

**OFFICE OF ADMINISTRATIVE HEARINGS**

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MEMORANDUM

To: Legislative Management's Administrative Rules Committee

From: Allen C. Hoberg, Director 
North Dakota Office of Administrative Hearings

Re: Office of Administrative Hearings July 2012 rules - Title 98

Date: June 14, 2012

The Office of Administrative Hearings July 2012 rules do not result from statutory changes made by the Legislative Assembly. Rather, they result from changes in practice and procedure experienced by the Office of Administrative Hearings in conducting hearings for state agencies, local entities, and North Dakota citizens. The rules are also not related to any federal statute or regulation. They are not emergency rules. They are rules that recognize that the filing and service of documents in administrative hearings is increasingly being accomplished by electronic means and these rules are an effort to bring some uniformity to the process.

A rules hearing was held on these rules on October 7, 2011. However, prior to that hearing, the proposed rules were reviewed and commented on by the State Advisory Council for Administrative Hearings ("SAC"). See N.D.C.C. section 54-57-08. The SAC is a statutory body comprised of ten attorneys in private practice and government service that advises OAH regarding legislation, rulemaking, and policy. The rules were reviewed at three SAC meetings

prior to the rules hearing and prior to changes that were made in response to written comment about the rules. The SAC had input regarding the rules both before and after they were proposed by OAH. Then, after the rules hearing and written comment, and the changes made in response to written comment, the SAC again reviewed the rules. There were no suggestions for changes made by the SAC at the fourth meeting, after OAH made changes in the rules in response to written comment. OAH lead ALJs and OAH's office manager also had input into the rules, before they were proposed.

When the rules were proposed, OAH gave notice of rulemaking as required by N.D.C.C. section 28-32-10, with the Legislative Council and by newspaper publication. OAH also sent a copy of the proposed rules to its three major user agencies, Workforce Safety and Insurance, the Department of Human Services, and the Public Service Commission, as well as to all of OAH's administrative law judges. And, of course, the SAC received copies. Both WSI and the PSC have a member on the SAC. A former DHS employee is also a member of the SAC.

The rules hearing was held on October 7, 2011. One person attended the rules hearing but no one gave oral testimony. The person attending, a representative of the PSC, filed written comments after the hearing. One other person, an OAH contract ALJ, filed written comments. OAH made changes to its proposed rules in response to the written comments. Those changes were specifically identified in a February 28, 2012, memorandum to the attorney general and the code revisor. The changes were, essentially, clarification changes relating to confirmation

of receipt of documents, filing with a hearing officer outside of the agency, filing in different word processing formats, required formatting of the documentation, time of filing, waiver of filing fee, the statement about a surcharge, the time for making payment of required filing fees, discretion of the filing party whether to file electronically, and consent to electronic service.

Other than considerable OAH staff time spent on drafting the rules, giving notice, meeting with the SAC, and the proposal and adoption of these rules, the cost to OAH was the amount it paid, \$1,978.68, to give newspaper notice as required by statute.

Although no state statutory change or federal statutory or regulatory change required these rules, OAH and other state agencies currently receive various documents that are filed and served in administrative proceedings. These rules recognize that filing and service of documents in administrative proceedings is increasingly being accomplished by electronic means; the rules are an effort to bring some uniformity to the process. All of these rules relate to the electronic filing and service of various documents in administrative hearings, except the changes to N.D. Admin. Code section 98-01-01-03, regarding inquiries to OAH (pg 185), which recognizes OAH's change in address upon moving its offices in 2011.

To some extent, these rules are patterned after North Dakota court rules on electronic filing and service. These rules apply to OAH and to all other agencies under N.D.C.C. chapter 28-32, but they do not require any agency to accept electronic filing or anyone to serve documents

electronically. Rather, they facilitate the electronic filing of documents if permitted by the agency, and they facilitate service of documents upon the parties by electronic means.

The amendments to N.D. Admin. Code sections 98-02-02-03 and 98-02-02-04 (pgs. 186-187) recognize the fact that electronic service by email now occurs. The real substance regarding electronic filing and service, however, occurs in N.D. Admin. Code section 98-02-02-19, titled "Electronic Filing and Service." (pgs. 187-189).

Electronic filing may occur only if an agency permits it. *See* section 98-02-02-19(1) (pg. 187). However, these rules also do not require anyone to file electronically. OAH currently does permit electronic filing for all of the hearings it conducts for other agencies.

Section 98-02-02-19 states the details of filing and service if the agency permits electronic filing. Section 98-02-02-19(2) (pgs. 187-188) details filing formats; filing must be in an agency-approved filing format. Section 98-02-02-19(3) (pg. 188) details the requirements for the time of filing; it also requires the filing party to pay a filing fee as required by the agency, but an agency must have some other authority for charging such a fee, if it does charge a filing fee. OAH does not charge a filing fee. The same applies for any surcharge for internal production of documents, if internal production is necessary; the filing party must pay a surcharge as required by the agency, if authorized. But, there can be no surcharge for documents 20 pages in length or less. Again, the agency must have some other authority to require a filing fee or payment of

a surcharge. For example, OAH has authority in N.D.C.C. section 54-57-07 to require payment for the various hearing services it provides. Again, no one is required to file electronically; it is an option that more and more government agencies and North Dakota attorneys and citizens are using.

Section 98-02-02-19(4) (pgs. 188-189) deals with electronic service of documents to parties in an administrative proceeding. Service to parties is different than filing with the agency but is a necessary part of any administrative proceeding. As with filing, service electronically is an option and a party does not have to serve documents electronically and no party has to agree to accept electronic service of documents.

In summary, filing and service electronically is occurring more and more frequently in administrative proceedings. It may be that in the not too distant future electronic filing and service will be the only method of service and filing allowed for most parties. We have not reached that point yet in administrative proceedings. But these rules recognize electronic filing and service as an option and provide a uniform process for electronic filing and service.

On February 14, 2012, these rules were submitted to the attorney general for his opinion as to their legality before final adoption, and on March 15, 2012, the attorney general stated to the director of OAH that "[t]hese administrative rules are in substantial compliance with N.D.C.C. chapter 28-32 and are hereby approved as to their legality." On March 16, 2012, OAH adopted

these rules and submitted them to the Legislative Council's code revisor for publication in the North Dakota Administrative Code pursuant to N.D.C.C. section 28-32-15.

No regulatory analysis was required in regard to these rules because the new and amended rules are not expected to have an impact on the regulated community in excess of \$50,000, and neither the governor nor any member of the legislative assembly requested a regulatory analysis. Again, filing and service electronically is optional and it is likely that filing and service electronically will save agencies and citizens money, not cost them more. A brief takings assessment is attached but that document concludes that there is no likelihood of any takings or regulatory takings. Attachment A. Also, a small entity analysis and small entity economic impact statement is attached, though none of the new or amended rules appear to have an economic or regulatory impact on small entities. Attachment B. Regardless of entity size, either governmental or private, electronic filing and service is likely to be a cost saver.

It is not anticipated that these rules will have a fiscal effect on state revenues and expenditures including any effect on OAH because electronic filing occurs already with OAH and other agencies, and will continue. If electronic filing is ever required by the courts (*e.g.*, for administrative hearing appeals to the courts) or by OAH or other agencies in administrative proceedings, then electronic filing and service may have an effect on agency expenditures. But we are not at that point yet.

TAKINGS ASSESSMENT

The amendments and new rules to the Uniform Rules of Administrative Procedure for Adjudicative Proceedings ("Uniform Rules") are being amended, primarily, to allow for state agencies under N.D.C.C. chapter 28-32 to permit electronic filing of documents in adjudicative proceedings and to provide guidelines and a process for electronic filing of documents with agencies. There is currently no rule on electronic filing in the Uniform Rules, but the state courts and federal courts have rules on electronic filing. In the information age, electronic filing is or soon will be the norm for many in the filing of documents in court proceedings and adjudicative proceedings. It behooves state agencies to seriously consider implementing the electronic option if they have not already, and it is appropriate for the Uniform Rules to provide authority, guidelines, and a process. There is no likelihood that rules for electronic filing will result in a taking or regulatory taking. Agencies will have the option to allow electronic filing, but if allowed by the agency, the filer is not required to file electronically.

SMALL ENTITY REGULATORY ANALYSIS

The Uniform Rules of Administrative Procedure for Adjudicative Proceedings ("Uniform Rules"), N.D. Admin. Code art 98-02, were adopted in 1992 and amended in 1994, 1998, and 2004. The Uniform Rules serve a public welfare purpose of providing uniform rules applying equally to all individual citizens, agencies of government, political subdivisions, businesses, and other entities, including small entities, in North Dakota that are involved in adjudicative proceedings under N.D. Admin. Code chapter 28-32 (hearings, *etc.*). Generally, a small business entity must be represented at a hearing by someone who is an attorney but an individual may represent himself or herself. Generally, a government entity is represented at a hearing by an attorney. However, the Uniform Rules are designed and drafted so that any person as well as attorneys may understand and apply the rules. Out of necessity, some rules are more complex and some may be intended to apply only to attorneys. OAH has published an informational guide to help those not represented by an attorney understand adjudicative proceedings.

The Uniform Rules implement the provisions of N.D.C.C. chapter 28-32 and relate to the N.D. Rules of Civil Procedure. All along the process of drafting and amending the Uniform Rules some consideration has been given to less stringent compliance, less stringent schedules or deadlines for compliance, consolidation or simplification of compliance, and exemptions, but for the adequate and reasonable conduct of hearings, uniform rules must be as uniform as possible. The amendments and new rules in these 2012 changes to the Uniform Rules deal primarily with the filing of documents electronically with agencies. These changes allow for agencies to decide whether or not to allow electronic filing of documents in adjudicative

proceedings, by email or facsimile mail, and provide for guidelines and process for doing so. It is anticipated that if an agency allows electronic filing of documents it will be either revenue- and cost-neutral for the agency or it will save both the agency and the electronic filer compared to the costs for filing traditional hard copy. As has always been the case, the Uniform Rules remain procedural rules for adjudicative proceedings and do not impose a regulatory burden on citizens, agencies of government, or other entities, except indirectly in how those rules are used in an adjudicative proceeding. The amendments and new rules to N.D. Admin. Code art. 98-02 do not make the Uniform Rules any more or less complex or burdensome than they were when last amended in 2004, and they possibly make them less burdensome because of the option for electronic filing.

SMALL ENTITY ECONOMIC IMPACT STATEMENT

To the extent they may be involved in an adjudicative proceeding at any time, all small entities are subject to the Uniform Rules of Administrative Procedure for Adjudicative Proceedings ("Uniform Rules"), as well as the proposed amendments to the Uniform Rules and new Uniform Rules. There appear to be no additional administrative and other costs associated, necessarily, with the proposed amendments. Agencies have the option to impose a filing fee and a surcharge for electronic filing and for the filing of larger volumes of documents but those additional fees and costs, if imposed, are likely to be offset by the savings to any filer, which may be a small entity, from no longer having to file hard copies of documents with the agency. Under these rules, no one is required to file electronically even if an agency decides to allow electronic filing. Again, the benefit for all private persons, business entities, agencies, and political subdivisions to having Uniform Rules is that they are uniform, applying to all, and are

known in advance of the adjudicative proceeding. Electronic filing is already allowed in state and the federal courts. Indeed, electronic filing already occurs to some extent in adjudicative proceedings. The information age makes it necessary and desirable for the Uniform Rules to specifically allow the option of electronic filing to all agencies, an option which all agencies will likely sooner or later adopt. There is little or no probable affect of the proposed amendments and new rules for an increase in spending of state revenues if an agency allows electronic filing, and there is little or no probable affect on small entities in North Dakota if they use electronic filing when allowed by an agency. Electronic filing is or can be less intrusive and less costly for all involved than the filing of hard copy. And, again, an agency need not allow electronic filing and, if allowed, no one is required to file electronically; it is an option.