House Bill 1280
Study of Administrative Agency Adoption of Standards
Administrative Rules Committee
Rep. Lawrence R. Klemin
September 1, 2009

As originally introduced in the 2009 Session, HB 1280 provided that an administrative agency could not apply "standards" from other than state or federal law to the regulated community, unless the agency had adopted those standards as rules in compliance with the Administrative Agencies Practice Act, Chapter 28-32 of the North Dakota Century Code. "Standards" included regulatory provisions developed by an association, commission, or other organization, which do not have the force and effect of law.

HB 1280 did not preclude an administrative agency from adopting those standards as rules, but merely provided that they would not be valid unless the rulemaking procedures of North Dakota law were followed. In general, those procedures include a notice to the public of proposed rulemaking, a hearing on the proposed rules, an opportunity for the public to comment, a regulatory or economic analysis, a review by the Attorney General, and a review by the Administrative Rules Committee.

"Standards" that are imposed by an agency on the regulated community without going through the proper procedure are not rules adopted in accordance with the laws of this State; are not subjected to public review, comment, and hearing before they are implemented; do not have a regulatory or economic analysis to determine the effect on regulated entities; are not reviewed by the Attorney General to determine legality and conformity with the law; are not subject to review and objection by the Administrative Rules Committee **because they are not "rules"**; and are not published in the North Dakota Administrative Code so that the regulated community and the public know what they are. These procedures in the Administrative Agencies Practice Act were enacted by the Legislature after public hearings, with input and comment by all affected parties, including the public and the administrative agencies.

Compliance with this rulemaking procedure has been reviewed and upheld by the North Dakota Supreme Court. In *Huber v. Jahner*, 460 N.W.2d 717 (N.D. 1990), a case involving the Department of Human Services, the North Dakota Supreme Court stated:

> The Department of Human Services is an administrative agency and is subject to the provisions of Chapter 28-32, N.D.C.C. **Pursuant to that chapter, an administrative rule is invalid unless it is adopted in substantial compliance with Section 28-32-02, N.D.C.C.** *Mullins v. Department of Human Services*, 454 N.W.2d 732 (N.D. 1990); *Little v. Spaeth*, 394 N.W.2d 700 (N.D. 1986). [case dealing with child support guidelines that had been enforced by the agency but had not been adopted as rules.]

After HB 1280 was introduced, OMB prepared a fiscal note indicating that the bill could potentially impact many agencies. OMB stated in the fiscal note that there would be a need for an appropriation of $1,000,000 in the 2009-2011 biennium and $1,100,000 in the 2011-2013 biennium. A considerable sum in order for the agencies to comply with existing law.

It then became clear that this could be a much larger problem than I originally thought. Consequently, HB 1280 was amended to provide for an interim study of the use of these outside "standards" by the agencies. The study was then assigned to the Administrative Rules Committee. This committee should determine if there really is a problem and the scope of that problem. The committee can then report back to the next Legislature in 2011 with a recommendation on what to do abut it.

It was not the intent of this bill to preclude the agencies from adopting "standards" as rules or to preclude them from proposing legislation to enact these "standards" into law in North Dakota. However, they should do it in the manner provided by law so that the public has the right to review and comment on them before they are implemented. The Legislature also has an interest in ensuring that administrative rules have the force and effect of law and will be upheld by the courts, if challenged. The agencies could be adopting the "standards" as rules even while this interim study is in progress.

Since OMB determined that the study could potentially impact many agencies, I suggest that this committee begin by surveying the administrative agencies to determine if there are "standards" that are being implemented from entities outside of the State, and if so, what they are. The agencies could be asked to propose a time line by which they could either adopt the standards as administrative rules, using the public comment and hearing procedures in Chapter 28-32, or by introducing appropriate enabling legislation in the 2011 Session. If they decline to do either, then they should be prepared to justify their position. They could also agree not to further implement these "standards" without going through these procedures.

If this committee deems it appropriate, I also suggest that the powers of this committee be expanded in Chapter 28-32 to give this committee greater authority to act when an agency implements standards from an outside entity. As presently written, Chapter 28-32 does not appear to give the Administrative Rules Committee authority to review agency adoption of "standards" that are not set out in rules.

In a future meeting of this committee, I would ask that the committee take testimony from the public on the scope of this issue. I know that there are members of the public who feel that they are being forced to follow outside standards that appear nowhere in North Dakota law or in existing rules.

I would be available to assist this committee in whatever direction you decide to proceed.