

SENATE JUDICIARY COMMITTEE
MONDAY, MARCH 13, 2023

TESTIMONY OF ALLYSON M. HICKS
OFFICE OF ATTORNEY GENERAL
HOUSE BILL NO. 1154

Madam Chair Larson, members of the Committee.

I am Allyson M. Hicks, Assistant Attorney General, General Counsel Division of the Office of Attorney General, and I appear on behalf of the Attorney General to oppose House Bill 1154.

Administrative agencies utilize chapter 28-32 to administer hearings for a variety of purposes. Whether it be licensure or approval of a request, denial of benefits, or addition of a name to a registry, these hearings are held for a variety of reasons throughout state government. Chapter 28-32 was drafted with a degree of flexibility so that, much like the judiciary, it can meet the needs of agencies and citizens of North Dakota. Generally, an administrative hearing begins with a request from a member of the public to an administrative agency. The agency will investigate the matter and, if warranted, try to resolve the matter informally through either settlement agreements or dismissal. A matter will reach a 28-32 hearing either because an action of the agency is appealed and a hearing is requested by the member of the public, or because the parties are unable to resolve an issue and a hearing is requested by the agency. At that point, a Complaint or appeal is filed with the Office of Administrative Hearings (OAH) and generally the administrative rules promulgated by OAH guide the proceeding.

OAH's administrative rules very closely mirror the rules adopted by the court as it relates to both procedure and evidence. If one of the parties is appearing without an attorney, OAH can waive the rules of evidence and proceed in a more informal matter to accommodate the parties. When both parties are represented by attorneys, however, the rules of procedure very closely parallel those rules adopted by the Court. After a complaint is filed, the other party responds to those allegations by filing an answer. At that point, the parties enter what is called the discovery phase of the proceedings. Each party is able to use tools adopted by OAH to gather information, documents, and evidence to support their position. Again, the discovery process adopted by OAH closely mirrors those rules adopted by the Court. Once the discovery process is completed, the parties will begin the dispositive phase of the lawsuit.

A lawsuit can be disposed of in many ways. A party can move to dismiss the lawsuit if certain standards are met. The parties can continually negotiate to resolve the lawsuit by settlement or other consent decree. Lastly, after the parties have done all of the discovery and have a good grasp on what happened, each party can file what's called a "summary judgment motion." This motion tells the administrative law judge (ALJ) that the facts are clear; based on the evidence, the facts that matter to the resolution of the lawsuit cannot be disputed. So, if the facts are clearly established and only questions about the law remain, the parties can avoid a trial and ask a judge to just make a decision about the laws. That's the crux of what a summary judgment motion is—it is a procedural tool to move matters

along when we don't need a trial to determine the facts; we have all the evidence we need.

If an ALJ grants either party's motion for summary judgment, a recommended or final order is issued. If a recommended order is issued, that goes to the agency to be finalized. Any final order is appealable by either party.

Summary judgment is not appropriate in all cases, but it is appropriate in some. When it is appropriate, it can save both parties time, money, and the unnecessary burden of going through a trial. For example, when a regulatory board takes disciplinary action against a licensee because they were convicted of a crime, the only fact that matters is likely whether or not that licensee was convicted of a crime. That is a fact that is easily determined through discovery. Once that fact is determined, there's no need for a trial; summary judgment is appropriate. Courts have upheld the administrative use of summary judgment in cases such as these where the standard is met. See Johnson vs. N. D. Board of Accountancy, Case No. 08-2020-CV-00939.

If summary judgment is inappropriate, and a hearing is needed to resolve issues of fact, the ALJ is the person that the legislature has entrusted to have the legal understanding to make that call. Because of that, it is unnecessary to prohibit the use of a longstanding legal tool in statute. There are checks and balances already in place to guard against misuse.

I understand that this bill was drafted in response to a specific circumstance. Appeals happen in administrative proceedings. If the case had gone to a regular

hearing, it still likely would've been appealed. Those costs wouldn't have been avoided. In fact, arguably it would've just taken longer to have the issue resolved. This bill is a kneejerk reaction to a singular case out of hundreds of cases each year that utilize summary judgment and appeals without issue.

Summary judgment is a vital resource for parties to utilize in administrative proceedings, and the ALJ is the appropriate body to determine whether or not it is appropriate in certain circumstances. There is no reason for the legislature to remove a necessary procedural tool from both parties during administrative hearings because of one single case. For that reason, the Attorney General recommends a **DO NOT PASS** on House Bill 1154.

Thank you for your time, and I would stand for any questions.