

# ADMINISTRATIVE RULES COMMITTEE

The Administrative Rules Committee is a statutory committee deriving its authority from North Dakota Century Code (NDCC) Sections 54-35-02.5, 54-35-02.6, 28-32-17, 28-32-18, and 28-32-18.1. The committee is required to review administrative agency rules to determine whether:

- Administrative agencies are properly implementing legislative purpose and intent.
- There is dissatisfaction with administrative rules or statutes relating to administrative rules.
- There are unclear or ambiguous statutes relating to administrative rules.

The committee may recommend rule changes to an agency, formally object to a rule, or recommend to the Legislative Management the amendment or repeal of statutes relating to administrative rules. The committee also may find a rule void or agree with an agency to amend or repeal an administrative rule to address committee concerns, without requiring the agency to begin a new rulemaking proceeding.

The committee is authorized under NDCC Sections 54-06-32 and 54-06-33 to approve rules adopted by Human Resource Management Services authorizing service awards and employer-paid costs of training to employees in the classified service.

Committee members were Senators Nicole Poolman (Chairman), Joan Heckaman, Jerry Klein, Randy D. Lemm, and Shawn Vedaa and Representatives Bill Devlin, Tom Kading, Karen Karls, Kim Koppelman, Andrew Marschall, Brandy Pyle, Bernie Satrom, Nathan Toman, and Robin Weisz.

## ADMINISTRATIVE AGENCY RULES REVIEW

Administrative agencies are the state agencies authorized to adopt rules under the Administrative Agencies Practice Act (NDCC Chapter 28-32). A rule is an agency's statement of general applicability that implements or prescribes law or policy, or the organization, procedure, or practice requirements of the agency. Properly adopted rules have the force and effect of law. Each rule adopted by an administrative agency must be filed with the Legislative Council office for publication in the North Dakota Administrative Code (NDAC).

Under NDCC Section 54-35-02.6, it is the standing duty of the Administrative Rules Committee to review administrative rules adopted under NDCC Chapter 28-32. For rules scheduled for review, each adopting agency is requested to address:

- Whether the rules resulted from statutory changes made by the Legislative Assembly.
- Whether the rules are related to any federal statute or regulation. If so, the agency is requested to indicate whether the rules are mandated by federal law or explain any options the agency had in adopting the rules.
- A description of the rulemaking procedure followed in adopting the rules, e.g., the time and method of public notice and the extent of public hearings on the rules.
- Whether any person presented a written or oral concern, objection, or complaint for agency consideration with regard to the rules. Each agency is asked to describe any such concern, objection, or complaint, and the agency's response, including any change made in the rules to address the concern, objection, or complaint, and to summarize the comments of any person who offered comments at the public hearings on the rules.
- The approximate cost of giving public notice and holding hearings on the rules and the approximate cost (not including staff time) used in developing and adopting the rules.
- The subject matter of the rules and the reasons for adopting the rules.
- Whether a regulatory analysis was required by NDCC Section 28-32-08. If a regulatory analysis was prepared, a copy is to be provided to the committee.
- Whether a regulatory analysis or small entity economic impact statement was required by NDCC Section 28-32-08.1. If a regulatory analysis or small entity economic impact statement was prepared, a copy is to be provided to the committee.
- Whether the rules have a fiscal effect on state revenues and expenditures, including any effect on funds controlled by the agency. If a fiscal note was prepared, a copy is to be provided to the committee.
- Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. If a takings assessment was prepared, a copy is to be provided to the committee.

- If the rules were adopted as emergency rules under NDCC Section 28-32-03, the agency is to provide the statutory grounds for declaring the rules to be an emergency, the facts that support the declaration, a copy of the Governor's approval of the emergency status of the rules, and the steps taken to make the rules known to persons who could reasonably be expected to have a substantial interest in the rules.

During committee review of the rules, agency testimony is required and any interested party may submit oral or written comments. If no representative of the agency appears before the committee to provide testimony, the rules are required by statute to be carried over for consideration and may be delayed in taking effect until a representative of the agency appears before the committee.

### **CURRENT RULEMAKING STATISTICS**

The committee reviewed 1,218 rules sections and 1,716 pages of rules changed from January 2021 through October 2022. Table A at the end of this report shows the number of rules amended, created, superseded, repealed, reserved, or redesignated for each administrative agency that appeared before the committee.

Although rules differ in length and complexity, comparison of the number of administrative rules sections affected during biennial periods is one method of comparing the volume of administrative rules reviewed by the committee. The following table shows the number of NDAC sections amended, repealed, created, superseded, reserved, or redesignated during designated time periods:

Time Period	Number of Sections
December 2000-November 2002	1,417
December 2002-November 2004	2,306
December 2004-October 2006	1,353
January 2007-October 2008	1,194
January 2009-October 2010	1,451
January 2011-October 2012	907
January 2013-October 2014	1,383
January 2015-October 2016	2,108
January 2017-October 2018	3,736
January 2019-October 2020	1,950
January 2021-October 2022	1,218

For committee review of rules at each meeting, the Legislative Council staff prepares an administrative rules supplement containing all rules changes submitted for publication since the previous committee meeting. The supplement is prepared in a style similar to bill drafts, with changes indicated by overstrike and underscore. Comparison of the number of pages of rules amended, created, or repealed is another method of comparing the volume of administrative rules reviewed by the committee. The following table shows the number of pages in administrative rules supplements during designated time periods:

Time Period	Supplement Pages
December 2000-November 2002	2,016
December 2002-November 2004	4,085
December 2004-October 2006	1,920
January 2007-October 2008	1,663
January 2009-October 2010	2,011
January 2011-October 2012	2,399
January 2013-October 2014	2,116
January 2015-October 2016	2,938
January 2017-October 2018	4,047
January 2019-October 2020	2,285
January 2021-October 2022	1,716

### **Rule Review Schedule**

Since September 2005, NDAC supplements have been published on a calendar quarter basis. The deadlines and effective dates are as follows:

Filing Date	Committee Meeting Deadline	Effective Date
August 2-November 1	December 15	January 1
November 2-February 1	March 15	April 1
February 2-May 1	June 15	July 1
May 2-August 1	September 15	October 1

## **COMMITTEE ACTION ON RULES REVIEWED**

### **Repealing Obsolete Rules**

Under NDCC Section 28-32-18.1, an agency may amend or repeal a rule without complying with the normal notice and hearing requirements relating to adoption of administrative rules if the agency initiates the request to the committee, the agency provides notice to the regulated community of the time and place the committee will consider the request, and the agency and the Administrative Rules Committee agree the rule amendment or repeal eliminates a provision that is obsolete or no longer in compliance with law and that no detriment would result to the substantive rights of the regulated community.

Because the Legislative Assembly recognized there are constitutional questions about the Administrative Rules Committee voiding rules, an alternative amendment to NDCC Section 28-32-18 will take effect if the North Dakota Supreme Court rules the authority to void rules is unconstitutional. The alternative amendment is the same in all respects as the amendment allowing the committee to find rules void except under the alternative amendment the committee may not find a rule to be void but may suspend a rule or portion of a rule. The effect of a suspension is the rule becomes ineffective temporarily and will become permanently ineffective unless it is ratified by both houses of the Legislative Assembly during the next legislative session. The amendment requires the agency seeking ratification of a suspended rule to introduce a bill for that purpose. The authority of the Legislative Management to reverse the decision of the committee also applies in the case of a suspension of a rule.

### **Voiding or Carrying Over Rules**

Under NDCC Section 28-32-18, the committee may void all or part of a rule if that rule is initially considered by the committee no later than the 15<sup>th</sup> day of the month before the date of the NDAC supplement in which the rule change appears. The committee may carry over consideration of voiding administrative rules for not more than one additional meeting. This allows the committee to act more deliberately in rules decisions and allows agencies additional time to provide information or to work with affected groups to develop mutually satisfactory rules. The committee may void all or part of a rule if the committee makes the specific finding that with regard to the rule there is:

- An absence of statutory authority;
- An emergency relating to public health, safety, or welfare;
- A failure to comply with express legislative intent or to substantially meet the procedural requirements of NDCC Chapter 28-32 for adoption of the rule;
- A conflict with state law;
- Arbitrariness and capriciousness; or
- A failure to make a written record of an agency's consideration of written and oral submissions respecting the rule under NDCC Section 28-32-11.

Within 3 business days after the committee finds a rule void, the Legislative Council office is required to provide written notice to the adopting agency and the Chairman of the Legislative Management. Within 14 days after receipt of the notice, the agency may file a petition with the Chairman of the Legislative Management for Legislative Management review of the decision of the committee. If the adopting agency does not file a petition, the rule becomes void on the 15<sup>th</sup> day after the notice to the adopting agency. If within 60 days after receipt of a petition from the agency the Legislative Management has not disapproved the finding of the committee, the rule is void.

### **Obsolete Rules Repealed by Committee**

The committee approved a request from the State Department of Health for the repeal of NDAC Sections 33-33-10-01, 33-33-10-02, and 33-33-10-03 relating to cottage food products due to the invalidation of the rules by a state district court order.

The committee approved a request from the Department of Human Services for the repeal of NDAC Chapter 75-03-12, relating to foster parent grievance procedure, due to the repeal of NDCC Chapter 50-11.2 by Senate Bill No. 2086 (2021).

### **Rules Carried Over or Amended by Committee Approval**

The committee carried over for consideration rules of the State Board of Dental Examiners to address concerns raised by the North Dakota Dental Association, North Dakota Dental Assistants Association, and North Dakota Dental Hygiene Association relating to the board's rulemaking process and the communication with the dental community. The committee, at the request of the board, withdrew the rules from consideration.

The committee carried over for consideration a rule of the North Dakota Board of Social Work Examiners making it a violation of the board's code of ethics for a licensed social worker to practice conversion therapy. The committee and the board agreed to amendments offered by the board to address the issue.

The committee carried over for consideration rules of the State Board of Dental Examiners relating to dental assistants' and dental hygienists' permitted duties on patients of record due to concerns of its potential effect on a teeth aligner company's business model. The committee, at the request of the board, withdrew the rules from consideration.

The committee carried over for consideration a rule of the State Board of Cosmetology permitting service animals and companion animals in licensed salons due to concerns regarding the difference in training between service and companion animals. The committee agreed to an amendment offered by the board to address the issue.

The committee, as authorized by NDCC Section 28-32-18(3), approved requested amendments to the rules of the State Board of Registration for Professional Engineers and Land Surveyors (NDAC Section 28-03.1-01-03(3)) and the Department of Human Services (NDAC Sections 75-02-01.3-05, 75-03-14-04, 75-03-17-05, 75-03-17-16.1, 75-03-36-03, 75-03-36-16, 75-03-36-16.1, and 75-03-41-19).

### **Rules Voided by Committee**

The committee considered a motion to void a rule of the North Dakota Board of Social Work Examiners, relating to conversion therapy, for being arbitrary and capricious and going beyond legislative intent. The motion to void the rule failed.