

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, and 28-32-03.3. The committee is required to review administrative agency rules to determine whether:

1. Administrative agencies are properly implementing legislative purpose and intent.
2. There is dissatisfaction with administrative rules or statutes relating to administrative rules.
3. 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 Council the amendment or repeal of the statutory authority for the rule. The committee also may find a rule void or agree with an agency to amend an administrative rule to address committee concerns, without requiring the agency to begin a new rulemaking proceeding.

Fee schedules for medical and hospital services proposed for adoption as administrative rules by the Workers Compensation Bureau must be approved by the committee under NDCC Section 65-02-08.

The Legislative Council delegated to the committee its authority under NDCC Section 28-32-02 to distribute administrative agency notices of proposed rulemaking and to approve extensions of time for administrative agencies to adopt rules and its responsibility under Section 28-32-15 to receive notice of appeal of an administrative agency's rulemaking action.

Committee members were Representatives William R. Devlin (Chairman), LeRoy G. Bernstein, Rex R. Byerly, Duane DeKrey, Mary Ekstrom, Bette Grande, Pam Gulleson, George J. Keiser, Kim Koppelman, Stacey L. Mickelson, Jon O. Nelson, Darrell D. Nottestad, Sally M. Sandvig, and Blair Thoreson and Senators John Andrist, Tom Fischer, Jerry Klein, Deb Mathern, Bob Stenehjem, and Rich Wardner.

The committee submitted this report to the Legislative Council at the biennial meeting of the Council in November 2000. The Council accepted the report for submission to the 57th Legislative Assembly.

ADMINISTRATIVE AGENCY RULES REVIEW

Administrative agencies are those state agencies authorized to adopt rules under the Administrative Agencies Practice Act (NDCC Chapter 28-32). By statute, 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. A copy of each rule adopted by an administrative agency must be filed with the office of the Legislative Council for publication in the North Dakota Administrative Code.

Under NDCC Section 54-35-02.6, it is the standing duty of the committee to review administrative rules adopted under NDCC Chapter 28-32. This continues the rules review process initiated in 1979.

For rules scheduled for review, each adopting agency is requested to address the following:

1. Whether the rules resulted from statutory changes made by the Legislative Assembly.
2. Whether the rules are related to any federal statute or regulation.
3. A description of the rulemaking procedure followed in adopting the rules, e.g., the type of public notice given and the extent of public hearings held on the rules.
4. Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to these rules. Each agency is asked to describe the concern, objection, or complaint and the response of the agency, 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 these rules.
5. Whether a written request for a regulatory analysis was filed by the Governor or an agency, whether the rules are expected to have an impact on the regulated community in excess of \$50,000, and whether a regulatory analysis was issued. A copy is to be provided to the committee if a regulatory analysis was prepared.
6. 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.
7. The subject matter of the rules and the reasons for adopting the rules.
8. Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-02.5. A copy is to be provided to the committee if a constitutional takings assessment was prepared.
9. If the rules were adopted as emergency rules under NDCC Section 28-32-02(6), the agency is to provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support the declaration.

During committee review of the rules, agency testimony is required and any interested party may submit oral or written comments.

Current Rulemaking Statistics

The committee reviewed 2,074 rule sections that were changed from November 1998 through November 2000. Table A 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 North Dakota Administrative Code sections amended, repealed, created, superseded, reserved, or redesignated during designated time periods:

Time Period	Number of Sections
November 1986 - October 1988	2,681
November 1988 - October 1990	2,325
November 1990 - October 1992	3,079
November 1992 - October 1994	3,235
November 1994 - October 1996	2,762
November 1996 - October 1998	2,789
November 1998 - November 2000	2,074

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, e.g., changes are 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
November 1992 - October 1994	3,809
November 1994 - October 1996	3,140
November 1996 - October 1998	4,123
November 1998 - November 2000	1,947

For many years, committee members have expressed concern about the volume of administrative rulemaking. The trend of increased rulemaking activity appears to have reversed since 1995.

Voiding of Rules

Under NDCC Section 28-32-03.3, the committee may void all or part of a rule within 90 days after the date of the Administrative Code supplement in which the rule change appears or, for rules appearing in the Administrative Code supplement from November 1 through May 1 encompassing a regular legislative session, at the first committee meeting after the regular legislative session. The committee may carry over, for one additional meeting, consideration of voiding administrative rules. This allows the committee to act more deliberately in rules decisions and allows agencies additional time 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:

1. An absence of statutory authority;
2. An emergency relating to public health, safety, or welfare;

3. 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;
4. A conflict with state law;
5. Arbitrariness and capriciousness; or
6. A failure to make a written record of an agency's consideration of written and oral submissions respecting the rule under NDCC Section 28-32-02(3).

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

State Board of Nursing

The State Board of Nursing adopted rules governing medication administration. Committee members were concerned about whether the rules applied in schools, whether the rules conflicted with 1999 legislation that exempted long-term care facility employees from medication administration rules of the State Board of Nursing, and whether the rules conflicted with 1999 legislation that directed the Department of Human Services and State Board of Nursing to jointly develop a recommendation regarding administration of medication in a residential treatment center, care center for developmentally disabled persons, or residential care facility. The committee carried over consideration of the rules to the subsequent meeting to receive further information. The committee received information from the State Board of Nursing, Department of Public Instruction, Department of Human Services, and North Dakota Long Term Care Association that resolved the concerns of the committee.

Highway Patrol

The Highway Patrol adopted rules to eliminate the heavyweight fee for out-of-state motor vehicle carriers and to reduce ton mile fees for overweight permits. Committee members were concerned with the estimated loss of revenue of \$478,000 per biennium to the state highway fund from these fee changes and whether the negative revenue impact was considered in the Department of Transportation's budget for the biennium. The committee carried consideration of the rule over to the subsequent meeting to receive further information. The committee received information from the Department of Transportation that the negative fiscal effect of the fee changes was reflected in the executive budget submitted to the 56th Legislative Assembly, and the negative effect was to be offset by an additional \$1.1 million in fees generated as a result of 1997 legislation.

Milk Marketing Board

The Milk Marketing Board adopted rules to allow third-party contract haulers to haul milk products directly to retail outlets under minimum dock pick up pricing provisions and to allow retailers a 23 percent discount on wholesale prices for milk orders of 45 or more full cases of milk. Committee members were concerned that the rules were adopted as emergency rules effective August 31, 1998, but the rules were not finally adopted by the Milk Marketing Board until February 1999; whether the rules met the statutory grounds for what constitutes an emergency for rulemaking purposes; and whether the discounts for large purchases of milk discriminated against small retailers because the rules did not allow them to join together to make larger purchases to qualify for the discount. The committee carried consideration of the rule over to the subsequent meeting to receive further information. At the subsequent meeting, the Milk Marketing Board advised the committee that it decided to reopen public hearings on the rules. Subsequent rules were adopted by the Milk Marketing Board and reviewed by the committee that, among other things, allowed more small retail grocers to participate in hauling of milk products by contract haulers, reduced the minimum order from 45 cases to 27 cases to qualify for the discount under the minimum dock pick up price discount program, and granted additional discounts to small retail grocers for limited or full-service distribution.

Superintendent of Public Instruction

The Superintendent of Public Instruction adopted a substantial body of rules pursuant to 1997 legislation that made the Superintendent of Public Instruction an administrative agency for all rulemaking purposes. Committee members and education groups expressed concern about inadvertent omission from the rules of provisions on counselor credentials, elementary principals licensing exceptions, and some issues of possible interpretation problems. The committee carried consideration of the rules over to the subsequent meeting to receive further information and to allow concerned groups to work with the Superintendent of Public Instruction on issues of concern to them. At the subsequent meeting, the Superintendent of Public Instruction suggested several amendments to the rules to address these concerns, and the committee agreed with the Superintendent of Public Instruction on the amendments.

Department of Human Services

The Department of Human Services adopted rules governing ratemaking for reimbursement of nursing homes and basic care facilities. North Dakota Long Term Care Association representatives disagreed with changes to reimbursement for housekeeping services, treating property costs as passthrough costs, and the 90 percent occupancy limit imposed by the rules for basic care facilities. The committee carried consideration of the rules over to the subsequent meeting to receive further information. The department and the association resolved their differences on the rules except with regard to the limit of 90 percent of licensed bed capacity for basic care facilities. Committee members pointed out that the Legislative Assembly has imposed a 90 percent occupancy limit in the statutory provisions governing nursing home reimbursement but has not set a corresponding limitation in statutes governing basic care facility reimbursement. The committee received information that there was no fiscal note or any effort to adjust the budget of the Department of Human Services to reflect a 90 percent occupancy limit for basic care facilities during the 1999 legislative session. Committee members suggested the Department of Human Services should bring this issue forward as legislation for consideration in the 57th Legislative Assembly. The committee approved a motion to void the rule imposing a 90 percent occupancy limitation for basic care facilities. The department did not seek review of this motion, and the rule change became void.

The Department of Human Services adopted medical services reimbursement rules. At the first meeting for committee consideration of the rules, the department requested the committee to void portions of the rules requiring prior authorization by the Department of Human Services for coverage for partial hospitalization and certain categories of prescribed drugs. The department said the request to void these rules resulted from a substantial number of negative comments received after the rules were adopted. The committee approved a motion to void those portions of the rules. The committee also carried consideration of portions of the rules applying a standard of "medically necessary" that must be met before coverage is provided for ambulance and emergency room services over to the subsequent meeting. At the subsequent meeting, the department submitted proposed amendments that were agreed upon by the North Dakota Medical Association. The committee agreed with the department on the amendments.

Board of Animal Health

The Board of Animal Health adopted rules requiring a chronic wasting disease risk assessment for all cervidae to be imported into the state. Cervidae are antlered cud-chewing animals such as deer, elk, and moose. Groups representing nontraditional livestock growers protested that the coverage of the rules is too broad because it applies to all cervidae while only certain species, particularly elk, are subject to chronic wasting disease. The committee carried consideration of the rules over to the subsequent meeting to receive further information. At the subsequent meeting, the Board of Animal Health submitted proposed amendments to limit coverage of the rules to species at risk to contract chronic-wasting disease. Nontraditional livestock growers group representatives agreed with the proposed changes, and the committee agreed upon the amendments with the Board of Animal Health.

State Gaming Commission

The State Gaming Commission adopted rules governing charitable gaming. Committee members expressed concern that the rules allowed use of electronic bingo card marking devices. Use of these devices allows bingo players to electronically play up to 72 cards at a time. Committee members expressed concern that authorizing these devices constitutes an expansion of gaming, contrary to long-standing policy of the Legislative Assembly. The committee carried consideration of the rules over to the subsequent meeting to receive further information. The committee reviewed subsequent information submitted by the State Gaming Commission, including a legal memorandum on whether use of the devices would be prohibited by statute. A motion to void the portions of the gaming rules allowing use of electronic bingo card marking devices failed.

Board of Psychologist Examiners

The Board of Psychologist Examiners adopted rules governing licensing and fees of psychologists. Committee members expressed concern that the rules set fees for licensees and out-of-state registrants that exceed statutory limits. The committee carried consideration of the rules over to the subsequent meeting to receive further information. Upon receiving information at the subsequent meeting, the committee took no further action.

Committee Considerations

Committee members raised several concerns during discussion of the administrative rules process and statutes. It was suggested that comments on rules should be submitted to the Legislative Council when rules are published so committee members can have access to comments for review before the committee reviews the rules.

Concern was expressed that emergency rules can be adopted and become effective and enforceable almost six months before

the agency must finally adopt the rules. Emergency rules could be in effect for a year or more before they are reviewed by the Administrative Rules Committee.

Committee members expressed concern that the public may be unaware of the review of rules by the Administrative Rules Committee. It was suggested that agencies should inform interested parties of when rules adopted by the agency will be considered by the Administrative Rules Committee.

Rulemaking provisions of the Administrative Agencies Practice Act have become crowded into a few sections of law. The provisions in each section on rulemaking may deal with a variety of subjects. Because subjects are intermixed, the reader has difficulty locating provisions on a specific topic. It was suggested that revision of the chapter without substantive changes could reorganize provisions into shorter sections to allow the laws to be more understandable.

The Attorney General's office suggested that the committee review statutory rulemaking authority for agencies. During the 1979-80 interim, the Administrative Rules Committee studied the Administrative Agencies Practice Act, especially the difficulty caused by the definition of "administrative agency" which then required substantive administrative procedure authority outside NDCC Chapter 28-32 before the provisions of Chapter 28-32 would apply. As a result of that study, the 1979-80 interim committee recommended legislation to revise the definitions so that Chapter 28-32 applied to every executive branch agency except those the Attorney General or a court had determined were not subject to Chapter 28-32 under the prior definition. During that interim, time did not permit a review of the entire Century Code to revise or eliminate references to Chapter 28-32 to reflect the committee's recommendation. As a result, there are hundreds of individual provisions throughout the Century Code which provide rulemaking authority for agencies. This apparent incongruity has caused some to question whether an agency has rulemaking authority for all its programs when some programs contain specific rulemaking authority and some do not, even though the agency is an "administrative agency" with general rulemaking authority under Chapter 28-32. The issue is whether the programs that have no specific rulemaking authority were not intended by the Legislative Assembly to have rulemaking authority or whether the Legislative Assembly recognized that general rulemaking authority would apply under Chapter 28-32 in those cases. A survey of statutory provisions was completed, letters were sent to all administrative agencies asking them to review statutory provisions, and a compilation of statutes providing rulemaking authority was completed. The survey identified 646 statutes providing specific rulemaking authority. The committee considered a bill draft that would have eliminated general rulemaking authority under Chapter 28-32 and would have required explicit statutory rulemaking authority for agencies before rules could be adopted. This approach raised several concerns, including whether the Legislative Assembly would have to consider the issue of rulemaking in every piece of future legislation, whether every appropriations bill would require rulemaking provisions, whether placement of new laws in the North Dakota Century Code in chapters with or without explicit rulemaking authority would determine whether rulemaking authority exists under those statutes, and the fact that rulemaking provisions would still be rather general in nature because those provisions are worded to apply to a chapter of law or to all laws administered by an agency. The committee did not approve the bill draft.

Recommendations

The committee recommends [House Bill No. 1027](#) to require agencies to notify interested parties when rules will be considered by the Administrative Rules Committee.

The committee recommends [House Bill No. 1028](#) to require agencies to obtain Administrative Rules Committee approval of emergency status of rules that have been declared effective on an emergency basis. The bill is intended to not add any additional delay to the time when an agency may make a rule effective on an emergency basis under existing law. The bill allows an agency to declare rules effective on an emergency basis in the same manner as under current law but requires the agency to seek approval of the emergency grounds for the rules from the Administrative Rules Committee at the first committee meeting after the effective date of the rules. The bill provides that if the emergency status of the rules is disapproved by the committee, the agency may proceed with adoption of the rules that would become effective at the normal time rules take effect.

The committee recommends [House Bill No. 1029](#) to require agencies to file comments received on rules with the Legislative Council when the rules are filed for publication.

The committee recommends [House Bill No. 1030](#) to revise the Administrative Agencies Practice Act to reorganize the provisions on administrative rulemaking. The bill is intended to reorganize the chapter without substantive change.

TABLE A

STATISTICAL SUMMARY OF RULEMAKING							
November 1998 Through November 2000 Supplements 233 Through 257							
Agency	Amend	Create	Supersede	Repeal	Special	Reserved	Total

State Board of Accountancy	33	3		5		41
Office of Management and Budget		5				5
Department of Agriculture	1	34				35
Attorney General	14	1		4		19
Department of Banking and Financial Institutions	4	3				7
North Dakota State Board of Dental Examiners	8	1				9
North Dakota Board of Dietetic Practice	7					7
Electrical Board	17	2		4	1	24
Board of Registration for Professional Engineers and Land Surveyors	41			1		42
Game and Fish Department	18					18
North Dakota State Board of Cosmetology	11	3				14
State Department of Health	35	10		102		147
Department of Transportation	8					8
Highway Patrol	9	10				19
Board for Indian Scholarships	6	12				18
Industrial Commission	46	6				52
Insurance Department	40	43				83
Board of Animal Health	2	10				12
State Board of Medical Examiners	7	30		1		38
Milk Marketing Board	36			4		40
State Board of Nursing	6	9		1		16
State Board of Examiners for Nursing Home Administrators	11			1		12
Board of Occupational Therapy Practice	14	1		1		16
Pesticide Control Board	1					1
State Board of Pharmacy	6	24				30
State Plumbing Board		22		242		264
Board of Psychologist Examiners	16	5		4		25
Department of Public Instruction	1	323			7	331
Education Standards and Practices Board	44	7				51
Public Service Commission	56	6		3		65
Real Estate Commission	10	2				12
Public Employees Retirement Board	14	14				28
Secretary of State	6			1		7
Department of Human Services	95	33		1	2	131
Retirement and Investment Office	11	4		2		17
Board of Veterinary Medical Examiners	14	13				27
State Water Commission	13	1		9		23
Workers Compensation Bureau	25	5		76	1	107
Private Investigative and Security Board	2	29		31		62
Department of Corrections and Rehabilitation				109		109
Agricultural Products Utilization Commission		8				8
State Gaming Commission	84	1		7		92
North Dakota Board of Hearing Instrument Dispensers	2					2

Sections Affected	774	680	0	609	4	7	2,074
Grand Total All Sections	2,074						