

2009 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HB 1415

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1415

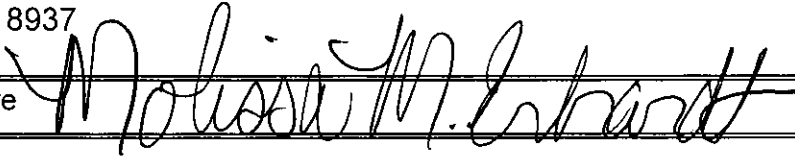
House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Hearing Date: 02/06/2009

Recorder Job Number: 8937

Committee Clerk Signature



Minutes:

Chairman Grande: Open the hearing on HB 1415. Clerk read the title.

Rep. Frances Wald, District 37, Dickinson: HB 1415 in front of you deals with the agencies that are exempt from Administrative Agencies Practice Act. If my memory serves me right I think that this act came into being by the State Legislature early in the Schafer administration so it was about 14, 15, or 16 years ago. At any rate, I was asked to introduce the bill because there was a problem with one of the people who are not exempt, that is on Line 19 on Page 2: The board of university and school lands except with respect to activities under chapter 47-30.1 and since then some information has come to light. We would prefer that you leave them in the bill. If you look at all of the groups that are exempt from the administrative agencies practices act starting on Line 14, Item A and then go on to B, C, D etc. You will see that most of the commissions, councils, boards and agencies of that variety are excluded and if you look at some of the exceptions the Industrial Commission is included with respect to

lignite research on Line 24, Page 2. The Attorney General on sexual offender type issues, so it's a very limited scope of why they are excluded under the Administrative Agencies Practices Act. The industrial commission, starting on Line 7 in regard to the Housing Finance Agencies, State Mill and Elevator, the transmission authority, the pipeline authority so when an agency is excluded it is a very narrow exclusion as specifically mentioned in the bill. The bill as written before you would bring back the Board of University and School lands, which I would request that you take out and leave it as it is. Then on Page 1, Line 22, the State Auditor and I see no reason why some of these State Agencies should be excluded from the Administrative Agencies Practices Act. As you go through the bill you will find that the Secretary of State is not excluded, the Insurance Commissioner, the Tax Commissioner, the (don't know), the Attorney General, with the exceptions that are limited, the Ag Commissioner, and the Dept of Public Instruction, these are the reasons for the bill before you. Many times I have witnessed in my 30 years in this lobby that sometimes the agencies will introduce a bill that fails in the Legislature, then they will write the rules after we go home. To prevent that sort of thing, that is why the bill is in front of you. I have no specific examples to share with you, but I know that it happens.

Rep. Amerman: Has there ever been a study done to look at all these agencies to see which ones should stay in and which ones should stay out by an interim committee?

Rep. Wald: I am not aware of a study, but it might be a good suggestion because this is proliferated to some extent. But I hope you don't turn it into a study resolution.

Rep. Nathe: Your reason for striking out the State Auditor is? When you gave the example about the agencies re-writing the rules after we go home is that your reason for striking them out?

Rep. Wald: Yes. Other elected offices are not excluded why should they be?

Rep. Winrich: What is the effect of excluding an agency from the Administrative Agencies Practices Act?

Rep. Wald: Legislative oversight. I think that is the bottom line. So that when an agency writes administrative rules they have to come in front of an interim committee, maybe you have served on it, so then they would come before the Administrative Agencies interim committee and justify why they are writing an administrative rule. So the legislature has the last say. The agency can promulgate a rule or regulation but it has to come in front of the interim committee as I understand the process.

Chairman Grande: Any other questions from the committee? Favor? Against?

Robert Peterson, State Auditor: Testimony. See Attachment # 1.

Rep. Dahl: You noted that this would be a significant burden and expense, and we heard a bill similar to this in Judiciary and the Securities Department came in with a \$150 fiscal note. Do you think that not having a fiscal note to show the committee what kind of expenses you anticipate should this pass?

Robert Peterson: I see (can't understand) an estimate as to what kind of expenses we would go through. Just wouldn't be possible to give you something off the top of my head. All the standards have to be followed and we hire private CPA firms to audit State entities because we don't have the staff to audit, so in essence, are you requiring those private CPA firms to be held to the same standard. Another words, would they have to come before the Legislative Committee to be able to hear the standards being issued before they could do the audits.

Rep. Kasper: Mr. Peterson I think that is a stretch and I think that you realize that. I have a question on the second page. Where you say the standards and the guidance change frequently as nationally recognized energies issue new standards. In the last year how many of the new standards and guidelines have been issued by the National Energies Commission?

Robert Peterson: The AICTA has issued at least a couple of new standards, with the advent of (can't understand) we promulgate the national level (can't hear the speaker). I can get that answer to you.

Rep. Kasper: If this bill were to pass how would your agency have to operate differently than what you currently do? Could you give me an example of what you have to report or go to the interim committee with compared to what you are not doing now?

Robert Peterson: I suspect that we would have to report all the changes of the standards. We currently want to implement (can't understand).

Rep. Kasper: Which would be the standards I just asked you about? So, if there were two in the last year you would have to appear there twice and explain the generally accepted changes and accounting principles and obviously if it is a national standard the legislative rules committee would say "Well, ok, go ahead." Are there any other areas that you see that you would have to report?

Robert Peterson: I just (can't understand or hear) off the top of my head, there are probably a lot more. I think that in my statement that it would be expensive to appear to present statements that are promulgated on a national basis followed by all 50 states, as well as, (can't understand or hear). I don't see that there would be a benefit to asking the Legislature to approve the national standards.

Yes, it would be time consuming and it would cost us some time and effort to prepare those statements.

Rep. Kasper: I am trying to get beyond that, the National Standards, which I think would be relatively simple but that is debatable. What other areas do you see your agency having to report to the interim committee besides the National Standards?

Robert Peterson: Just the ones I mentioned in my testimony.

Rep. Karls: When you reference that Administrative Agencies Practice Act, (can't hear the speaker speaking). Are there other (can't hear) that you might fall under?

Robert Peterson: Not to my knowledge.

Chairman Grande: When we talk about the rules that you promulgate within your agency, they affect the agencies but are the agencies not here to serve the people?

Robert Peterson: We don't really promulgate those rules, they are promulgated by the National Institutions, we simply adopt them and then they become required. The reasoning of (coughing) is just for that reason. So that someone cannot deduct the standards. I suppose that if I made up those standards, then yes definitely we would want to hear it (can't understand), and say these are

standards made up by the Attorney General but they would have to have XX number of lawyers instituted (can't understand or hear the speaker).

Otherwise we would have to go through an audit. But the standards that are being promulgated and distributed to all the States are all level National Standards and are not promulgated by (can't hear the speaker).

Rep. Schneider: This 18 person Legislative Committee did they just meet this last interim? Did they find any problems?

Robert Peterson: No, they did not.

Rep. Winrich: In the event that a National Standard was issued and your department took it to the administrative rules committee and for some reason or another it was not approved so that ND would become an exception to an audit or something, what sort of an effect what that have on the State?

Robert Peterson: Let's say it was a serious enough audit that (can't hear). In another words, not following the National Standards (can't hear the speaker). They give us a bond rating, and if are AICTA report is out of sync with whatever the (can't understand). Yes, the Legislature has that authority to say that we don't have to follow a standard. Texas is doing that right now. But it might have a detrimental effect on future bond ratings for the State.

Rep. Kasper: When you get these National Standards, how do you get them? Are they in a book, document, or email, or how do you receive them?

Robert Peterson: When the standard is promulgated, at least for the government side, it is first sent out as an exposure law and they would like comments and of course, it is sent to all the States. If you choose to comment on that Standard you do so. In some cases if it is a large enough issue that they will hold public hearings and they will invite (can't understand or hear speaker) and then study the issue and the comments. They will issue a preliminary draft to see what the response is and after they have the answer to the response, they will then issue a (can't understand), if they want to continue. They will issue that standard and it usually comes out in a small paperback binder type thing. (Can't hear the speaker or understand).

Rep. Kasper: So you receive a standard in your office, I would assume you communicate it to all of your staff and you might have some inside education because of the new standards, and if this bill were passed you would simply take the standard and go to the administrative rules committee and say "Here is the new standard". Generally accept the following principles if you want to preserve our bond rating and then you adopt it, and I recommend you do, here's what it does and might not take any longer than you are here today to explain it. But any Legislator with a brain would probably say that is pretty good and we should adopt that. You are telling me that that is all this bill is going to do is make you

report that standard and get the Legislative Interim Rules Committee to adopt it or allow it to be adopted?

Robert Peterson: I believe that sums up the process.

Rep. Kasper: So it is really not very onerous when you think about it?

Robert Peterson: It depends upon how many of the issues are promulgated and who (can't understand speaker or hear very well).

Rep. Kasper: 2, 3, or 4 as you said previously.

Robert Peterson: That I can think of and it depends upon the length of the issues. We have had certain issues in the past (can't understand) that are rather extensive.

Rep. Nathe: I am just going to follow Rep. Wald's example and the strike "you" out of the bill, what is the reason?

Robert Peterson: Just because of the other agencies that are included should be dealing with the public or following adjudicated hearings that issue the rulings that deal with the public. We do not deal with the public. We deal with agencies that produce audits. (Can't understand or hear speaker).

Chairman Grande: Any other questions? Anyone else wishing to speak against?

Jeff Engelson, Deputy Land Commissioner: Presenting testimony for Gary D Preszler, State Land Commissioner, ND State Land Department:

Testimony. See Attachment # 2.

Rep. Amerman: To get this straight in my mind, in the previous testimony from the auditor's office, they do not deal with the public, they deal with what comes down nationally so they are exempt. But you do deal with the general public and still your exempt, is that correct?

Jeff Engelson: Yes, that is correct.

Rep. Amerman: Do you know or can you tell me to start with why you are going to be taken off the exemption list?

Jeff Engelson: As I understand it the oil industry wasn't too happy with us when we raised our royalty rates, so that is initially why, I believe.

Chairman Grande: Anyone else wishing to speak against? Neutral? Closed the hearing on HB 1415.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. Committee Work One HB 1415

House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Hearing Date: 02/12/2009

Recorder Job Number: 9400

Committee Clerk Signature

Melissa M. Erhardt

Minutes:

Committee Work One:

Chairman Grande: We will take up HB 1415.

Vice Chairman Randy Boehning: We have to remove the overstrike on Lines 19 and 20. Motion for Do Pass As Amended.

Chairman Grande: The amendment is on Page 2, Lines 19 and 20 remove the overstrikes.

Rep. Wolf: 2nd.

Chairman Grande: All in favor of that amendment? Consent: I. Opposed?

Rep. Kasper: Move a Do Pass As Amended.

Vice Chairman Randy Boehning: 2nd.

Chairman Grande: We have the amended bill in front of us. Any discussion?

Rep. Schneider: Just going back through the testimony, the administrative rules committee that met this past interim found that the exemptions under current law

are still appropriate for each agency that has an exemption. I just don't really see what problems this bill is trying to solve. I am going to oppose the motion.

Rep. Amerman: Just following along the lines of what Rep. Schneider said I really don't understand what this bill is going to accomplish. In the testimony from the auditor they don't deal with, as far as the administrative rules committee, as far as the public things or whatever, and the one that did deal with them, we amended them back out, so I am not sure exactly what we are doing here, there was a Legislative Study this last interim that said that all these are here should be remain where they are. I don't understand what we are doing and I am going to oppose this. It's not a good bill.

Rep. Dahl: I would vote yes on this bill, but we have a motion on the floor. I think it is appropriate that they go through some of the administrative rules but in terms of some of the National Standards that they would have to bring to the rules committee it doesn't really make any sense. It seems somewhat cost prohibiting, if we could have amended it, I would have voted for it, but this is not amended and there is a motion on the floor, I am going to vote no.

Chairman Grande: We have a Do Pass As Amended motion in front of us.
Clerk will call the roll.

Clerk Erhardt: Roll Call. Yes: 5. No: 7. Absent: 1.

Chairman Grande: The motion fails. Do I have a motion for a Do Not Pass As Amended?

Rep. Wolf: Motion for a Do Not Pass As Amended.

Rep. Amerman: 2nd.

Chairman Grande: Discussion?

Rep. Kasper: What would Rep. Dahl's amendment have been?

Chairman Grande: That was one of my concerns and I spoke to council on it and it really became vague if we took out the National, it became so vague there really was nothing left to work with.

Rep. Dahl: Could we have defined it the other way and included what they do have to go through, the rules processes for scholarships, for etc.

Chairman Grande: When I approached counsel on that, it was the thought of council that they will still fall under anything OMB directs anyway. So they wouldn't right there own set of rules on it. So that was null and void also. So we ended up with really nothing as kind of what the study had shown. Unless we are asking about the national there area is so very narrow, that there is nothing that they would be writing rules on. They can only function off of National Standards otherwise the agency does not function.

Rep. Dahl: So then does it make sense for them to go through the administrative rules process to follow the National Standards.

Chairman Grande: No probably not.

Rep. Kasper: There are other areas that other agencies have to write rules for as you indicated.

Chairman Grande: Only when it comes to the public side. For those rules that we are talking about with bonus programs and this was just what I learned while we were on the floor talking with counsel. That all of those areas that I thought that they administrative rules auditor would have to come to administrative rules with, they will actually end up going to OMB or HR and that is as far as those rules go and then those groups will take them to the administrative rules process.

So it will be back to still that the State Auditor's office will submit their rules to those two groups and that's as far as the Auditor's Office would have to go. That is how the treasurer's office does that or whatever. The only time the Treasurer's office writes a rule would be is if she needed to do something that dealt with the public and off the top of my head I can't think of anything. I don't think that that office writes a whole lot of rules either. When I served on LAFRC, I don't remember ever seeing them comply with rules, it is mostly boards and commissions that come through rules. It is not agencies per say. The Health Department, Human Services, Education they all deal directly with the public. We have a Do Not Pass As Amended in front of us. Call the roll.

Clerk Erhardt: Roll Call. Yes: 7. No: 5. Absent: 1. Carrier: Rep. Amerman.

VR
2/13/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1415

Page 2, line 19, after "s." insert "r." and remove the overstrike over "~~The board of university and school lands except with respect to activities~~"

Page 2, remove the overstrike over line 20

Page 2, line 21, replace "r." with "s."

Page 2, line 24, replace "s." with "t."

Page 2, line 26, replace "t." with "u."

Page 2, line 29, replace "u." with "v."

Renumber accordingly

Date: 2/12/09
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1415

House Government and Veterans Affairs

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

Motion Made By

Seconded By

Representatives	Yes	No	Representatives	Yes	No
Chairman Grande	✓		Rep. Amerman		✓
Vice Chairman Boehning	✓		Rep. Conklin		✓
Rep. Dahl	✓	✓	Rep. Schneider		✓
Rep. Froseth	✓		Rep. Winrich		✓
Rep. Karls	✓		Rep. Wolf		✓
Rep. Kasper	✓				
Rep. Meier		✓			
Rep. Nathe					

Total (Yes)

No

Absent

Floor Assignment

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

Date: 2/12/09
Roll Call Vote #: 22

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1415

House Government and Veterans Affairs

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken

DNP As Amended

Motion Made By

Wolf

Seconded By

Amerman

Representatives	Yes	No	Representatives	Yes	No
Chairman Grande		✓	Rep. Amerman	✓	
Vice Chairman Boehning		✓	Rep. Conklin	✓	
Rep. Dahl	✓		Rep. Schneider	✓	
Rep. Froseth		✓	Rep. Winrich	✓	
Rep. Karls		✓	Rep. Wolf	✓	
Rep. Kasper		✓			
Rep. Meier					
Rep. Nathe	✓				

Total (Yes)

7

No

5

Absent

0

Floor Assignment

Rep. Amerman

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

REPORT OF STANDING COMMITTEE

HB 1415: Government and Veterans Affairs Committee (Rep. Grande, Chairman)
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends
DO NOT PASS (7 YEAS, 5 NAYS, 1 ABSENT AND NOT VOTING). HB 1415 was
placed on the Sixth order on the calendar.

Page 2, line 19, after "s." insert "r." and remove the overstrike over "~~The board of university
and school lands except with respect to activities~~"

Page 2, remove the overstrike over line 20

Page 2, line 21, replace "r." with "s."

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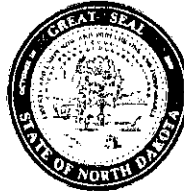
Page 2, line 29, replace "u." with "v."

Renumber accordingly

2009 TESTIMONY

HB 1415

STATE AUDITOR
ROBERT R. PETERSON



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OFFICE OF THE STATE AUDITOR
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**TESTIMONY BEFORE THE
HOUSE GOVERNMENT AND VETERAN'S AFFAIRS COMMITTEE
February 6, 2009**

House Bill 1415

Testimony provided by:
Robert R. Peterson, State Auditor

Good morning Madam Chair and members of the Government and Veteran's Affairs Committee. I'm here to testify in opposition to HB 1415 which would remove the State Auditor's Office exemption from the Administrative Agencies Practices Act. The State Auditor's Office conducts audits of state entities and political subdivisions and does not make rules that apply to the general public or conduct adjudicative proceedings. These are the reasons our office has not been subject to the Administrative Agencies Practices Act.

Chapter 28-32 comprises the Administrative Agencies Practice Act. It defines an adjudicative proceeding as "...an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required". The State Auditor's Office does not hold any meetings which would meet this definition. As mentioned earlier we also do not make rules which apply to the general public.

During the most recent interim the Administrative Rules Committee conducted a comprehensive study of the agencies exempted from the Administrative Agencies Practices Act. Each of the agencies which are granted an exemption were invited to appear before the interim committee to address four basic questions:

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

After the study of the Administrative Agencies Practices Act the Administrative Rules Committee interim report notes "It appears committee members agreed that the exemptions under current law are still appropriate for each agency that has an exemption." The committee made no recommendations regarding the study of agencies exempt from the Administrative Agencies Practices Act. Thus this 18 person legislative committee found no cause to suggest or recommend that the exemption for the State Auditor's Office be removed.

This bill is a good example of a solution looking for a problem. I am not aware of any problems that have been encountered because the State Auditor is excluded from the Administrative Agencies Practices Act. This bill is contrary to the findings of the interim Administrative Rules Committee. The State Auditor's Office is required by state law to follow generally accepted auditing standards and generally accepted government auditing standards. These standards are established by nationally recognized entities (such as the Comptroller General of the United States). In addition, other nationally recognized entities such as the Committee of Sponsoring Organizations issue guidance that serves as criteria for our recommendations involving internal controls. One of the purposes of these internal controls is to protect the assets of the entity being audited. Additional literature relating to internal controls is found in the university courses that are taken in order to receive a degree in accounting.

These standards and the guidance change frequently as the nationally recognized entities issue new standards and guidance and only those entities may change the standards. The bureaucratic burden and expenses associated with this would be wasted since neither our office nor a legislative committee can change the standards or guidance.

In order for the state of North Dakota to receive a "clean" audit opinion on its financial statements, the statements must be prepared and audited in accordance with generally accepted accounting principles and standards which are promulgated by nationally recognized entities such as the Government Accounting Standards Board and the American Institute of Certified Public Accountants. These standards are extensive, in many cases are extremely technical in nature and change frequently.

We do not apply any of the aforementioned standards to the general public and they do not result in our holding any adjudicatory proceedings, our exemption from the Administrative Agencies Practices Act should remain intact.

I request that this bill be amended so that our exemption from the Administrative Agencies Practices Act remains intact.

This would conclude my presentation and I would be happy to respond to any questions.

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www.nd.gov



Gary D. Preszler, Commissioner

Attachment #2

**TESTIMONY OF GARY D. PRESZLER
STATE LAND COMMISSIONER
North Dakota State Land Department
In Opposition to House Bill 1415**

**HOUSE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE
February 6, 2009**

Chairman Grande, members of the House Government and Veterans Affairs Committee, I am Jeff Engleson, Deputy Commissioner testifying on behalf of Commissioner Preszler. Commissioner Preszler is also the Secretary for the Board of University and School Lands (Board).

Efforts to remove the exempted agencies from Chapter 28-32 rulemaking requirements are not new. In 1986 and 1987 the Administrative Rules Committee studied and took testimony from each agency exempted from the Act. In 1993, SB2023 introduced by the Interim Administrative Rules Committee and identical to HB1479 failed to pass on a vote of 1 to 45.

The activities of the Board are exempt from Chapter 28-32 rulemaking requirements, except for the activities related to Chapter 47-30.1, the Uniform Unclaimed Property Act. This is because (1) unclaimed property administration is not a part of the Constitution, whereas activities related to lands, minerals, and investments management are proprietary and authorized under the Constitution; and, (2) the Trusts do not own the unclaimed property.

Further, all activities related to goods or services and the physical servicing, maintenance, or care of agency-owned or agency-operated facilities are excluded from the definition of "rule". See Section 28-32-01 (11)(c) and (d). The Board's activities are not regulatory as with many of the agencies subject to Chapter 28-32. Instead, our activities involve providing goods and services and the management of trust-owned investment and real property.

Currently, the Board has adopted rules and regulations pertaining to the farm (real estate) loan pool, investments, minerals leasing including coal and oil and gas, and sand and gravel, and surface leasing activities. Again, most of these relate to goods or services provided, or servicing, maintenance, or care of agency-owned property and would not meet the definition of a rule.

The Constitution, the Enabling Act, and case law in ND jurisdictions and other courts provide that the lands granted to the State of North Dakota are for the exclusive benefit of the trust beneficiaries and that the Board is empowered to manage those lands and trust funds. As such, it is the Board that has the ultimate decision making authority to prudently manage those assets. Due process is provided to any aggrieved party as the Board conducts its business during open public meetings and is the appellate body settling commercial disputes with Board activities.

Further, the North Dakota Supreme Court has stated in earlier cases that there is a balance between Legislative policy to control and the Board's fiduciary duty under the Constitution to manage grant lands. The Legislature does not have unbridled authority to control and override the Board's fiduciary duties.

Exempting the Board from the full rulemaking requirements, which take about nine months to make a rule effective, provides the Board with the flexibility to respond to changing conditions. For example, this includes the need to respond to drought conditions when considering pasture rental rates, and to the oil industry to provide relief in the form of incentives to stimulate activity.

I respectfully request that the Board remain exempt from Chapter 28-32 rulemaking requirements, with the exception for the Uniform Unclaimed Property Act, and that the Committee give HB1415 a "do not pass" recommendation.