

# JUDICIAL PROCEDURE, CIVIL

## CHAPTER 337

SENATE BILL NO. 2368  
(Stenehjem)

### ADJOURNMENT OF JURORS

AN ACT to amend and reenact section 28-14-18 of the North Dakota Century Code, relating to the temporary dismissal of jurors in deliberations.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 28-14-18 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-14-18. Conduct of jurors in retirement. When the case finally is submitted to the jurors, they may decide in court or retire for deliberation. If they retire, they must be kept together in some convenient place under charge of an officer, until they agree upon a verdict, are temporarily dismissed by the court, or are permanently discharged by the court. Unless, by order of the court, the officer having the jurors under the officer's charge must not suffer any communication to be made to them, or to make any himself except to ask them if they have agreed upon a verdict, and the officer, before the verdict is rendered, must not communicate to anyone the state of their deliberations or the verdict agreed upon. Where the jurors have not agreed upon a verdict by twelve midnight during normal working hours of any day of deliberations, the trial judge may temporarily dismiss the jurors from twelve midnight to eight a.m. that day and direct them when the jurors shall to resume deliberations. Where a trial jury contains both male and female members, the trial judge may direct that the female members of the jury be placed in charge of a female bailiff and permitted to retire to a suitable place for rest, and the male members of the jury placed in charge of a male bailiff for a similar purpose. In all cases where the jurors are dismissed or separated, as above stated, the trial judge shall admonish the members thereof that they must not in any manner discuss the case with anyone, nor permit anyone to discuss it with them, while they are so dismissed or separated, and that they must discuss and consider the case only in the room when all members of the jury are present.

Approved March 11, 1991  
Filed March 11, 1991

## CHAPTER 338

SENATE BILL NO. 2369  
(Stenehjem)

### JUDGMENT RENEWAL FILING

AN ACT to amend and reenact section 28-20-22 of the North Dakota Century Code, relating to filing an affidavit of renewal of a judgment.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 28-20-22 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-20-22. Affidavit of renewal - Where filed - Entry. If the judgment was rendered in a ~~district~~ court of this state, ~~or was entered upon a transcript or abstract from a county court;~~ the affidavit for renewal must be filed with the clerk of ~~the district~~ court where the judgment was first docketed. If the judgment filed and docketed was a foreign judgment, the affidavit for renewal may be filed with the clerk of any ~~district~~ court where the same has been docketed. The clerk of ~~the district~~ court shall immediately enter in the judgment docket, ~~after a statement of the original judgment;~~ the fact of renewal, the date of renewal, and the amount for which the judgment is renewed. A copy of the affidavit of renewal and the docket entries thereon, certified by the clerk of ~~the district~~ court where the judgment is filed, ~~may must~~ be filed and docketed in any other county of the state in which a transcript of the original judgment was filed.

Approved March 11, 1991  
Filed March 11, 1991

## CHAPTER 339

SENATE BILL NO. 2367  
(Stenehjem)

### FOREIGN JUDGMENT FILING

AN ACT to amend and reenact section 28-20.1-02 of the North Dakota Century Code, relating to the filing and status of foreign judgments.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 28-20.1-02 of the North Dakota Century Code is amended and reenacted as follows:

28-20.1-02. Filing and status of foreign judgments. A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state may be filed in the office of the clerk of any district court or county court of any county of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the district court of any county of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a district court or county court of any county of this state and may be enforced or satisfied in like manner.

Approved March 11, 1991  
Filed March 11, 1991

## CHAPTER 340

HOUSE BILL NO. 1489  
(Kelsch)

### SERVICE OF NOTICE OF LEVY

AN ACT to amend and reenact section 28-21-12 of the North Dakota Century Code, relating to service of the sheriff's notice of levy.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 28-21-12 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-21-12. Notice of levy - Service - Contents. In all cases of levy upon personal property, the sheriff or other officer must ~~give notice thereof by copy to the debtor, the debtor's attorney, agent, or spouse, or, failing to find anyone of these conveniently, to such child as is described in section 20-22-11~~ serve the notice of levy in the same manner as a summons is served in accordance with the North Dakota Rules of Civil Procedure. Such notice must have written or printed upon its face the further notice to the debtor, that if exemptions are claimed or demanded, such claim must be made within ten days after service of notice.

Approved April 3, 1991  
Filed April 4, 1991

## CHAPTER 341

HOUSE BILL NO. 1335  
(Schneider, Kretschmar)

### JUDICIAL PROCESS EXEMPTIONS

AN ACT to amend and reenact section 28-22-03.1 of the North Dakota Century Code, relating to property exempt from judicial process.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 28-22-03.1 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-22-03.1. Additional absolute exemptions for residents. In addition to the exemptions from all attachment or process, levy and sale upon execution, and any other final process issued from any court, otherwise provided by law, a resident of the state may select:

1. In lieu of the homestead exemption, up to seven thousand five hundred dollars.
2. A motor vehicle exemption not to exceed one thousand two hundred dollars.
3. Pensions~~+~~, annuity policies or plans~~+~~, and life insurance policies which, upon the death of the insured, would be payable to the spouse, children, or any relative of the insured dependent, or likely to be dependent, upon the insured for support and which have been in effect for a period of at least one year; individual retirement accounts; Keogh plans and simplified employee pension plans; and all other plans qualified under section 401 of the Internal Revenue Code [Pub. L. 83-591; 68A Stat. 134; 26 U.S.C. 401] and section 408 of the Internal Revenue Code [Pub. L. 93-406; 88 Stat. 959; 26 U.S.C. 408], and proceeds, surrender values, payments, and withdrawals from such pensions, policies, plans, and accounts, up to one hundred thousand dollars for each pension, policy, plan, and account with an aggregate limitation of two hundred thousand dollars for all pensions, policies, plans, and accounts. The dollar limit does not apply to the extent this property is reasonably necessary for the support of the resident and that resident's dependents, except that the pensions, policies, plans, and accounts or proceeds, surrender values, payments, and withdrawals are not exempt from enforcement of any order to pay spousal support or child support, or a qualified domestic relations order under sections 15-39.1-12.2, 39-03.1-14.2, and 54-52-17.6. As used in this subsection, "reasonably necessary for the support" means required to meet present and future needs, as determined by the court after consideration of the resident's responsibilities and all the present and anticipated property and income of the resident, including that which is exempt.

4. The debtor's right to receive, or property that is traceable to:
  - a. A payment, not to exceed seven thousand five hundred dollars, on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.
  - b. A payment, not to exceed seven thousand five hundred dollars, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent.
  - c. A social security benefit, except that the benefit is not exempt for enforcement of any order for the support of a dependent child.
  - d. Veteran's disability pension benefits, not including military retirement pay, except that the benefits are not exempt from process levy or sale for enforcement of any order for the support of a dependent child.

Approved March 8, 1991  
Filed March 8, 1991

## CHAPTER 342

HOUSE BILL NO. 1194  
(Committee on Judiciary)  
(At the request of the Attorney General)

### ADMINISTRATIVE HEARINGS

AN ACT to create and enact five new subsections to section 28-32-01 and twelve new sections to chapter 28-32 of the North Dakota Century Code, relating to practices and procedures in administrative proceedings; to amend and reenact subsection 3 of section 4-18.1-18, subsection 2 of section 15-47-38, subsection 5 of section 28-32-03, sections 28-32-05, 28-32-06, 28-32-07, 28-32-08, 28-32-09, 28-32-11, 28-32-12, 28-32-13, 28-32-14, 28-32-15, 28-32-17, 28-32-18, 28-32-19, 28-32-20, 28-32-21, 28-32-21.1, 38-08-11, 38-08-13, 38-08-14, subsection 3 of section 38-14.1-30, and subsection 3 of section 43-23-11.1 of the North Dakota Century Code, relating to administrative practices and procedures; to repeal section 28-32-10 of the North Dakota Century Code, relating to proceedings when subpoenas are disobeyed; and to provide an appropriation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 3 of section 4-18.1-18 of the North Dakota Century Code is amended and reenacted as follows:

3. The proceedings authorized or required by subsections 1 and 2 must be in strict conformity with ~~sections 28-32-04 through 28-32-14 and rules of practice that are issued by the board and that are not inconsistent with said statutes~~ chapter 28-32, any rules adopted under chapter 28-32, and any other rules of administrative practice or procedure adopted by the board.

\* SECTION 2. AMENDMENT. Subsection 2 of section 15-47-38 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

2. The school board of any school district contemplating discharging a teacher for cause prior to the expiration of the term of the teacher's contract shall notify the teacher in writing of that fact at least ten days prior to the date of contemplated discharge. The teacher ~~shall~~ must be informed in writing of the time and place for a special meeting of the school board to be held on the question of the teacher's discharge prior to a final decision on the matter. The teacher ~~shall~~ must also be informed in writing of ~~his~~ the right to demand a specification of the reasons for discharge, which must, upon receipt of the demand of the teacher, be furnished not less than five days prior to the meeting to be held on the question of the teacher's discharge. The reasons ~~shall~~ must be sufficient to justify the contemplated action of the board and ~~shall~~ may not be frivolous or arbitrary. At the meeting with the board, if the

\* NOTE: Section 15-47-38 was also amended by section 1 of House Bill No. 1249, chapter 198.

teacher has informed the board in writing at least two days prior thereto that ~~he~~ the teacher will contest the charges brought against ~~him~~ the teacher, the board must sustain the charges with evidence produced at the hearing with witnesses who ~~shall be~~ are subject to cross-examination by the teacher or ~~his~~ the teacher's representative. A witness, if a minor, ~~shall~~ must be accompanied by a parent or parents, legal guardian, or legal counsel, if requested by the minor or the minor's parents. The teacher may then produce ~~such~~ such witnesses as may be necessary to refute the charges, which witnesses ~~shall be~~ are subject to cross-examination. All procedures relative to evidence, subpoena of witnesses, oaths, record of testimony, decision, rehearing, appeals, certification of record, scope and procedure for appeals, ~~and~~ and appeals to the supreme court ~~shall~~ shall, and other administrative procedures must be conducted in accordance with the provisions of ~~sections 28-32-06, 28-32-07, 28-32-09, 28-32-10, 28-32-11, 28-32-12, 28-32-13, 28-32-14, 28-32-15, 28-32-16, 28-32-17, 28-32-18, 28-32-19, 28-32-20, and 28-32-21~~ chapter 28-32. The meeting ~~shall~~ must be an executive session of the board unless both the school board and the teacher requesting the meeting shall agree that it ~~shall~~ is to be open to other persons or the public. The teacher may be represented at the meeting by two representatives of ~~his~~ the teacher's own choosing; and the teacher's spouse, or one other family member of the teacher's choice, may also attend the meeting if the teacher so desires. In addition to board members, the business manager of the school district, and the superintendent, the school board may be represented by two other representatives of its own choosing at ~~such~~ the executive session. If the teacher so requests ~~he shall be granted,~~ the board must grant a continuance of not to exceed seven days by the board unless for good cause is otherwise shown. No cause of action for libel or slander ~~shall~~ may be brought for any statement expressed either orally or in writing at any executive session of the school board held for the purposes provided for in this section.

SECTION 3. Five new subsections to section 28-32-01 of the 1989 Supplement to the North Dakota Century Code are created and enacted as follows:

"Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by law.

"Hearing officer" means any agency head or one or more members of the agency head when presiding in an administrative proceeding, or, unless prohibited by law, one or more other persons designated by the agency head to preside in an administrative proceeding, or any other person duly assigned, appointed, or designated to preside in an administrative proceeding pursuant to statute or rule.

"License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.



"Order" means any agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons, but does not mean an executive order issued by the governor.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the administrative action more probable or less probable than it would be without the evidence.

SECTION 4. AMENDMENT. Subsection 5 of section 28-32-03 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

5. A rule is invalid unless adopted in substantial compliance with section 28-32-02. However, inadvertent failure to supply any person with a notice required by section 28-32-02 does not invalidate a rule. An action to contest the validity of a rule on the grounds of noncompliance with section 28-32-02 must be commenced within two years of the effective date of the rule.

SECTION 5. AMENDMENT. Section 28-32-05 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-05. Rules of practice or procedure - Complaint - Notice of hearing - Filing and service Contested case proceedings - Emergency proceedings - Other proceedings. The following rules of procedure shall be observed by all administrative agencies in proceedings in which the same are applicable:

1. a. The For contested cases involving a complaint and a specific-named respondent, a complainant shall prepare and file a clear and concise complaint with the agency having subject matter jurisdiction of a proceeding. The complaint shall contain a concise statement of the claims or charges upon which the complainant relies including reference to the statute or rule alleged to be violated, and the relief sought.
2. b. Upon filing of the When a complaint is filed, the appropriate administrative agency shall serve a copy of the complaint and a notice for hearing upon the respondent personally or by certified mail, as the agency may direct, at least forty-five days before the time specified for a hearing on the complaint. Unless a statute or rule otherwise requires or specifically provides for suspension or revocation without a hearing, the administrative agency shall designate the time and place for the hearing. Service may be waived in writing by the respondent, or the parties may agree upon on a definite time and place for hearing with the consent of the agency having jurisdiction. A notice for hearing on a complaint may be served less than forty-five days before the time specified for hearing if otherwise authorized by statute. However, no administrative hearing regarding the renewal, suspension, or revocation of a license may be held fewer than ten days after the licensee has been served, personally or by certified mail, with a copy of a notice for hearing along with an affidavit,

complaint, specification of issues, or other document alleging violations upon which the license hearing is based.

- 3- c. The notice for hearing shall ~~fix~~ state the time and place for ~~trial upon the hearing on the merits, and shall~~ complaint. The notice for hearing may inform the respondent that an answer to the complaint must be served upon the complainant and agency giving the notice within twenty days after service of the complaint and notice for hearing, or the agency may deem the complaint ~~will~~ to be ~~deemed~~ admitted; ~~and~~. If the respondent fails to answer as requested within twenty days after service of the complaint and notice for hearing, the agency ~~will~~ may enter ~~such~~ an order in default as the facts and law may warrant. Service by certified mail is complete as of the date of certification. If a respondent is given less than ~~forty-five days'~~ notice before a hearing pursuant to another statute, the notice may allow less than twenty days to answer the complaint, but no respondent may be required to answer a complaint in less than five days and an answer must be served on the agency giving the notice at least two days before the hearing on the complaint.
- 4- d. In an emergency the agency, in its discretion, may notice a ~~proceeding for contested case hearing upon the merits upon on a~~ complaint by giving less than forty-five days' notice. Every party to ~~such an emergency~~ proceeding shall be given a reasonable time within which to serve an answer and to prepare for the hearing, which may be extended by the agency upon good cause being shown.
- 5- 2. At the ~~any~~ contested case hearing, the respondent, applicant, appellant, or other party shall be afforded the ~~same~~ opportunity to present evidence and to examine and cross-examine witnesses as is permitted under section 28-32-06 and section 16 of this Act.
- 6- Unless otherwise precluded by law, ~~informal disposition may be made of any contested case, or any issue therein, by stipulation, agreed settlement, consent order, or default subject to agency approval.~~
- 7- 3. a. If the nature of the administrative action does not involve a complaint and a specific-named respondents respondent or is not a contested case, the ~~above rules shall~~ provisions of subsection 1 of this section do not apply. ~~Unless specific provision for notice is otherwise provided for in this code or the rules of the agency, public notice of the hearing shall be given by publication in the official newspaper in the county or counties in which the subject matter involved is located. All rules must provide for at least fourteen days' notice before the hearing except in cases of emergency.~~
- b. An administrative agency may adopt rules establishing practices or procedures for proceedings which do not involve a complaint and a specific-minded respondent or which are not contested cases, including agency hearings on applications seeking some right, privilege, or authorization from an agency, or appeals to the agency of some other agency action. All noncontested case proceedings or proceedings which do not involve a

complaint and a specific-named respondent must comply with another statute or rules of practice or procedure adopted pursuant to statute by an administrative agency. Notice pursuant to a rule must provide for at least fifteen days' notice before the hearing except in cases of emergency or when a shorter notice period is necessary to comply with the requirements of federal statutes, rules, or standards.

SECTION 6. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Informal disposition. Unless otherwise prohibited by statute or rule, informal disposition may be made of any contested case, noncontested case, or other administrative proceeding, or any part or issue thereof, by stipulation, settlement, waiver of hearing, consent order, default, alternative dispute resolution, or other informal disposition, subject to agency approval. Any administrative agency may adopt rules of practice or procedure for informal disposition if such rules do not substantially prejudice the rights of any party. Such rules may establish procedures for converting an administrative hearing from one type of proceeding to another type of proceeding.

SECTION 7. AMENDMENT. Section 28-32-06 of the North Dakota Century Code is amended and reenacted as follows:

28-32-06. Evidence to be considered by agency - Official notice.

1. The admissibility of evidence in any proceeding before an administrative agency shall be determined, insofar as circumstances will permit, in accordance with the practice in the district court North Dakota Rules of Evidence. An administrative agency, or any person conducting an investigation or hearing proceedings for it, may waive application of the usual common-law or statutory North Dakota Rules of Evidence if such a waiver is necessary to ascertain the substantial rights of all the parties a party to the proceeding, but only relevant evidence of probative value shall be accepted admitted. The waiver must be specifically stated, orally or in writing, either prior to or at a hearing or other proceeding. All objections offered to evidence shall be noted in the record of the proceeding. No information or evidence except such as shall have that which has been offered, admitted, and made a part of the official record of the hearing proceeding shall be considered by the administrative agency, except as otherwise provided in this chapter.
2. Upon proper objection, evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of evidentiary privilege recognized in the courts of this state, may be excluded. In the absence of proper objection, the agency or any person conducting an investigation or proceeding for it may exclude objectionable evidence. The North Dakota Rules of Evidence in regard to privileges apply at all stages of an administrative proceeding under this chapter.
3. All testimony must be made under oath or affirmation. Relevant statements presented by nonparties may be received as evidence if all parties are given an opportunity to cross-examine the nonparty

witness or to otherwise challenge or rebut the statements. Nonparties may not examine or cross-examine witnesses except pursuant to a grant of intervention.

4. Evidence may be received in written form if doing so will expedite the proceeding without substantial prejudice to the interests of any party.
5. Official notice may be taken of any facts that could be judicially noticed in the courts of this state. Additionally, official notice may be taken of any facts as authorized in agency rules.

SECTION 8. AMENDMENT. Section 28-32-07 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-07. Consideration of information not presented at a formal hearing. ~~If an~~ An administrative agency ~~desires to~~ may avail itself of competent and relevant information or evidence in its possession or furnished by members of its staff, or secured from any person in the course of an independent investigation conducted by such the agency, in addition to the evidence presented at any formal hearing, ~~it.~~ It may do so after first transmitting a copy of such the information or evidence or an abstract thereof to each party of record in the proceeding, ~~and after affording.~~ The agency must afford each such party, upon written request, an opportunity to examine such the information or evidence and to present its own information or evidence in connection therewith and to cross-examine the person furnishing such the information at a or evidence. Any further ~~public~~ testimony that is necessary shall be taken at a hearing to be called and held upon at least ten days' notice given by registered personal service or certified mail. ~~Nothing contained in this section prevents any administrative agency from taking notice of any fact or facts set forth in its duly adopted rules or any facts which are judicially noticed by the courts of this state.~~ This section also applies to information officially noticed after the hearing when the issuance of any initial or final order is based in whole or in part on the facts or material noticed.

SECTION 9. AMENDMENT. Section 28-32-08 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-08. Investigations - Hearings - Specifications of any issues to be furnished by agency - Costs of investigation.

1. An administrative agency may hold investigatory hearings to which the provisions of subsections 1 and 2 of section 28-32-05 and any rules adopted establishing practices or procedures for a contested or noncontested case proceeding do not apply. An administrative agency may adopt rules of practice or procedure for investigatory hearings. No investigatory hearing may be held except pursuant to statute or rules of practice or procedure adopted by an agency. No investigatory hearing may be held unless the agency gives at least five days' notice to all parties involved in the hearing.
2. Whenever an administrative agency, pursuant to authority conferred upon it by law, institutes an investigation upon its own motion or upon the claim or request of any person, without the filing of a specified complaint, or holds any contested case hearing ~~or makes any independent investigation~~ upon its own motion or the claim or

request of any person, without the filing of a specified complaint, no ~~decision~~ final order may be ~~made~~ issued by the agency until all parties in interest have been furnished with a written specification of the issues which are to be considered and determined, nor until an opportunity has been afforded to ~~such~~ all parties to present evidence and to be heard upon the precise issues so specified pursuant to notice being issued as required by section 28-32-05, unless the final order is issued pursuant to informal disposition in accordance with section 6 of this Act. The director of the workers compensation bureau may make initial determinations without giving the notice provided by this section, but the director is subject to the requirements of section 28-32-13.

3. An agency may assess the costs of an investigation to a person found to be in violation of a statute or rule as a result of a hearing or informal disposition. The total costs assessed and any civil penalty that may be imposed as a result of violation may not exceed the statutorily authorized civil penalty for the violation. For the purposes of this subsection, costs mean reasonable out-of-pocket agency costs, not including any attorney's fees, actually incurred in conducting the investigation for which they may be assessed. Any such costs paid must be paid into the general fund and are hereby appropriated as a refund to the agency for the purposes of defraying the costs of undertaking the investigation.

SECTION 10. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Hearing officer - Disqualification - Substitution.

1. Any person or persons presiding for the agency in an administrative proceeding must be referred to individually or collectively as hearing officer.
2. Any hearing officer is subject to disqualification for good cause shown.
3. Any party may petition for the disqualification of any person presiding as a hearing officer upon discovering facts establishing grounds for disqualification.
4. A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.
5. If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute may be appointed by:
  - a. The attorney general, if the disqualified or unavailable person is an assistant attorney general;
  - b. The agency head, if the disqualified or unavailable person is one or more members of the agency head or one or more other persons designated by the agency head;

- c. A supervising hearings officer, if the disqualified or unavailable person is a hearing officer designated from an office, pool, panel, or division of hearings officers; or
  - d. The governor, in all other cases.
- 6. Any action taken by a duly appointed substitute for a disqualified or unavailable person is as effective as if taken by the disqualified or unavailable person.
  - 7. Any hearing officer in an administrative proceeding, from the time of appointment or designation, may exercise any authority granted by law or rule. A hearing officer may be designated to preside over the entire administrative proceeding and may issue orders accordingly. A procedural hearing officer may only issue orders in regard to the course and conduct of the hearing under statute or rule, and to otherwise effect an orderly hearing. If a procedural hearing officer is designated the agency head must be present at the hearing and the agency head shall issue findings of fact and conclusions of law, as well as any order resulting from the hearing.

SECTION 11. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Intervention. An administrative agency may grant intervention in an administrative proceeding to promote the interest of justice if intervention will not impair the orderly and prompt conduct of the proceedings and if the petitioning intervenor demonstrates that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of statute or rule. The agency may impose conditions and limitations upon intervention. The agency shall give reasonable notice of the intervention to all parties. An administrative agency may adopt rules relating to intervention in an administrative proceeding.

SECTION 12. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Prehearing conference. Prior to a hearing, an administrative agency may conduct a prehearing conference after giving reasonable notice to all parties and other interested persons. A prehearing conference may be conducted in total or in part by making use of telephone, fax services, television, or other electronic means, as long as such use does not substantially prejudice or infringe on the rights and interests of any party. An administrative agency may adopt rules regarding the availability of, notice of, and procedures for prehearing conferences.

SECTION 13. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Default.

- 1. If a party fails to attend or participate in a prehearing conference, hearing, or other stage of a contested case administrative proceeding, the agency may serve upon all parties

written notice of default and a default order, including a statement of the grounds for default.

2. Within seven days after service of the default notice, order, and grounds, the party against whom default was ordered may file a written motion requesting that the default order be vacated and stating the grounds relied upon. During the time within which a party may file a written motion under this section, or at the time of issuing notice and the default order, the agency may adjourn the proceedings or conduct them without the participation of the party against whom a default order was issued, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings. If an agency conducts further proceedings necessary to complete the administrative action without the participation of a party in default, it shall determine all the issues involved, including those affecting the defaulting party.

SECTION 14. AMENDMENT. Section 28-32-09 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-09. Subpoena and attendance of witnesses Subpoenas - Discovery - Protective orders. Any officer, examiner, chairman, or acting chairman of any administrative agency, upon request of any party to a hearing conducted by it, or upon his own motion on behalf of the agency, shall require by subpoena the attendance and testimony of witnesses and the production of the documents and other objects described in such subpoena at such hearing or proceeding, and the cost of serving such subpoena shall be paid by the person or agency requesting it. A subpoena to compel a witness to produce documentary evidence will be issued to a party other than the agency only upon petition showing general relevance and reasonable scope of the evidence sought, which petition must also specify with particularity the books, papers, or documents desired. The deposition of a witness or party in any proceeding before an agency may be taken in the same manner and on the same notice as in a civil action pending in the district court. Interrogatories may be sent to any witness or party in any proceeding in the same manner and on the same notice as in an action pending in the district court.

1. Any hearing officer may issue subpoenas, discovery orders, and protective orders in accordance with the North Dakota Rules of Civil Procedure.
2. Any hearing officer may require, upon the request of any party to the proceedings conducted by the agency, or upon the agency's or the hearing officer's own motion on behalf of the agency, the attendance and testimony of witnesses and the production of documents and other objects described in a subpoena at a hearing or other part of the proceedings. The cost of issuing and serving a subpoena must be paid by the person or agency requesting it. A party, except an administrative agency, must first show general relevance and reasonable scope of the evidence sought, by written petition, and obtain the written approval of the agency or the person presiding, before a subpoena to compel a witness to produce documentary evidence will be issued for the party.
3. The deposition of a witness or any party in proceedings before an agency may be taken in accordance with the North Dakota Rules of Civil Procedure.

4. Interrogatories and requests for production of documents may be sent to any witness or party in proceedings before an agency in accordance with the North Dakota Rules of Civil Procedure.
5. A party, ~~other than the~~ except an administrative agency, must first show good cause, by written petition, and obtain the written approval of the agency or the presiding hearing officer, before undertaking discovery proceedings, including depositions and interrogatories.
6. Any witness who is subpoenaed under the provisions of this section and who appears at ~~the~~ a hearing or other proceeding, or whose deposition is taken, shall receive the same fees and mileage as a witness in a civil case in the district court, and such. Witness fees and mileage shall be paid by the party or agency at whose instance the witness appears ~~or his deposition is taken~~. Any hearing officer may order the payment of witness fees or mileage by the appropriate party or agency.
7. Subpoenas, discovery orders, protective orders, and other orders issued under this section may be enforced by applying to any judge of the district court for an order requiring the attendance of a witness, the production of all documents and objects described in the subpoena, or otherwise enforcing an order. Failure of a witness or other person to comply with the order of the district court is contempt of court which is punishable by the district court, upon application.

SECTION 15. AMENDMENT. Section 28-32-11 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-11. Administration of oaths - Parties to be advised of perjury provisions. The officer, special examiner, chairman, or acting chairman of an administrative agency before which a Any hearing officer in an administrative proceeding or hearing is held has the power to examine witnesses and records and to administer oaths to witnesses. At the time the officer conducting the proceeding or hearing person presiding administers the oath to a witness, the officer person shall advise the witness of the provisions of subsection 1 of section 12.1-11-01 and of the maximum penalty for perjury.

SECTION 16. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Procedure at hearing. The person presiding at a hearing shall regulate the course of the hearing in conformity with this chapter and any rules adopted under this chapter by an administrative agency, any other applicable laws, and any prehearing order. To the extent necessary for full disclosure of all relevant facts and issues, the person presiding at the hearing shall afford to all parties and other persons allowed to participate the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted or conditioned by a grant of intervention or by a prehearing order. A hearing may be conducted in total or in part by making use of telephone, television, fax services, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if practicable, to see



the entire proceeding while it is taking place, and if such use does not substantially prejudice or infringe on the rights and interests of any party.

SECTION 17. AMENDMENT. Section 28-32-12 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-12. Record to be made of testimony Agency to make record. A An administrative agency shall make a record ~~shall be made~~ of all testimony ~~adduced~~, written statements, documents, exhibits, and other evidence presented at any hearing before an administrative agency contested case proceeding, noncontested case proceeding, or other administrative proceeding heard by it. ~~Such Oral~~ testimony may be taken by a court reporter, by a stenographer, or by use of an electronic recording device. All evidence ~~and exhibits produced~~ presented at any hearing proceeding before the administrative agency shall be filed with the agency concerned. A transcript of the evidence taken by or copy of the record of any proceeding before an administrative agency ~~shall~~, or a part thereof, must be furnished to any party to the proceeding and to any other person allowed to participate in the proceeding, upon written request ~~therefor~~, at submitted to the agency and upon payment of a uniform charge to be set by the agency, ~~and such transcript~~. Any fee paid to an administrative agency for the record, or a part thereof, shall be paid into the general fund and is hereby appropriated as a refund to the agency for the purposes of defraying the costs of preparing the record. An agency may contract with any person or another agency to prepare a record, or a part thereof, of any proceeding before the agency.

SECTION 18. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Ex parte communications.

1. Except as provided in subsection 2 or unless required for the disposition of ex parte matters specifically authorized by another statute, an agency head or hearing officer in a contested case proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding, with any other person allowed to participate in the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.
2. When more than one person is the hearing officer in a contested case proceeding, those persons may communicate with each other regarding a matter pending before the panel. An agency head or hearing officer may communicate with or receive aid from staff assistants if the assistants do not furnish, augment, diminish, or modify the evidence in the record.
3. Unless required for the disposition of ex parte matters specifically authorized by statute, no party to a contested case proceeding, no person who has a direct or indirect interest in the outcome of the proceeding, no person allowed to participate in the proceeding, and no person who presided at a previous stage in the proceeding may communicate directly or indirectly in connection with any issue in that proceeding, while the proceeding is pending,

with any agency head or hearing officer in the proceeding without notice and opportunity for all parties to participate in the communication.

4. If, before being assigned, designated, or appointed to preside in a contested case proceeding, a person receives an ex parte communication of a type that could not properly be received while presiding, the person, promptly after being assigned, designated, or appointed, shall disclose the communication in the manner prescribed in subsection 5.
5. An agency head or hearing officer in a contested case proceeding who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, or a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the person received an ex parte oral communication, and shall advise all parties, interested persons, and other persons allowed to participate that these matters have been placed on the record. Any person desiring to rebut the ex parte communication must be allowed to do so, upon requesting the opportunity for rebuttal. A request for rebuttal must be made within ten days after notice of the communication.
6. If necessary to eliminate the effect of an ex parte communication received in violation of this section, an agency head or hearing officer in a contested case proceeding who receives the communication may be disqualified, upon good cause being shown in writing to the hearing officer or to the agency. The portions of the record pertaining to the communication may be sealed by protective order issued by the agency.
7. The agency shall, and any party may, report any willful violation of this section to the appropriate authorities for any disciplinary proceedings provided by law. In addition, an administrative agency may, by rule, provide for appropriate sanctions, including default, for any violations of this section.
8. Nothing in this section prohibits a member of the general public, not acting on behalf or at the request of any party, from communicating with an agency in cases of general interest. The agency shall disclose such written communications in contested cases.

SECTION 19. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Separation of functions.

1. No person who has served as investigator, prosecutor, or advocate in the investigatory or prehearing stage of a contested case proceeding may serve as hearing officer.
2. No person who is subject to the direct authority of one who has served as an investigator, prosecutor, or advocate in the

investigatory or prehearing stage of a contested case proceeding may serve as hearing officer.

3. Any other person may serve as hearing officer in a contested case hearing, unless a party demonstrates grounds for disqualification.
4. Any person may serve as hearing officer at successive stages of the same contested case proceeding, unless a party demonstrates grounds for disqualification.

SECTION 20. AMENDMENT. Section 28-32-13 of the North Dakota Century Code is amended and reenacted as follows:

28-32-13. Findings of fact, conclusions of law, and ~~decision~~ order of agency - Notice.

1. Within thirty days after the evidence has been received, briefs filed, and arguments closed in a proceeding before an administrative agency, or as soon thereafter as possible, the agency shall make and state concisely and explicitly its findings of fact and its separate conclusions of law, and the ~~decision~~ order of the agency based upon ~~such~~ its findings and conclusions.
2. If the agency head, or another person authorized by the agency head or by law to issue a final order, is presiding, the order issued is the final order.
3. If the agency head, or another person authorized by the agency head or by law to issue a final order, is not presiding, then the person presiding shall issue a recommended order which becomes final unless specifically amended or rejected by the agency head. The agency head may adopt a recommended order as the final order. The agency may allow petitions for review of a recommended order and may allow oral argument pending issuance of a final order. An administrative agency may adopt rules regarding the review of recommended orders and other procedures for issuance of a final order by the agency.
4. The agency ~~shall~~ must give notice of its ~~decision or determination~~ an order issued in any proceeding heard by it by delivering a copy of ~~such decision or determination~~ the order, and the findings and conclusions upon which it is based, to all the parties to the proceeding either personally or by ~~registered or~~ certified mail; and if such. If notice is given by ~~registered or~~ certified mail, the notice shall be deemed given as of the date of the ~~registry or~~ certification. Pursuant to agency rule, in circumstances requiring it, an agency may give notice of an order by mailing the order, and the findings and conclusions upon which it is based, to all the parties by regular mail, provided it files an affidavit of service by mail indicating upon whom the order was served.

SECTION 21. AMENDMENT. Section 28-32-14 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-14. Petition for ~~rehearing~~ reconsideration.

1. Any party before an administrative agency who is aggrieved by the decision thereof final order of the agency, within fifteen days after a copy of such decision has been mailed or delivered to such party by the administrative agency notice has been given as required by section 28-32-13, may request a rehearing by such agency; ~~provided, however, that any~~ file a petition for reconsideration with the agency. Filing of the petition is not a prerequisite for seeking administrative or judicial review.
2. Any party appearing before the workers compensation bureau may have thirty days within which to request a rehearing file a petition for reconsideration.
3. ~~He shall~~ The party must submit with the request petition for rehearing reconsideration a statement of the specific grounds upon which relief is requested or a statement of any further showing to be made in the proceeding; and such request. The petition must also state whether a rehearing is requested. The petition and any statement shall constitute be considered a part of the record in the proceeding.
4. The administrative agency may deny such request the petition for rehearing reconsideration or may grant the same petition on such terms as it may prescribe. If a rehearing is granted, the agency may allow a new hearing or limit the hearing as appropriate. The agency may dissolve or amend the final order and set the matter for further hearing. The petition is deemed to have been denied if the agency does not dispose of it within thirty days after the filing of the petition. Any rehearing must be presided over by the same person or persons presiding previously at hearing, if available. Any amended findings, conclusions, and orders must be issued by the same person or persons who issued the previous recommended or final orders, if available. Within thirty days after the close of proceedings upon reconsideration, or as soon thereafter as possible, the agency shall issue and give notice of its order upon reconsideration as required in subsection 4 of section 28-32-13.
5. This section; ~~however, shall~~ does not limit the right of any agency to reopen any proceeding or rehear any matter under any continuing jurisdiction which is granted to any such the agency by any law of this state statute.

SECTION 22. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Effectiveness of orders. Unless a later date is stated in the order, a final order of an administrative agency is effective immediately, but a party may not be required to comply with a final order unless it has been served upon the party and notice is deemed given pursuant to section 28-32-13 or the party has actual knowledge of the final order. A nonparty may not be required to comply with a final order unless the agency has made the final order available for public inspection and copying or the nonparty has actual knowledge of the final order. This section does not preclude an agency from taking emergency action to protect the public health, safety, or welfare, as authorized by statute.

SECTION 23. AMENDMENT. Section 28-32-15 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-15. Appeal from determination of agency - Time to appeal - How appeal taken.

1. Any party to any proceeding heard by an administrative agency, except in cases where the ~~decision~~ order of the administrative agency is declared final by any other statute, may appeal from ~~such decision~~ the order within thirty days after notice thereof of the order has been given, ~~or if~~ as required by section 28-32-13. If a ~~rehearing~~ reconsideration has been requested as provided herein and denied, within thirty days after notice of such denial has been mailed to him in section 28-32-14, the party may appeal within thirty days after notice of the final determination upon reconsideration has been given as required by sections 28-32-13 and 28-32-14. If an agency does not dispose of a petition for reconsideration within thirty days after the filing of the petition, the agency is deemed to have made a final determination upon which an appeal may be taken.
2. Any interested person who has participated in the rulemaking process of an administrative agency may appeal the agency's rulemaking action if the appeal is taken within ninety days after the date of publication in the North Dakota Administrative Code of the rule resulting from the agency rulemaking action.
3. a. ~~Such~~ The appeal of an order may be taken to the district court designated by law, and if none is designated, then to the district court of the county wherein in which the hearing or a part thereof was held. If the administrative proceeding was disposed of informally, or for some other reason no hearing was held, an appeal may be taken to the district court of Burleigh County. Only final orders or decisions and orders or decisions substantially affecting the rights of parties are appealable. A procedural order made by an administrative agency during the while a proceeding is pending of a hearing before it shall not be deemed is not a final order nor an order affecting a substantial right.
- b. The appeal of an agency's rulemaking action may be taken to the district court of Burleigh County.
4. ~~Such~~ An appeal shall be taken by serving a notice of appeal and specifications of error specifying the grounds on which the appeal is taken, upon the administrative agency concerned, upon the attorney general or an assistant attorney general, and upon all the parties to the proceeding before ~~such the~~ administrative agency, and by filing the notice of appeal and specifications of error together with proof of service thereof of the notice of appeal, and the undertaking herein required by this section, with the clerk of the district court to which ~~such~~ the appeal is taken. In an appeal of an agency's rulemaking action, only the administrative agency concerned, the attorney general, or an assistant attorney general, as well as the legislative council, need to be notified.

5. The notice of appeal must specify the parties taking the appeal as appellants. The agency and all other parties of record who are not designated as appellants must be named ~~respondents~~, except that in as appellees. A notice of appeal of agency actions taken pursuant to section 28-32-02, need not name all persons participating in the rulemaking proceeding need not be named respondents as appellees. The agency and all parties of record have the right to participate in the appeal. In the appeal of agency action taken pursuant to section 28-32-02, any person who has participated in the rulemaking process has the right to participate in the appeal.
6. An undertaking must be executed by the appellant, with sufficient surety to be approved by the judge of the district court, ~~conditioned that upon conditions requiring the appellant will~~ to prosecute such the appeal without delay and ~~will~~ to pay all costs adjudged against ~~him~~ the appellant in the district court. ~~Such~~ The undertaking ~~shall~~ must be made to the state of North Dakota and may be enforced by the agency concerned for and on behalf of the state as obligee.

SECTION 24. AMENDMENT. Section 28-32-17 of the North Dakota Century Code is amended and reenacted as follows:

28-32-17. Agency to maintain and certify record on appeal.

1. An administrative agency shall maintain an official record of each contested case proceeding, noncontested case proceeding, or other administrative proceeding heard by it.
2. Within thirty days, or ~~such~~ a longer time as the court by order may direct, after an appeal has been taken to the district court as provided in this chapter, and after the ~~deposit~~ payment by the appellant of the estimated cost of a transcript of the evidence preparation and filing of the entire record of the proceedings before the agency, the administrative agency concerned shall prepare and file in the office of the clerk of the district court in which the appeal is pending the original or a certified copy of the entire record of proceedings before the agency, or such an abstract of the record as may be agreed upon and stipulated by the parties, including the pleadings, notices, transcripts of all testimony taken, exhibits, reports or memoranda, exceptions or objections, briefs, findings of fact, proposed findings of fact submitted to the agency, and the decision of the administrative agency in such proceeding. Upon receiving a copy of the notice of appeal and specifications of error pursuant to subsection 4 of section 28-32-15, the administrative agency shall notify the party appealing of the estimated costs of preparation and filing of the record. Thereafter, the party appealing shall pay the administrative agency the estimated costs required by this subsection. If the actual costs of preparation and filing of the entire record of the proceedings is greater than the estimated costs, the party appealing shall pay to the agency the difference. If the actual costs are less than the estimated costs, the agency shall pay to the party appealing the difference. Any payment for the costs of preparation and filing of the record must be paid into the general fund and is hereby appropriated as a refund to the agency for the purposes of defraying the costs of preparing and

- filing the record. An agency may contract with any person or another agency to prepare and file the record of any proceeding before the agency.
3. The cost of preparation and filing of the record may be waived by the district court upon application by an appellant, showing that the appellant is a low-income person unable to afford these costs. When a waiver is granted, the costs of preparation and filing of the record must be paid by the administrative agency.
  4. The agency record of the proceedings, as applicable, must consist of only the following:
    - a. The complaint, answer, and other initial pleadings or documents.
    - b. Notices of all proceedings.
    - c. Any prehearing notices, transcripts, documents, or orders.
    - d. Any motions, pleadings, briefs, petitions, requests, and intermediate rulings.
    - e. A statement of matters officially noticed.
    - f. Offers of proof and objections and rulings thereon.
    - g. Proposed findings, requested orders, and exceptions.
    - h. The transcript of the hearing prepared for the person presiding at the hearing, including all testimony taken, and any written statements, exhibits, reports, memoranda, documents, or other information or evidence considered before final disposition of proceedings.
    - i. Any recommended or proposed order, recommended or proposed findings of fact and conclusions of law, final order, final findings of fact and conclusions of law, or findings of fact and conclusions of law or orders on consideration.
    - j. Any information considered pursuant to section 28-32-07.
    - k. Matters placed on the record after an ex parte communication.
    - l. Any other document that the agency believes is relevant to the appeal.
    - m. Any other document that is not privileged and which is a public record that the appellant requests the agency to include in the record, if relevant to the appeal.
  5. Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for administrative agency action and judicial review of an administrative agency action.

6. The record on review of agency rulemaking action, as applicable, must consist of only the following:
  - a. All agency notices concerning purposed rulemaking.
  - b. A copy of the proposed rule upon which written and oral submissions were made.
  - c. A copy of the rule as submitted for publication.
  - d. Any opinion letters by the attorney general as to a rule's legality.
  - e. A copy of any interim rule and the agency's findings and statement of the reasons for an interim rule.
  - f. The regulatory analysis of a proposed rule.
  - g. The transcript of any oral hearing on a proposed rule.
  - h. All written submissions made to the agency on a proposed rule.
  - i. Any staff memoranda or data prepared for agency consideration in regard to the proposed rule.
  - j. Any other document that the agency believes is relevant to the appeal.
  - k. Any other document that is not privileged and which is a public record that the appellant requests the agency to include in the record, if relevant to the appeal.
7. If the notice of appeal shall specify specifies that no exception or objection is made to the agency's findings of fact, and that the appeal is concerned only with the agency's conclusions of law based on the facts found by it, the evidence submitted at the hearing before such agency shall be omitted agency may submit an abstract of the record along with such portions of the record as the agency deems necessary, to be supplemented by those portions of the record requested to be submitted by the appellant.
8. The court may permit amendments or additions to the record thus filed by the administrative agency in order to complete the same record.

SECTION 25. AMENDMENT. Section 28-32-18 of the North Dakota Century Code is amended and reenacted as follows:

28-32-18. Consideration of additional or excluded evidence. If an application for leave to adduce offer additional testimony, written statements, documents, exhibits, or other evidence is made to the court in which an appeal from a determination of an administrative agency is pending, and it is shown to the satisfaction of the court that such the additional evidence is relevant and material and that there were reasonable grounds for the failure to adduce such offer the evidence in the hearing or proceeding had before the administrative agency, or that such the evidence is relevant and material to the issues involved and was rejected or excluded by the



agency, the court may order that ~~such~~ the additional evidence be taken, heard, and considered by ~~such~~ the agency on ~~such~~ terms and conditions as the court may deem proper. After considering ~~such~~ the additional evidence, the administrative agency may amend or ~~modify~~ reject its findings of fact, conclusions of law, and ~~decision~~ order, and shall file with the court a transcript of ~~such~~ the additional evidence together with its new or ~~modified~~ ~~amended~~ findings of fact, conclusions of law, and ~~decision~~ order, if any, which constitute a part of the record with the court.

SECTION 26. AMENDMENT. Section 28-32-19 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-19. Scope of and procedure on appeal from determination of administrative agency. The A judge of the district court shall try and hear must review an appeal from the determination of an administrative agency without a jury and the evidence considered by the court shall be confined to based only on the record filed with the court. If additional testimony is taken by the administrative agency or if additional findings of fact, conclusions of law, or a new decision shall be filed pursuant to section 28-32-18, such evidence, findings, conclusions, and decision shall constitute a part of the record filed with the court. After such a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court shall must affirm the decision order of the agency unless it shall find that any of the following are present:

1. The ~~decision or determination~~ order is not in accordance with the law.
2. The ~~decision~~ order is in violation of the constitutional rights of the appellant.
3. Provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions ~~and decision~~ of law and order of the agency are not supported by its findings of fact.

If the ~~decision~~ order of the agency is not affirmed by the court, it shall be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the ~~decision~~ order of the court.

SECTION 27. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Scope of and procedure on appeal from agency rulemaking. A judge of the district court shall review an appeal from an administrative agency's rulemaking action based only on the record filed with the court. If an appellant requests documents to be included in the record but the agency does not include them, the court, upon application by the appellant, may compel their inclusion. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court shall affirm the

agency's rulemaking action unless it finds that any of the following are present:

1. The provisions of this chapter have not been substantially complied with in the agency's rulemaking actions.
2. A rule published as a result of the rulemaking action appealed is unconstitutional on the face of the language adopted.
3. A rule published as a result of the rulemaking action appealed is beyond the scope of the agency's authority to adopt.
4. A rule published as a result of the rulemaking action appealed is on the face of the language adopted an arbitrary or capricious application of authority granted by statute.

If the rulemaking action of the agency is not affirmed by the court, it must be remanded to the agency for disposition in accordance with the order of the court, or the rule or a portion of the rule resulting from the rulemaking action of the agency must be declared invalid for reasons stated by the court.

SECTION 28. AMENDMENT. Section 28-32-20 of the North Dakota Century Code is amended and reenacted as follows:

28-32-20. An appeal from a determination of an administrative agency does not stay proceedings Appeal - Stay of proceedings. An appeal from a determination or decision an order or the rulemaking action of an administrative agency shall not stay the enforcement of such decision or determination the order or the effect of a published rule unless the court to which the appeal is taken, upon application and after a hearing or the submission of briefs, shall order a stay. The court may impose such terms and conditions for a stay of the enforcement of the determination or decision appealed from as it shall deem proper order or for a stay in the effect of a published rule. The provisions of this section do not prohibit the operation of an automatic stay upon the enforcement of an administrative order as may be required by another statute.

SECTION 29. AMENDMENT. Section 28-32-21 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-21. Review in supreme court. The judgment of the district court in an appeal from a decision an order or rulemaking action of an administrative agency may be reviewed in the supreme court on appeal in the same manner as provided in section 28-32-19 or section 27 of this Act, except that the appeal to the supreme court must be taken within sixty days after the service of the notice of entry of judgment in the district court. Any party of record, including the agency, may take an appeal from the final judgment of the district court to the supreme court. If an appeal from the judgment of the district court is taken by an agency, the agency may not be required to pay a docket fee or file a bond for costs or equivalent security.

SECTION 30. AMENDMENT. Section 28-32-21.1 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

28-32-21.1. Actions against administrative agencies - Attorneys' fees and costs.

1. In any civil judicial proceeding involving as adverse parties an administrative agency and a party not an administrative agency or an agent of an administrative agency, the court must award the party not an administrative agency reasonable attorneys' fees and costs if the court finds in favor of that party and determines that the administrative agency acted without substantial justification.
2. This section applies to an administrative or civil judicial proceeding brought by a person party not an administrative agency against an administrative agency for judicial review of a final agency order or decision, or for judicial review pursuant to this chapter of the legality of agency rulemaking action or a rule adopted pursuant to this chapter by an agency as a result of the rulemaking action being appealed.
3. Any attorneys' fees and costs awarded pursuant to this section must be paid from funds available to the administrative agency the final order, decision rulemaking action, or rule of which was reviewed by the court. The court may withhold all or part of the attorneys' fees from any award if the court finds the administrative agency's action was substantially justified or that special circumstances exist which make the award of all or a portion of the attorneys' fees unjust.
4. Nothing in this section shall be construed to alter the rights of a party to collect any fees under other applicable law.

SECTION 31. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Witnesses - Immunity. If any person objects to testifying or producing evidence, documentary or otherwise, at any proceeding before an administrative agency, claiming a privilege against self-incrimination, but is directed to testify or produce evidence pursuant to the written approval of the attorney general, that person must comply with the direction; but no testimony or evidence compelled from that person, after a valid claim of privilege against self-incrimination has been made, may be used against that person in any criminal proceeding subjecting that person to a penalty or forfeiture. No person testifying at any proceeding before an administrative agency may be exempted from prosecution and punishment for perjury or giving a false statement, or for contempt committed in answering, or failing to answer, or in producing, or in failing to produce, evidence, pursuant to direction given under this section.

SECTION 32. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Nothing in this chapter prohibits an elected official from presiding at that agency's cases, nor from deciding cases within that agency's jurisdiction.

SECTION 33. AMENDMENT. Section 38-08-11 of the North Dakota Century Code is amended and reenacted as follows:

38-08-11. Rules covering practice before commission.

1. The commission ~~shall prescribe~~ may adopt rules and regulations governing the practice and procedure before the commission, which rules shall be adopted pursuant to the provisions of chapter 28-32.
2. ~~No rule, regulation, or order, or amendment thereof, except in an emergency, may be made by the commission without a public hearing upon at least ten days' notice. The public hearing must be held at such time and place as may be prescribed by the commission, and any interested person is entitled to be heard.~~
3. ~~When an emergency requiring immediate action is found to exist, the commission is authorized to~~ may issue an emergency order without notice or hearing, reciting the existence of the emergency and requiring that necessary action be taken to meet the emergency, which order is effective upon promulgation issuance. No emergency order may remain ~~effective~~ in effect for more than forty days.
- 4- 3. Any notice required by this chapter must be given at the election of the commission either by personal service in accordance with chapter 28-32 or by one publication in a newspaper of general circulation in the state capital and in a newspaper of general circulation in the county where the land affected, or some part thereof, is situated. The notice must issue in the name of the state, must be signed by the chairman or secretary of the commission, and must specify the style and number of the proceeding, the time and place of the hearing, and must briefly state the purpose of the proceeding. Should the commission elect to give notice by personal service, such service may be made by any officer authorized to serve process, or by any agent of the commission, in the same manner as is provided by law for the service of summons in civil actions in the courts of the state. Proof of the service by such agent must be by the affidavit of the person making personal service.
- 5- All rules, regulations, and orders issued by the commission must be in writing, must be entered in full and indexed in books to be kept by the commission for that purpose, and are public records open for inspection at all times during reasonable office hours. A copy of any rule, regulation, or order certified by any member of the commission, or its secretary, under its seal, must be received in evidence in all courts of this state with the same effect as the original.
- 6- 4. The commission may act upon its own motion, or upon the petition of any interested person. On the filing of a petition concerning any matter within the jurisdiction of the commission, the commission shall promptly ~~must~~ fix a date for a hearing thereon, and shall cause give notice of the hearing to be given. The hearing must be held without undue delay after the filing of the petition. The Upon the filing of a petition of any interested party, the commission must enter its order within thirty days after the a hearing. A copy of ~~the any~~ order of the commission must be forwarded by mail mailed to those all the persons filing written appearances at the hearing.

SECTION 34. AMENDMENT. Section 38-08-13 of the North Dakota Century Code is amended and reenacted as follows:

38-08-13. Person adversely affected may apply for rehearing reconsideration. Any person adversely affected by any order of the commission may within thirty days after the entry of such order file in writing a petition for rehearing reconsideration in accordance with the procedures of section 28-32-14. The petition must state with particularity the evidence, facts, points of law, or newly discovered evidence which in the opinion of the petitioner indicate the order of the commission is erroneous. The commission shall grant or deny any such petition in whole or in part within thirty days after the same is filed. If a petition for rehearing is granted, the rehearing must be held without undue delay in accordance with the provisions of section 28-32-14 or rules adopted pursuant to it.

SECTION 35. AMENDMENT. Section 38-08-14 of the North Dakota Century Code is amended and reenacted as follows:

38-08-14. Person adversely affected may appeal to district court - Procedure of appeal.

1. Any person adversely affected by an order entered by the commission may appeal, pursuant to chapter 28-32, from such the order to the district court for the county in which the oil or gas well or the affected property is located. However, if the oil or gas well or the property affected by the order is located in or underlies more than one county, any appeal must may be taken to the district court for any county in or under which any part of the affected property is located. Notice of appeal must be filed by such person with the commission within thirty days after the entry of the order complained of by the appellant, or in the event a petition for rehearing has been filed as provided herein within thirty days following the entry of the order either sustaining or overruling the original order, or within thirty days after the day upon which a petition for rehearing is denied. A copy of the notice of appeal must be filed with the district court for the county in which the appeal is taken at the same time the notice of appeal is filed with the commission. The notice of appeal must identify the order and the grounds of appeal, and reasonably specify that portion of the record which the appellant desires included in the transcript upon appeal. Immediately upon the filing of the notice of appeal the commission shall certify to the appellant the estimated cost of preparing the transcript of appeal of the proceedings upon which the order complained of was entered. The amount of the estimated cost must be deposited with the commission within ten days after the mailing of the certification of the costs to the appellant. Upon the deposit of the costs the commission shall prepare and certify under its seal the transcript. The transcript must be delivered to the district court for the county in which the appeal is taken within sixty days after the filing of the notice of appeal. A copy of the transcript must be delivered to the appellant, or his designated attorney, upon deposit of the cost of preparing same with the commission. Fees charged and collected for the transcript of evidence may be paid to the person preparing such transcript.
2. An appeal must be perfected by filing the notice of appeal with the commission within the specified thirty-day period. The appeal may be dismissed by the district court for failure of the appellant to make the required cost deposit unless for good cause shown the time

is extended by order of the district court. If the district court deems the transcript insufficient, the court may return the transcript to the commission for proper additions, and thereafter assess such further costs against the appellant as the court in its discretion deems sufficient.

- 3- 2. At the time of filing of the notice of appeal, if an application for the suspension of the order is filed, the commission may enter an order suspending the order complained of and fixing the amount of the a supersedeas bond. Within ten days after the entry of an order by the commission which suspends the order complained of and fixes the amount of the bond, the appellant shall file with the commission a supersedeas bond in the required amount and with proper surety. Upon approval of the bond, the order of the commission suspending the order complained of is effective until its final disposition upon appeal. The bond must run in favor of the commission for the use and benefit of any person who may suffer damage by reason of the suspension of the order in the event the same is affirmed by the district court. If the order of the commission is not superseded, it must continue in force and effect as if no appeal was pending, unless a stay is ordered by the court to which the appeal is taken under section 28-32-20.
- 4- 3. The district court shall, insofar as is practicable, give precedence to appeals from orders of the commission. Upon the appeal of such an order the district court shall review the proceedings before the commission as disclosed by the transcript upon appeal, and thereafter enter its judgment affirming or reversing the order appealed. Orders of the commission must be sustained by the district court if the commission has regularly pursued its authority and its findings and conclusions are sustained by the law and by substantial and credible evidence.
- 5- No court other than the district court, or the supreme court upon appeal from the final judgment or order entered in the district court, has jurisdiction to review the rules, regulations, or orders of the commission, or to enjoin or otherwise interfere with the commission in the exercise of the authority conferred upon it by this chapter.

SECTION 36. AMENDMENT. Subsection 3 of section 38-14.1-30 of the North Dakota Century Code is amended and reenacted as follows:

3. Administrative hearings pursuant to this section must be conducted in accordance with the provisions of chapter 28-32 and the following procedures:
- A hearing must be held within thirty days of a request for a formal hearing under subsection 1 or the issuance of an order to show cause under subsection 2.
  - The commission shall cause such an investigation to be made as it deems appropriate in connection with any hearing under this section. Evidence taken at a hearing under this section held in connection with a permit application ruling under section 38-14.1-20 may include, but is not be limited to, site inspections of the land to be affected and other surface coal

mining operations carried on by the applicant for a permit in the general vicinity of the proposed operation.

- c. Hearings held pursuant to this section must be conducted in accordance with appropriate procedures in chapter 28-32 and are subject to judicial review in accordance with that the provisions of chapter 28-32. ~~However, any time~~ Any requirements or other, procedural requirements or otherwise, specifically imposed under this section which are in conflict with requirements in the provisions of chapter 28-32 shall supersede the provisions of chapter 28-32.
- d. All parties to any informal conference held in reference to a permit application or application for release of performance bond under section 38-14.1-19, and all persons who submitted comments or written objections to the application for release of performance bond or the permit application under sections 38-14.1-17 and 38-14.1-18 respectively, and the permittee and other interested parties in hearings to review enforcement actions taken pursuant to section 38-14.1-28 must be given written notice of the date, place, and time of the hearing at least twenty days prior to ~~such~~ the hearing under this section. In case of an emergency, ~~such~~ the notification period may be shortened, but in no event may notice be given less than five days prior to the hearing. Time periods as provided in section 28-32-05 for any pleadings or filing of other papers before the commission in connection with the hearing must be adjusted to accommodate time periods set by this subdivision.
- e. In addition to any notice required by chapter 28-32, notice of hearings under this section must be published in the official newspaper of each county in which the subject matter of the hearing is located and in other daily newspapers of general circulation in the general vicinity of such counties, at least once a week for two successive weeks prior to the hearing. In case of an emergency, ~~such~~ the publication period may be shortened, but in no event may notice be published less than five days prior to the hearing in daily newspapers of general circulation in the general locality of the subject matter involved.
- f. No person, except a commissioner, who presides at any informal conference under section 38-14.1-19 in reference to a permit application may preside at a formal administrative hearing under this section or participate in making the final administrative decision pursuant to ~~section 28-32-13~~ chapter 28-32.
- g. All final orders of the commission under this section, except those issued under subsection 4, must be issued pursuant to the following procedures:
  - (1) Whenever a formal hearing has been held, the commission shall issue a written decision order pursuant to ~~section 28-32-13~~ chapter 28-32, provided that the ~~findings, conclusion, and~~ decision must be issued within thirty days

after the hearing. The commission shall have no discretion to increase such time period.

- (2) In the event that no one with standing to request an administrative hearing under subsection 1 ~~avails himself of the right to~~ requests such a hearing as provided therein, the commission shall establish whether or not a permit should be granted or suspended or revoked; or, in enforcement proceedings, whether the violation has in fact occurred; or, in connection with an application for release of a bond, whether such the application should be approved or denied, in whole or in part; and shall issue a final decision order as appropriate pursuant to regulations established ~~rules adopted~~ by the commission.

SECTION 37. AMENDMENT. Subsection 3 of section 43-23-11.1 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

3. No license may be revoked or suspended, no monetary fine imposed, nor any letter of reprimand issued except after hearing before the commission with a copy of the charges having been duly served upon the licensee and upon sustaining of the charges for suspension, revocation, fine, or reprimand. The provisions of chapter 28-32, ~~including but not limited to procedures for service of process, hearing, rules, evidence, findings, and appeals,~~ apply to and govern all proceedings for suspension, revocation, fine, or reprimand of licenses or licensees, ~~except where inconsistent with this chapter or rules of the commission.~~

SECTION 38. REPEAL. Section 28-32-10 of the North Dakota Century Code is repealed.

Approved April 8, 1991  
Filed April 8, 1991



## CHAPTER 343

HOUSE BILL NO. 1024  
(Legislative Council)  
(Interim Administrative Rules Committee)

### ADMINISTRATIVE RULE DEFINED

AN ACT to amend and reenact subsection 6 of section 28-32-01 of the North Dakota Century Code, relating to the definition of rule as used in the Administrative Agencies Practice Act, North Dakota Century Code chapter 28-32.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 6 of section 28-32-01 of the 1989 Supplement to the North Dakota Century Code is amended and reenacted as follows:

6. "Rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy, or the organization, procedure, or practice requirements of the agency. The term includes the amendment, repeal, or suspension of an existing rule. The term does not include:
  - a. A rule concerning only the internal management of an agency which does not directly or substantially affect the substantive or procedural rights or duties of any segment of the public.
  - b. A rule that sets forth criteria or guidelines to be used by the staff of an agency in the performance of audits, investigations, inspections, and settling commercial disputes or negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if the disclosure of the statement would:
    - (1) Enable law violators to avoid detection;
    - (2) Facilitate disregard of requirements imposed by law; or
    - (3) Give a clearly improper advantage to persons who are in an adverse position to the state.
  - c. A rule establishing specific prices to be charged for particular goods or services sold by an agency.
  - d. A rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property.
  - e. A rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately

indicated by means of signs or signals to persons who use the facility or property.

- f. A rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital.
- g. A form whose contents or substantive requirements are prescribed by rule or statute or are instructions for the execution or use of the form.
- h. An agency budget.
- i. An opinion of the attorney general.
- j. A rule adopted by an agency selection committee under section 54-44.7-03.
- k. ~~Interpretive statements; general statements of policy; or statements of agency organization, procedure, or practice.~~
- l. ~~Guidelines; manuals; brochures; pamphlets; and similar statements of policy intended to advise or guide the agency or the public concerning activities of the agency which are otherwise prescribed by rule or statute.~~
- m. ~~Statements of policy intended to implement federal statutes; rules; or requirements with which compliance by the agency is necessary to secure appropriated revenues; or to avoid the loss of otherwise available federal revenues.~~
- n. A contract. Any material, including a guideline, interpretive statement, statement of general policy, manual, brochure, or pamphlet, that is merely explanatory and not intended to have the force and effect of law.

Approved March 25, 1991

Filed March 26, 1991

## CHAPTER 344

HOUSE BILL NO. 1025  
(Legislative Council)  
(Interim Administrative Rules Committee)

### ADMINISTRATIVE RULE NOTICE

AN ACT to amend and reenact subsections 4 and 5 of section 28-32-02 of the North Dakota Century Code, relating to public comment on proposed administrative rules.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsections 4 and 5 of section 28-32-02 of the 1989 Supplement to the North Dakota Century Code are amended and reenacted as follows:

4. The agency's notice of the proposed adoption, amendment, or repeal of a rule must include a short explanation of the purpose of the proposed rule, identify at least one location where interested persons may review the text of the proposed rule, provide the address to which written data, views, or arguments concerning the proposed rule may be sent and, in the case of a substantive rule, the time and place set for each oral hearing. The notice must be filed with the office of the legislative council and published at least twice in each daily newspaper of general circulation published in this state. The agency shall mail a copy of the notice must be mailed to each person who has made a timely request to the agency for a mailed copy of the notice. The agency may mail or otherwise provide a copy of the notice to any person who is likely to be an interested person. The agency may charge for the actual cost of providing copies of the proposed rule. At least thirty days must elapse between the later of the date of the first publication of the notice or the date of filing with the office of the date the legislative council mails copies of an agency's notice and the end of the period in which written or oral data, views, or arguments concerning the proposed rules will be received. If no request has been made to the legislative council for copies of the notices, the thirty-day period begins on the fifth business day of the month in which the notices would have been mailed if a request had been made. If a request has been made to the legislative council for copies of the notices, notices filed on or before the last calendar day of the preceding month must be mailed by the legislative council on or before the fifth business day of each month.
5. The legislative council shall establish a procedure whereby any person may request and receive mailed copies of all filings made by agencies pursuant to subsection 4. The legislative council may charge for ~~the actual cost of~~ providing copies of the filings.

Approved March 7, 1991  
Filed March 7, 1991