laboratory Practice	1						1
97	07 JUL 325	Board of Counselor Examiners	1						1
101	08 JAN 327	Real Estate Appraiser Qualifications and Ethics Board	23	1		3			27
Sections affected			680	376	0	134	4	0	1,194
Grand total all sections									1,194