

HB 1368

Rep. Ben Koppelman- Testimony

Madame Chairman and Members of the Committee,

Thank You for the opportunity to introduce HB1368 to you today.

I introduced this bill to protect the administrative rules process by ensuring that rules follow legislative intent as well as hold rulemaking to a standard of reasonable and necessary. This is safeguarded by allowing the Administrative Rules Committee the tools necessary to void a rule or portion of a rule if it is determined to be too burdensome.

In North Dakota, we have delegated a narrow portion of our policy-making authority to various agencies, boards, and commissions within the executive branch.

However, with that delegation comes oversight by the legislative branch, as it should, through the Administrative Rules Committee. Since administrative rules have the "weight of law" once they are adopted, it is imperative that we can stand as a gatekeeper of the policy that we pass, rather than to have it undermined by de facto law through the rule-making process.

The Administrative rules committee is a standing statutory committee made up of legislators which meets quarterly or as often as is necessary.

Currently the Administrative Rules Committee can void rules if there is:

- 1) An absence of statutory authority
- 2) An emergency relating to public health, safety, and welfare
- 3) A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for the adoption of the rule
- 4) A conflict with state law
- 5) Arbitrariness and Capriciousness
- 6) A failure to make a written record of its consideration of written and oral submissions respecting the rule under section 28-32-11.

Traditionally, I had always thought that Arbitrariness and Capriciousness was the "catch-all" for objections to overregulation by the committee. However, there has been some disagreement as to whether those terms would truly be able to be used to overturn such regulation overreach. Here are the definitions that I could find for those terms.

According to USLegal.com, ***'A rule is arbitrary if it is not supported by logic or necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational'***.

Black's Law Dictionary defines ***Arbitrary***: ***'Willful and unreasoning action, without consideration and regard for facts or circumstances presented...bad faith or failure to exercise honest judgement'*** and defines ***Capricious***: ***'Subject to whim; impulsive and unpredictable*** and defined ***Arbitrary and Capricious***: ***'A willful and unreasonable action without consideration or in disregard of facts or law or without determining principle'***.

TheLawDictionary.org defines arbitrary as ***'Not supported by fair, solid, or substantial cause, and without reason given'***; it goes on to define capricious as ***'Given to sudden and unaccountable changes of mood or behavior'***.

One problem could be that rules may be arbitrary but not capricious. Another could be that the rules have been promulgated using one set of facts without weighing out the consequences of such regulations to figure out if the harm the rule may cause would outweigh the benefit. So, in order to figure out a solution, I worked with legislative council to come up with easily understandable terms that could be used by the Administrative Rules Committee for this purpose of safeguarding the public against overregulation. That is why I am seeking to add the following to the list:

- 1) An absence of necessity
- 2) An absence of reasonableness.

Many of you may have heard of the SCOTUS case *North Carolina State Board of Dental Examiners v. Federal Trade Commission* where the court emphasized the need for the legislative branch to exercise oversight over those it delegated its policy making authority to. In North Dakota, this is the Administrative Rules Committee. In order to properly oversee those activities, the committee needs these tools.

You may also be aware of the ND Supreme Court case *North Dakota Legislative Assembly v. Burqum* in which the court emphasized the separation of powers and ruled that the legislature may not delegate its authority to another entity, such as the Budget Section. This also would likely apply to the delegation of legislative authority, including making policy, to the executive branch. This is why it is key that through the administrative rules process, that the administrative branch nor the administrative rules committee are making/ changing policy, but rather the administrative branch is making rules in the narrowest and least restrictive fashion and that the administrative rules committee has the authority to reject rules that go too far.

So, since the constitutional authority to make policy is vested in the legislative branch of government, it is only reasonable that we safeguard our citizens against the temptation of overreach by the executive branch when executing the very power that we delegated to them.

Madame Chairman and members of the committee, I request that you give this bill a Do-Pass recommendation. I would be happy to attempt to answer any questions that you may have.

Sixty-ninth
Legislative Assembly
of North Dakota

PROPOSED AMENDMENTS TO FIRST ENGROSSMENT

ENGROSSED HOUSE BILL NO. 1368

Introduced by

Representatives Koppelman, Kasper, Louser

Senators Clemens, Cory, Lemm, Magrum, Myrdal, Paulson

1 A BILL for an Act to amend and reenact section 28-32-18 of the North Dakota Century Code,
2 relating to voiding and amending administrative rules by the administrative rules committee.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. AMENDMENT.** Section 28-32-18 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **28-32-18. Administrative rules committee may void rule - Grounds - Amendment by**
7 **agreement of agency and committee.**

8 1. The legislative management's administrative rules committee may find that all or any
9 portion of a rule is void if ~~that rule~~the:

10 a. Rule is initially considered by the committee not later than the fifteenth day of the
11 month before the date of the administrative code supplement in which the rule
12 change is scheduled to appear. ~~The administrative rules committee may find a~~
13 ~~rule or portion of a rule void if the committee~~ and a representative of the agency
14 appears before the administrative rules committee when the rule is scheduled for
15 committee consideration; and

16 b. Committee makes the specific finding that, with regard to that rule or portion of a
17 rule, there is:

18 a.(1) An absence of statutory authority.

19 b.(2) An emergency relating to public health, safety, or welfare.

- 1 ~~e.~~(3) A failure to comply with express legislative intent or to substantially meet the
2 procedural requirements of this chapter for adoption of the rule.
- 3 ~~d.~~(4) A conflict with state law.
- 4 ~~e.~~(5) Arbitrariness and/or capriciousness.
- 5 ~~f.~~(6) A failure to make a written record of its consideration of written and oral
6 submissions respecting the rule under section 28-32-11.
- 7 ~~g.~~(7) An absence of necessity.
- 8 ~~h.~~(8) An absence of reasonableness.
- 9 2. The administrative rules committee may find a rule void at the meeting at which the
10 rule is initially considered by the committee or may hold consideration of that a rule for
11 one subsequent meeting.
- 12 3. If no representative of the agency appears before the administrative rules committee
13 when:
- 14 a. When rules are scheduled for committee consideration, ~~these~~the rules are held
15 over for consideration at the next subsequent committee meeting. ~~Rules are not~~
16 ~~considered initially considered by the committee under this subsection until a~~
17 ~~representative of the agency appears before the administrative rules committee~~
18 ~~when the rules are scheduled for committee consideration. If no representative of~~
19 ~~the agency appears before the administrative rules committee meeting~~
- 20 b. Meeting to which rules are held over for consideration, ~~the~~:
- 21 (1) The rules are void if the rules were adopted as emergency rules and ~~for~~
22 ~~rules not adopted as emergency rules the~~; or
- 23 (2) The administrative rules committee may void the rules, allow the rules to
24 become effective, or hold over consideration of the rules to the next
25 subsequent committee meeting.
- 26 4. Within three business days after the administrative rules committee finds that a rule is
27 void, the legislative council shall provide written notice of that finding and the
28 committee's specific finding under ~~subdivisions a through f~~subdivision b of
29 subsection 1 to the adopting agency and to the chairman of the legislative
30 management.

1 5. Within fourteen days after receipt of the notice, the adopting agency may file a petition
2 with the chairman of the legislative management for review by the legislative
3 management of the decision of the administrative rules committee. If the adopting
4 agency does not file a petition for review, the rule becomes void on the fifteenth day
5 after the notice from the legislative council to the adopting agency. If within sixty days
6 after receipt of the petition from the adopting agency the legislative management has
7 not disapproved by motion the finding of the administrative rules committee, the rule is
8 void.

9 ~~3.6.~~ An agency~~The committee~~ may amend or repeal a rule or create a related rule if, after
10 consideration of rules by the administrative rules committee, the representative from
11 the agency and committee agree that the rule amendment, repeal, or creation is
12 necessary to address any of the considerations under subsection ~~4~~reasonable.

13 7. A rule amended, repealed, or created under ~~this subsection is~~subsection 6:

14 a. Is not subject to the other requirements of this chapter relating to adoption of
15 administrative rules ~~and may~~.

16 b. May be published by the legislative council as amended, repealed, or created. ~~If~~
17 ~~requested by the agency or any interested party, a rule amended, repealed, or~~
18 ~~created under this subsection must~~

19 c. Must be reconsidered by the administrative rules committee at a subsequent
20 meeting at which public comment on the agreed rule change must be allowed, if
21 requested by the agency or an interested party.