2023 SENATE JUDICIARY

SB 2296

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2296
2/1/2023

A bill relating to agency adjudications and judicial deference in administrative hearings.

2:59 PM Chairman Larson opened the meeting.

Present are Chairman Larson and Senators Myrdal, Luick, Sickler, Estenson, Braunberger and Paulson.

Discussion Topics:

- Deference
- Agency powers
- Fraud
- Adjudication
- Security Department enforcement

3:00 PM Senator Paulson introduced the bill and provided written testimony #18617.

3:01 PM Daniel Dew, Legal Policy Director, Pacific Legal Foundation, spoke in favor of the bill.

3:11 PM Doctor Jake Schmitz, Chiropractor, testified in favor of the bill and provided written testimony #18495.

3:20 PM Karen Tyler, North Dakota State Securities Commissioner, testified in favor of the bill and provided written testimony #18619.

3:31 PM Courtney Titus, Deputy Solicitor General, North Dakota Office of the Attorney General, testified opposed to the bill and provided written testimony #18568.

3:42 PM David Glatt, Director of Environmental Quality, testified opposed to the bill and provided written testimony #18446

4:47 PM Johannes Palsgraaf, North Dakota Insurance Department, spoke opposed to the bill.

3:59 PM Sandra Depountis, North Dakota Board of Nursing, Executive Director, testified opposed to the bill and offered written testimony #18226.

4:02 PM Stacey Pfenning, North Dakota Board of Nursing, testified opposed to the bill and provided written testimony #17896.

4:04 PM Timothy Dawson, Office of Administrative Hearings, spoke neutrally on the bill.

4:09 PM Chairman Larson closed the public hearing.

Additional written testimony:

Jon Godfread, North Dakota Insurance Commissioner, provided written testimony #18545.

Randy Christmann provided written testimony #18264.

Rebecca Pitkin provided written testimony #18489.

Jonathan Alm provided written testimony #18548.

Mark Hardy provided written testimony #18390.

Lise Kruse provided written testimony #18428.

Art Thompson provided written testimony #18504.

4:09 PM Chairman Larson closed the meeting.

Rick Schuchard, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2296
2/15/2023

A bill relating to agency adjudications and judicial deference in administrative hearings.

10:59 AM Chairman Larson opened the meeting.
Chairman Larson and Senators Paulson, Braunberger, Myrdal, Sickler, Estensen and Luick are present.

Discussion Topics:

- Committee action

10:59 AM Senator Larson discusses amendment LC 23.1009.01004.

11:11 AM Alyson Hicks, North Dakota Attorney General's Office, provided oral testimony.

11:21 AM Senator Paulson moved to adopt amendment LC 23.1009.01004, with additional language suggested by Senator Sickler. Motion seconded by Senator Myrdal.

11:33 AM Roll call vote is taken.

Senators	Vote
Senator Diane Larson	Y
Senator Bob Paulson	Y
Senator Jonathan Sickler	Y
Senator Ryan Braunberger	Y
Senator Judy Estenson	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Motion passed 7-0-0.

11:34 AM Senator Paulson moved to further amend, remove everything from the bill except section six.

11:36 AM Senator Paulson withdrew his motion to further amend.

Additional Written testimony:
Senator Sickler #20890
Senator Paulson #20855, #20856.

Lynn Helm #21153.

11:37 AM Chairman Larson closed the meeting.

Rick Schuchard, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2296
2/20/2023

A bill relating to agency adjudications and judicial deference in administrative hearings.

10:33 AM Chairman Larson opened the meeting.
Chairman Larson and Senators Myrdal, Luick, Estenson, Sickler, Paulson and Braunberger are present.

Discussion Topics:

- Committee action

10:33 AM Senator Paulson spoke on amendment 23.1009.01005.
Senator moved to adopt amendment LC 23.1009.01005. Motion seconded by Senator.
10:36 AM Allyson Hicks, Assistant Attorney General, provided oral testimony.

Roll call vote is taken.

Senators	Vote
Senator Diane Larson	Y
Senator Bob Paulson	Y
Senator Jonathan Sickler	Y
Senator Ryan Braunberger	N
Senator Judy Estenson	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Motion passes 6-1-0.

Senator Paulson moves Do Pass the bill as Amended. Senator Luick seconds the motion.

Roll call vote is taken.

Senators	Vote
Senator Diane Larson	Y
Senator Bob Paulson	Y
Senator Jonathan Sickler	Y
Senator Ryan Braunberger	N
Senator Judy Estenson	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Motion carries 6-1-0.
Senator will Sickler carry the bill.
This bill does not affect workforce safety.
10:51 AM Chairman Larson closed the meeting.

Rick Schuchard, Committee Clerk

23.1009.01005
Title.02000

Prepared by the Legislative Council staff for
Senator Paulson
February 17, 2023

Alt
2-20-23
(1-1)

PROPOSED AMENDMENTS TO SENATE BILL NO. 2296

Page 1, line 1, replace "two" with "a"

Page 1, line 1, replace "sections" with "section"

Page 1, line 2, replace "agency adjudications and" with "limiting"

Page 1, line 2, remove "in administrative"

Page 1, line 3, replace "hearings" with "to governmental entities; and to provide for a legislative management study"

Page 1, remove lines 5 through 17

Page 1, line 21, remove the underscored colon

Page 1, line 22, replace "1. When" with ", in"

Page 1, line 22, after "interpreting" insert "or applying"

Page 1, line 22, replace "regulatory document, an administrative law" with "rule, a"

Page 1, line 23, replace "an administrative agency's" with "a governmental entity's"

Page 1, line 23, replace "a" with "the"

Page 1, line 24, remove "other regulatory document to determine the meaning."

Page 2, remove lines 1 and 2

Page 2, line 3, replace "maximizes individual liberty" with "rule. After applying all customary rules of interpretation, the court shall resolve any remaining ambiguity against increased agency authority"

Page 2, after line 3, insert:

"**SECTION 2. LEGISLATIVE MANAGEMENT STUDY - AUTHORITY OF HEARING OFFICERS.** During the 2023-24 interim, the legislative management shall consider studying the impact of granting statutory authority under chapter 28-32 to a hearing officer, who may not be the agency head, to make findings of fact and conclusions of law, and issue orders. The study must include a review of chapter 28-32 and input from governmental entities and other interested parties. The legislative management shall report its findings and recommendations, together with any legislation necessary to implement the recommendations, to the sixty-ninth legislative assembly."

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2296: Judiciary Committee (Sen. Larson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). SB 2296 was placed on the Sixth order on the calendar. This bill does not affect workforce development.

Page 1, line 1, replace "two" with "a"

Page 1, line 1, replace "sections" with "section"

Page 1, line 2, replace "agency adjudications and" with "limiting"

Page 1, line 2, remove "in administrative"

Page 1, line 3, replace "hearings" with "to governmental entities; and to provide for a legislative management study"

Page 1, remove lines 5 through 17

Page 1, line 21, remove the underscored colon

Page 1, line 22, replace "1. When" with ", in"

Page 1, line 22, after "interpreting" insert "or applying"

Page 1, line 22, replace "regulatory document, an administrative law" with "rule, a"

Page 1, line 23, replace "an administrative agency's" with "a governmental entity's"

Page 1, line 23, replace "a" with "the"

Page 1, line 24, remove "other regulatory document to determine the meaning."

Page 2, remove lines 1 and 2

Page 2, line 3, replace "maximizes individual liberty" with "rule. After applying all customary rules of interpretation, the court shall resolve any remaining ambiguity against increased agency authority"

Page 2, after line 3, insert:

"**SECTION 2. LEGISLATIVE MANAGEMENT STUDY - AUTHORITY OF HEARING OFFICERS.** During the 2023-24 interim, the legislative management shall consider studying the impact of granting statutory authority under chapter 28-32 to a hearing officer, who may not be the agency head, to make findings of fact and conclusions of law, and issue orders. The study must include a review of chapter 28-32 and input from governmental entities and other interested parties. The legislative management shall report its findings and recommendations, together with any legislation necessary to implement the recommendations, to the sixty-ninth legislative assembly."

Renumber accordingly

2023 HOUSE GOVERNMENT AND VETERANS AFFAIRS

SB 2296

2023 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Pioneer Room, State Capitol

SB 2296
3/16/2023

Relating to limiting judicial deference to governmental entities; and to provide for a legislative management study.

Chairman Schauer called the meeting to order at 9:03 AM.

Chairman Austen Schauer, Vice Chairman Bernie Satrom, Reps. Landon Bahl, Claire Cory, Jeff A. Hoverson, Jorin Johnson, Karen Karls, Scott Louser, Carrie McLeod, Karen M. Rohr, Vicky Steiner, Steve Vetter, Mary Schneider. All present.

Discussion Topics:

- Issuing final judgements
- Chevron deference
- Judicial ability
- Cooperative federalism
- Citizen lawsuits
- Enforcing laws
- Agency professionals
- Agency protection
- Necessity of deference
- Administrative regulations
- Separation of powers

Sen. Paulson introduced SB 2296.

Sen. Sickler spoke in support.

David Glatt, Director of the North Dakota Department of Environmental Quality, opposition testimony (#25361).

Lyn Helms, Director of the North Dakota of Natural Resources, with North Dakota Health Commission, opposition testimony (#25509).

Art Thompson, on behalf of the Workforce Safety and Insurance Board of Directors, opposition testimony (#25321).

Lise Kruse, Commissioner with the North Dakota Department of Financial Institutions, and Chair of the State Banking board and State Credit Union Board, opposition testimony (#25372).

Randy Christmann, Chair of the Public Service Commission, opposition testimony (#25514).

Rick Clayberg, President and CEO of the North Dakota Bankers Association, spoke in opposition.

Johanas Palsgraaf, General Council for the North Dakota Insurance Department, spoke in opposition.

Brady Pelton, with the North Dakota Petroeum Council, spoke in opposition testimony.

Johnathan Fortner, on behalf of the Lignite Energy Council, spoke in opposition testimony.

Daniel Dew, legal policy director at Pacific Legal Foundation, neutral testimony (#25004).

Additional written testimony:

John Paczkowski, State Engineer at the Department of Water Resources, opposition testimony (#24346).

Mark Hardy, Executive Director of the North Dakota State Board of Pharmacy, neutral testimony (#25270).

Stacey Pfenning, Executive Director of the North Dakota Board of Nursing, opposition testimony (#25345).

Claire Ness, Chief Deputy Attorney General, on behalf of the Office of Attorney General, opposition testimony (#25381).

Sandra DePountis, Executive Director of the North Dakota Board of Medicine, opposition testimony (#25436).

Jake Schmitz, licensed chiropractor in North Dakota, supportive testimony (#25523).

Jonathan Alm, the Chief Legal Officer with the Department of Health and Human Services, opposition testimony (#25525).

Chairman Schauer adjourned the meeting at 10:38 AM.

Phillip Jacobs, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Pioneer Room, State Capitol

SB 2296
3/17/2023

Relating to limiting judicial deference to governmental entities; and to provide for a legislative management study.

Chairman Schauer called the meeting to order at 10:09 AM.

Chairman Austen Schauer, Vice Chairman Bernie Satrom, Reps. Landon Bahl, Claire Cory, Jeff A. Hoverson, Jorin Johnson, Karen Karls, Scott Louser, Carrie McLeod, Karen M. Rohr, Vicky Steiner, Steve Vetter, Mary Schneider. All present.

Discussion Topics:

- Committee work
- Amendments

Chairman Schauer called for a discussion on SB 2296.

Rep. McLeod moved a do not pass on SB 2296.

Roll Call Vote:

Representatives	Vote
Representative Austen Schauer	N
Representative Bernie Satrom	N
Representative Landon Bahl	N
Representative Claire Cory	N
Representative Jeff A. Hoverson	N
Representative Jorin Johnson	N
Representative Karen Karls	Y
Representative Scott Louser	N
Representative Carrie McLeod	Y
Representative Karen M. Rohr	N
Representative Mary Schneider	Y
Representative Vicky Steiner	N
Representative Steve Vetter	AB

Motion fails 3-9-1.

Claire Ness, Chief Deputy Attorney General, answered questions from the committee.

Rep. Louser discussed proposed amendments (#23.1009.02003) (#27244) to SB 2296.

Rep. Louser moved to adopt amendment to SB 2296.

Seconded by Rep. Steiner.

Roll Call Vote:

Representatives	Vote
Representative Austen Schauer	Y
Representative Bernie Satrom	Y
Representative Landon Bahl	Y
Representative Claire Cory	Y
Representative Jeff A. Hoverson	AB
Representative Jorin Johnson	Y
Representative Karen Karls	N
Representative Scott Louser	Y
Representative Carrie McLeod	N
Representative Karen M. Rohr	Y
Representative Mary Schneider	N
Representative Vicky Steiner	Y
Representative Steve Vetter	Y

Motion carries 9-3-1.

Vice Chairman Satrom moved to adopt amendment, changing SB 2296 into a study.

Seconded by Rep. Schneider.

Roll Call Vote:

Representatives	Vote
Representative Austen Schauer	Y
Representative Bernie Satrom	Y
Representative Landon Bahl	N
Representative Claire Cory	N
Representative Jeff A. Hoverson	AB
Representative Jorin Johnson	Y
Representative Karen Karls	Y
Representative Scott Louser	N
Representative Carrie McLeod	N
Representative Karen M. Rohr	Y
Representative Mary Schneider	Y
Representative Vicky Steiner	Y
Representative Steve Vetter	N

Motion carries 7-5-1.

Vice Chairman Satrom moved a do pass as amended on SB 2296.

Seconded by Rep. Steiner.

Roll Call Vote:

Representatives	Vote
Representative Austen Schauer	Y
Representative Bernie Satrom	Y
Representative Landon Bahl	Y
Representative Claire Cory	N
Representative Jeff A. Hoverson	AB
Representative Jorin Johnson	Y
Representative Karen Karls	Y
Representative Scott Louser	N
Representative Carrie McLeod	N
Representative Karen M. Rohr	Y
Representative Mary Schneider	Y
Representative Vicky Steiner	N
Representative Steve Vetter	N

Motion carries 7-5-1.

Carried by Rep. Karls.

Chairman Schauer adjourned the meeting at 10:45 AM.

Phillip Jacobs, Committee Clerk

23.1009.02007
Title.03000

Adopted by the House Government and
Veterans Affairs Committee
March 17, 2023

AG
3-17-23
(1-1)

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2296

Page 1, line 1, remove "create and enact a new section to chapter 28-32 of the North Dakota"

Page 1, line 2, remove "Century Code, relating to limiting judicial deference to governmental entities; and to"

Page 1, line 3, after "study" insert "relating to adjudicative proceeding procedures"

Page 1, remove lines 5 through 11

Page 1, line 12, remove "**AUTHORITY OF HEARING** "

Page 1, line 13, replace "**OFFICERS**" with "**ADJUDICATIVE PROCEEDING PROCEDURES**"

Page 1, line 13, replace "consider studying" with "study"

Page 1, line 14, replace "impact of granting statutory authority" with "adjudicative proceeding procedures"

Page 1, line 14, replace "to" with ", including the statutory authority of"

Page 1, line 14, remove ", who may not be"

Page 1, line 15, replace "the agency head, to make" with "and the procedures related to the"

Page 1, line 15, replace the first "and" with a comma

Page 1, line 15, replace "issue" with "issuance of"

Page 1, line 16, replace "governmental entities" with "administrative agencies"

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2296, as engrossed: Government and Veterans Affairs Committee (Rep. Schauer, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 5 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2296 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "create and enact a new section to chapter 28-32 of the North Dakota"

Page 1, line 2, remove "Century Code, relating to limiting judicial deference to governmental entities; and to"

Page 1, line 3, after "study" insert "relating to adjudicative proceeding procedures"

Page 1, remove lines 5 through 11

Page 1, line 12, remove "**AUTHORITY OF HEARING** "

Page 1, line 13, replace "**OFFICERS**" with "**ADJUDICATIVE PROCEEDING PROCEDURES**"

Page 1, line 13, replace "consider studying" with "study"

Page 1, line 14, replace "impact of granting statutory authority" with "adjudicative proceeding procedures"

Page 1, line 14, replace "to" with ", including the statutory authority of"

Page 1, line 14, remove ", who may not be"

Page 1, line 15, replace "the agency head, to make" with "and the procedures related to the"

Page 1, line 15, replace the first "and" with a comma

Page 1, line 15, replace "issue" with "issuance of"

Page 1, line 16, replace "governmental entities" with "administrative agencies"

Renumber accordingly

TESTIMONY

SB 2296

SB 2296
Senate Judiciary Committee
Testimony of
ND Board of Nursing

Chair Larson and members of the Committee. I am Dr. Stacey Pfenning, Executive Director of the North Dakota Board of Nursing ("Board").

I am here to provide testimony opposing **SB 2296** as this bill removes authority for administrative agencies to make final decisions in adjudicated proceedings under the Administrative Agencies Practice Act (28-32). Such action would greatly disrupt and impede the Board's compliance and disciplinary processes.

The administrative agencies practices act, which is codified in Chapter 28-32 of the North Dakota Century Code, is based upon an understanding that administrative agencies are in the best position to make determinations about the professions they govern, and that members of a profession are best able to govern their own profession.

The North Dakota Supreme Court has confirmed on numerous occasions that the boards of administrative agencies, such as the Board of Nursing, generally consist of members of the profession being governed, and therefore have specific knowledge and experience regarding the matters that come before the board, specifically including issues raised in disciplinary proceedings before the Board.

SB 2296 seeks to detract from the fundamental basis underlying the administrative agencies' practices act, and to take decision making away from members of the profession. Upon review by staff and legal counsel the following are the concerns of the Board within the proposed two new sections of NDCC Chapter 28-32.

Section 1. Administrative hearings: Agency adjudications. Subsection 4.

The proposed language on Page 1, lines 16 and 17, would require findings of fact, conclusions of law, and orders of an administrative law judge to be final. In other words, a board would not be able to modify or reject any findings, conclusions or orders that may ultimately be contrary to the profession governed by the board.

- Currently, a board can request an administrative law judge to handle a disciplinary hearing and to then make recommended findings, conclusions, and orders. Although it could conduct its own hearings, the Board of Nursing in particular utilizes the provisions of the administrative agency's practices act allowing it to have an administrative law judge conduct hearings. This allows the hearing to be conducted by an impartial third party, but further allows the Board of Nursing to make sure that the recommended findings, conclusions and order of the administrative law judge are consistent with the laws, rules and standards applicable to the practice of nursing.
- Importantly, Chapter 28-32 already allows participants in the hearing to appeal a board's final decision to the District Court. As a result, under its current provisions, Chapter 28-32 allows the members of a profession to govern themselves and to apply their specialized knowledge and experience to make sure that findings, conclusions, and orders issued in disciplinary matters are consistent with all standards applicable to the profession, while at the same time preserving the right of hearing participants to appeal such findings, conclusions

and orders to the District Court. There is no need to change Chapter 28-32 as proposed in lines 16 and 17.

Section 2. Judicial deference. Subsection 1.

The proposed language on Page 1, Lines 21 through 24, would also be a change to the current process established by the administrative agencies practices act, and confirmed by the North Dakota Supreme Court.

- The Board of Nursing, which is made up of eight nurses and one non-nursing public member, is entrusted by the Nurse Practices Act to regulate the profession of nursing in North Dakota. Given the backgrounds of the members of the Board of Nursing, which includes advanced practice registered nurses, registered nurses and licensed practical nurses, the Board should be regarded as an expert in nursing matters, and its interpretations and application of nursing laws, regulations and standards should be given deference, particularly by administrative law judges and other persons who do not have similar education, training and experience in nursing matters.
- The proposed language in lines 21 through 24 seeks to minimize the knowledge and expertise of boards which are made up of members of the profession at issue and are already entrusted to regulate that profession.
- In order to preserve the use of a board's knowledge and expertise, Chapter 28-32 should not be changed as proposed in lines 21 through 24.

Section 2. Judicial deference. Subsection 2.

Finally, the proposed language on Page 2, Lines 1 through 3, would require an administrative law judge to resolve any doubt regarding a nursing issue in a manner that maximizes the individual liberty of the nurse and that limits the Board of Nursing's power.

- Such interpretation would be contrary to the basic premise of the Nurse Practice Act, and that of the practice acts of most other professions, which is to protect the public.
- The decision-making of the Board of Nursing, and that of any administrative law judge conducting a hearing on behalf of the Board, should be to resolve doubt in a manner that best protects the safety of the public.
- It would be in the public's best interest not to change Chapter 28-32 as proposed in lines 16 and 17.

Historically, the Board of Nursing has worked diligently to negotiate settlements that are agreeable to both the Board and the nurse facing disciplinary action. A hearing is pursued as a last resort, when all efforts to negotiate a settlement have been exhausted.

With the proposed changes to **SB 2296**, if the Board of Nursing elects to have an administrative law judge conduct a disciplinary hearing, the Board will need to hope that the administrative law judge, without any nursing education, training and experience, is able to apply all of the laws, regulations and standards of practice to the issue at hand, because the **SB 2296** seeks to take

away the Board's ability to make sure that such laws, regulations and standards are correctly applied.

Thank you for the opportunity to share the Board's concerns. I am happy to answer any questions the committee may have.

Dr. Stacey Pfenning DNP APRN FNP FAANP
Executive Director, NDBON
701-527-6761
spfenning@ndbon.org

(Committee members: Chairwoman Sen. Diane Larson, Vice Chairman, Sen. Bob Paulson, Vice Chairman, Sen. Jonathan Sickler, Sen. Ryan Braunberger, Sen. Judy Estenson, Sen. Larry Luick, and Sen. Janne Myrdal)

Bill introduced by **Sen. Bob Paulson,** (Vice Chair Judiciary Committee), **Rep. Cole Christensen** (Member Judiciary & Transportation Committees), **Sen. Doug Larsen** (Chair Industry & Business Committee), **Rep. Bernie Satrom** (Vice Chair Government & Veterans Affairs Committee), **Rep. Steve Vetter** (Member Judiciary & Government & Veterans Affairs Committees) and **Sen. Kent Weston** (Member Human Services & Agriculture & Veterans Affairs Committees)

JUDICIARY COMMITTEE
FEBRUARY 1, 2023

TESTIMONY OF
NORTH DAKOTA BOARD OF MEDICINE
SENATE BILL NO. 2296

Chair Larson, members of the Committee. I'm Sandra DePountis, Executive Director of the North Dakota Board of Medicine, appearing on behalf of the Board in opposition to Senate Bill 2296.

The bill takes away the authority for administrative agencies to make final decisions in adjudicated proceedings under the Administrative Agencies Practice Act (28-32) and instead requires the final decision be made by an administrative law judge (ALJ). This is a big change affecting the entire chapter of 28-32, which recognizes that administrative agencies are in the best position to make the final determination on a matter due to their specialized knowledge and experience, especially with an agency like the Board of Medicine.

As recognized by the Supreme Court, members of the Board provide the expertise and experience that is necessary to make decisions due to the "technical" nature of its disciplinary cases. In the most recent example, NDBOM v. Hsu, 2007 ND 9, the Supreme Court ultimately found the ALJ's recommendations to be "unworkable" and affirmed the Board's departure from the recommendations based on the evidence. To support such a decision, the court provides:

> ¶42 "In technical matters involving agency expertise, an agency decision is entitled to appreciable deference. The determination of a physician's standard of care and the requirements for appropriate document of that care involve technical matters. The Board is comprised mostly of practicing physicians, and the Board's determination is entitled to

> appreciable deference. Moreover, it is not the court's function to act as a super board when reviewing decisions by an administrative agency, and courts do not reweigh the evidence or substitute their judgment for a duly authorized agency."

Medical cases hinge on the specialty area involved in the case and applicable standards of care, which ALJs may miss or lack the ability to provide. Allowing the Board to receive the recommended findings and orders and review the evidence and testimony from their expert point of view, permits the Board to work out many of the cases at the administrative level. Without this ability, the Board's only avenue would be to appeal the case to the District/Supreme Court – clogging up the court system. This avenue would also have a fiscal impact on the Board. Expert reviews of medical cases are very expensive to obtain, and medical cases are very technical, resulting in increased cost to the Board to bring an appeal through the court system. Generally, just a regular case going to the District and Supreme Court costs around $50,000 – that would not include fees for expert testimony. Depending on the experts and specialty area – we have had quotes provided ranging from $650/hour to just review medical records to do an initial expert opinion, to a live court testimony costing $2,910/hour with a $4,000 "appearance fee."

Finally, it is also unclear what the intent of Section 2 is. Administrative agencies work with their laws, statutes, and regulations each day and are arguably in the best position to shed light on their interpretations – an important piece of evidence for the ALJ to consider. The ALJ may decide to not give deference to the interpretation but that is left to his/her discretion. The bill takes away the ALJ's discretion.

Also problematic is taking away the ALJ's ability to review evidence as presented as a neutral third party under the requirements of North Dakota Rules of Evidence, and instead to mandate the ALJ to "exercise doubt in favor of a reasonable interpretation that limits agency power and maximizes individual liberty." The Board of Medicine brings cases due to substandard care or other discipline pursuant to the grounds set forth by law. This is not an exercise of "power" – but a duty of the Board to fulfill its mandate of protecting the public by verifying only competent and qualified health care providers are providing services to the citizens of North Dakota. The Board is already tasked with meeting the burden of proof – and licensees are afforded all opportunity to defend themselves. The language appears to take away the ALJ's ability to review the evidence and testimony in an unbiased and impartial manner and instead asks for all evidence presented by the Boards to be viewed as the Board engaging in a power trip.

It is due to the above reasoning that the Board of Medicine opposes this bill. Thank you for your time and attention and I would be happy to answer any questions.

Senate Bill 2296

Presented by: **Randy Christmann, Chair**
Public Service Commission

Before: **Senate Judiciary Committee**
The Honorable Diane Larson, Chair

Date: **February 1, 2023**

TESTIMONY

Madame Chair and committee members, I am Randy Christmann, Chair of the Public Service Commission, and I'm submitting testimony in opposition to this bill on behalf of the Public Service Commission (Commission).

The Public Service Commission is a constitutional agency with three state-wide elected officials. Constitutional agencies are unique in that they hold executive power as prescribed by the legislature, but are not subject to executive appointment. Generally, the Commission is vested with authority over a number of jurisdictions relating to economic, environmental, and energy infrastructure regulation. Some examples of areas that have legal proceedings under the Commission's jurisdiction are enforcement of the One-Call law, economic regulation of utilities, energy siting, and the state's surface mining enforcement.

Although the Commission is permitted to conduct proceedings without an administrative law judge (ALJ), they are frequently employed to guide the procedure in lengthy, in-depth, or contentious hearings. This permits the commissioners to focus on the substance of the hearings. Less frequently, ALJ's are employed by the Commission in non-contentious cases to substantively hear

a case and provide a recommended decision. Recommended decisions are still reviewed by the agency and commissioners before adoption. There have been times when the Commission has modified the orders with additional measures to address ongoing policy concerns or to create consistency with other Commission actions.

In its application, SB 2296 passes final decision making to the ALJ. The commissioners are elected to carry out the requirements set forth by this legislative body, and it would be inappropriate to transfer final decision making outside of the agency. Also, with the ALJ as the final decision maker, it is still the Commission and agency resources that would be subject to appeal. If passed, SB 2296 will alter the Commission's hearing practices, curtail the use of ALJs, and conflict with the Commission's current administrative rules.

Madame Chair, this concludes our testimony. I will be happy to answer any questions.

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STATE BOARD OF PHARMACY

State of North Dakota
Doug Burgum, Governor

E-mail= Mhardy@ndboard.pharmacy
www.ndboard.pharmacy

Mark J. Hardy, PharmD
Executive Director

Senate Bill No 2296 – Agency Adjudications

Senate Judiciary Committee – Peace Garden Room
3:00 PM - Wednesday – February 1, 2023

Madam Chair Larson, Members of the Senate Judiciary Committee for the record I am Mark Hardy, Executive Director of the North Dakota State Board of Pharmacy. Thank you for the opportunity to testify on this important legislation.

Our office does have concerns with the provisions of this Bill and the impacts it may have on our Board. I will admit that it is rare that the Board of Pharmacy has administrative hearings on complaints and most often can resolve them through an agreed upon stipulation with the parties involved. In that spirit, the existing model has functioned very well.

This legislation may lead to more administrative hearings, given the provisions would change the parameters involved in those hearings. Specifically, this legislation would not allow the Board of Pharmacy to assist a judge in looking at the proper statute or regulation involved. An increase in these hearings would come at a higher cost to all parties involved.

Another situational consequence that we see this legislation creatubg is judges being stricter than the administrative agency on a particular case. The Judge is likely not to have the expertise or understanding of the standard of care that may be applied in a particular matter and not have a way to meaningfully determine that from the appointed members or staff on the Board. It is important to note that any ruling of an administrative hearing can be appealed to a higher level for consideration.

We appreciate the opportunity to testify on this legislation and provide our concerns with the changes set forward in Senate Bill 2296.

I'd be happy to answer any questions.

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MEMORANDUM

DATE: February 1, 2023
TO: Senate Judiciary Committee
FROM: Lise Kruse, Commissioner, Chair of the State Banking Board and State Credit Union Board
SUBJECT: Testimony in Opposition of Senate Bill No. 2296

Chair Larson and members of the Senate Judiciary Committee, thank you for the opportunity to provide this testimony on Senate Bill No. 2296.

The Department of Financial Institutions is tasked with the oversight of banks, credit unions and several nonbank entities that provide financial services in North Dakota. The non-depository institutions include trust companies, collection agencies, payday lenders, money transmitters, debt settlement service providers, and all nonbank lenders (money brokers), and mortgage loan originators.

Financial fraud and scams have increased significantly in recent years. For example, financial exploitation of our elderly citizens is far too common with a national conservative estimate of 1 in 5 being victims with an average loss of $120,000 a person. Our legislators have passed numerous laws to make sure our department and the State Banking and Credit Union Boards have the ability to protect our citizens. We are here to protect the rights of North Dakota depositors, borrowers, customers, and shareholders. When money is stolen from North Dakota citizens – our friends, families, and neighbors – our department and the Boards need to have the ability to step in. We need to remove bad actors from the financial industry, and defend our citizens and enforce the laws passed by our legislature to the fullest extent.

Unfortunately, Senate Bill No. 2296 would make it difficult for us to enforce the laws our legislature has put in place to protect our citizens from financial fraud. It appears that this Bill would give the bad actors a legal advantage when we make an effort to enforce laws applicable to the financial services industry. Our department, the State Banking Board, and the State Credit Union Board, each made up of industry professionals, would be prohibited from interpreting facts which are specific to their industries. An administrative law judge is unlikely to have this type of specialized knowledge. Banking law and financial regulations can be complex, and it is in everyone's best interest that these are applied fairly and consistently by industry experts.

Although we all favor individual liberty and freedom, this Bill tries to achieve this at the victims' expense. The Bill instructs the administrative law judge to exercise doubt in favor of the individual and against the agency. Agencies step in to enforce laws to protect the public from bad actors. Agencies are acting on behalf of citizens, enforcing laws passed by this legislative body. This Bill tips the legal scale in favor of bad actors at the expense of honest North Dakota citizens, therefore, we respectfully oppose Senate Bill No. 2296.

NORTH Dakota | Environmental Quality
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Testimony in Opposition of
Senate Bill No. 2296
Senate Judiciary Committee
February 1, 2023

TESTIMONY OF
David Glatt, Director of the North Dakota Department of Environmental Quality

Good afternoon, Chairman Larson and members of the Judiciary Committee. My name is David Glatt, and I am the director of the North Dakota Department of Environmental Quality (DEQ). The DEQ is responsible for the implementation and enforcement of many of the environmental protection programs in North Dakota. These programs include the Clean Water Act, Clean Air Act, Safe Drinking Water Act, and Resource Conservation and Recovery Act. I am here today to testify in opposition to SB 2296.

The DEQ implements several environmental quality protection programs that at times are complex and require an in-depth technical knowledge of not only the regulations but how they are implemented specifically in North Dakota.

This knowledge is critical to ensure the rules are applied appropriately for our ecosystems, climate, businesses, and municipalities. SB 2296 Section 2 Judicial deference (1) seeks to limit technical and real-world input of DEQ in a proceeding before an administrative law judge. If the measure is passed in its current form, we are concerned about the following consequences:

- Interpretation of technical environmental protection rules would be left to parties with a limited knowledge of the state-specific conditions, resulting in inappropriate outcomes or those with an agenda contrary to legal intent. Examples have been the belief that crude oil discharged into a stream is not a violation of state statutes or air pollution controls and that inappropriate emission sources for North Dakota should be approved.

Also, we are concerned with the impact of language in Section 2, Judicial Deference (2):

- The phrase "… the administrative law judge shall exercise doubt in favor of a reasonable interpretation that limits agency power…" could result in North Dakota laws and rules being less stringent than federal law, putting DEQ authority to implement the regulations at the local level at risk. The result would be federal implementation of important environmental protection laws and rules.

In addition, the reference to "…maximizes individual liberty" is confusing as to who and how it would apply. Does it apply to the complainant or to an individual's ability to enjoy the environment?

- Examples could be a person might not like an oil well in the vicinity of their residence as it interferes with their individual liberty because they think it makes too much noise or a grandfather wanting to take his grandchildren fishing downstream of a discharge into a stream where he might believe the stream is too contaminated to fish (even if the discharge complies with applicable law). Whose individual liberty must the administrative law judge maximize --the defendant, or the person with actual or perceived impact?

It is important to note that the DEQ has a history of common-sense implementation of regulations following the law and appropriate science.

Keeping an arm's length from all parties our laws and rules are implemented to protect all North Dakotans, acknowledging that we do not all live upstream or upwind.

This concludes my testimony, and I will stand for questions.

NDESPB
Education Standards and Practices Board

2718 Gateway Avenue, Suite 204
Bismarck, ND 58503
Phone: 701-328-9641 • www.nd.gov/espb

Testimony SB 2296
Senate Education Committee
February 1, 2023; 3:00 P.M.
Education Standards and Practice Board
Dr. Rebecca Pitkin

Good afternoon, Chair Larson, and members of the Committee. My name is Rebecca Pitkin, and I am the Executive Director of the Education Standards and Practices Board. I am here today to testify in opposition to SB 2296. Chapter 28-32 indicates administrative agencies and their boards are best positions to make the final decision regarding an educator's case due to their specific knowledge and experience. There are multiple components to a case and the Board has the expertise to navigate these.

When our board receives recommended findings and orders from the Administrative Law Judge, they take these into consideration along with the hearing testimony and make a final decision. Although most our Board's final decisions have aligned with the recommended findings and order, the process has enabled the board to continue dialogue and integrate their expertise to arrive at a decision.

The Education Standards and Practices Board conducts a paper review of complaints and does not have oral testimony. The allowance of testimony (28-32-25) at a hearing provides additional information the board considers following the hearing, once again utilizing their knowledge and experience in the field to make a final decision.

SB 2296 attempts to diminish the elements underlying the administrative agencies' practices act and seeks to take the decision making away from those most qualified to determine teacher sanctions: school board members, principals, superintendents, teacher education faculty members, and teachers themselves. The current provisions of Chapter 28-32 allow the individuals who make up the ESPB Board to ensure that findings, conclusions, and orders issued

are consistent with the standards that govern the teaching profession. The Education Standards and Practices Board respectfully requests a DO NOT PASS on SB 2296.

Thank you for allowing me to share the Board's concerns. I am willing to answer any questions relating to my testimony.

Rebecca Pitkin, PhD

Executive Director, ESPB

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Dr. Jake Schmitz, DC, MS
4233 44th Avenue South, Fargo, ND 58104
701-770-0185
drjakedc4u@gmail.com

Chairman Larson, Senators of the Judicial Committee,

My name is Dr. Jake Schmitz, and I am testifying on behalf of myself as a licensed chiropractor in the state of North Dakota (ND). I have been a practicing chiropractor in Fargo for about 11 years. My testimony is in support of SB 2296.

SB 2296 serves an extremely important function for ND as it pertains to administrative proceedings. As it currently stands, administrative agencies are granted deference by administrative law judges (ALJ) during adjudicative proceedings. State boards/agencies regularly ask for deference when interpreting statutes or regulations. Boards shouldn't be granted deference for any part of the proceeding, as there are in many cases, disputes to both facts and law in question before the ALJ. SB 2296 requires ALJs to cast doubt in favor of a reasonable interpretation, limiting the power of the agency. The definition of reasonable from Black's Law is, "*fair, proper, or moderate under the circumstances.*" This equates to fairness and has a higher likelihood of leading to more settlements out of court. This should save money for all parties, since the agency in question has an increased reason for wanting to settle out of court, because they will no longer be getting an advantage through the administrative proceeding. As is the case with most agencies, if they do win, they get reimbursed for the costs of proceeding. This means there should be minimal to no increased cost to the state. In fact, occupational boards are funded with license holder dues, and not state money.

The unfortunate reality in ND is criminals are given more rights to defend themselves than license holders. In the criminal system, a person is innocent until proven guilty beyond a shadow of doubt. The burden is on the prosecutor to prove guilt. Licensees in ND are guilty unless they can prove themselves innocent. This disparity is largely due to boards getting granted deference. Deference is fine when dealing with highly technical matters within the agency's purview. It is being overutilized and abused, as anything and everything in an agency's statute/regulations falls under "deference". This is quite the hurdle to overcome, and I know this from my own personal case against my state board.

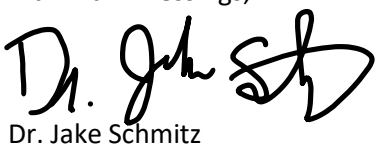
My understanding is this bill does not remove an agency's ability to levy a punishment if the ALJ agrees with their position. The agency is still the final decision-maker for punishments, unless they specifically ask for the ALJ to make the determination. The word "disposition" simply refers to the ALJ determining which party is right in the lawsuit.

If the ALJ agrees with the licensee, the board/agency can appeal to District Court. The appeals process isn't an additional burden, but an evening of the playing field. On one hand, agencies make the claim that a licensee can simply appeal decisions they don't agree with. On the other hand, they assert it is onerous when they must do the same.

The most important question to consider with this bill is why a state agency wouldn't want a truly neutral party (judge) to listen to the facts presented, make recommendations, and to decide the case, as they are trained to do? What are they afraid to lose with this bill? If they make a compelling case, the judge will side with them. They shouldn't be given an advantage no matter the circumstances.

Please vote DO PASS on SB 2296. Thank you for your time and I will answer any questions you might have for me.

Maximum Blessings,



Dr. Jake Schmitz

WSI
North Dakota Workforce
Safety & Insurance

Art Thompson
Director

2023 SB No. 2296
Senate Judiciary Committee
Written Testimony Submitted by Workforce Safety and Insurance
February 1, 2023

Madam Chair and Members of the Senate Judiciary Committee:

On behalf of the Workforce Safety and Insurance Board of Directors (WSI), I write in opposition to Senate Bill No. 2296.

WSI, employers, and injured employees subject to North Dakota workers' compensation laws participate in the administrative hearing process on a consistent basis to resolve disputes. In fiscal year 2022, WSI referred 140 requests for administrative hearing services to the Office of Administrative Hearings (OAH). Ultimately, 94 administrative hearings were completed. WSI believes the current laws governing the administrative hearing process generally work well. The Board's opposition to this bill is its potential to unduly frustrate the administrative hearing process, increase appeals, and ultimately increase costs for all participants. The following outlines the main concerns.

Section 1(1) It is unclear what the term "supervise" means in this context. WSI does not supervise OAH proceedings and is unaware of any instance in which this has been an issue in WSI's administrative hearing process. OAH has statutory processing standards found in Section 54-57-09 to follow in WSI cases. The broad language of this subsection raises questions regarding whether OAH and WSI's communications about these standards are permissible.

Section 1(2) It is unclear what the term "influence" means in this context. In WSI administrative hearings conducted by OAH, WSI's legal counsel puts forth legal positions based on the law and counsel permissibly advocates for WSI's position. There are laws and rules in place to preserve the integrity of this process. For example, laws preclude communications with an administrative law judge (ALJ) outside the presence of another party (Section 28-32-37). In addition, OAH's "Code of Judicial Conduct for ALJ's" prohibits impropriety in all an ALJ's activities (Canon 2).

Section 1(3) Under existing law, all orders issued by ALJ's in WSI matters are final orders.

Section 1(4) For WSI, this provision is redundant and unnecessary. There are provisions in workers' compensation law that confirm a decision is final if it is not appealed. However, it is unclear how this proposed subsection will affect a party's ability to request reconsideration of an ALJ's decision under Section 28-32-40 of the Administrative Agencies Practice Act.

Section 2(1) The North Dakota Supreme Court has long held an agency's interpretation of a statute is entitled to deference. The Court has done so for good reason. Agencies apply the law on a daily basis and agency personnel have developed expertise on how the law is consistently applied to various situations. This expertise is especially critical in specialized, technical areas

like workers' compensation insurance law. Deference to an agency's reasonable interpretation of a statute to accomplish its functions is logical.

In addition, on appeal, the North Dakota District Courts and the North Dakota Supreme Court are not required to defer to an ALJ's interpretation of the law. As a result, the appellate courts' reviews will not be limited to the language imposed on an ALJ in this bill. Because appellate courts still may give deference to an agency's legal interpretation, we expect this will create more issues for appeal.

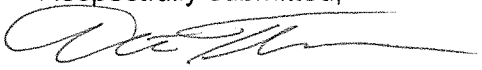
Finally, the breadth of the subsection makes it unclear whether it could limit WSI's ability to explain to an ALJ its use of certain forms and questionnaires used in the processing of injured employee claims and employer premiums.

Section 2(2) Of utmost concern is the review standard proposed in this subsection. It is unclear what this standard means and how it could be applied to administrative proceedings in WSI matters. We expect this standard will result in considerable time during the hearing devoted to whether a statute maximizes, or even impacts personal liberty and limits agency power. Under this standard, it appears an agency could be interpreting a law reasonably, but if the ALJ determines it does not "maximize individual liberty" or " limits agency power" that interpretation can be rejected.

Practically speaking, this standard could create significant challenges for WSI in the application of workers' compensation laws governing the obligations of injured employees and employers. For example, following a work injury, an injured employee is required to conduct a good faith work search for appropriate employment after the vocational rehabilitation process is completed. Does this standard mean that if an injured employee does not want to look for work in a job that does not pay what he/she believes they are worth, the ALJ could rule the employee does not have to conduct the work search to "maximize individual liberty", regardless of what the law requires? The required attendance at functional capacity evaluations, skills upgrading courses, or medical appointments are just a few additional areas in which this proposed standard may pose considerable issues during WSI administrative hearings.

Because of the potential to complicate the administrative hearing process, increase appeals and ultimately the costs to all parties, the WSI Board of Directors opposes this bill.

Respectfully submitted,



Art Thompson

TESTIMONY SB 2296

Presented by: **Jon Godfread**
Insurance Commissioner
North Dakota Insurance Department

Before: **Senate Judiciary Committee and Senator Diane Larson, Chairman**

Date: **February 1, 2023**

Good morning, Chairman Larson and members of the committee. My name is Jon Godfread, and I am the North Dakota Insurance Commissioner. I am here today in opposition to senate bill 2296.

Administrative Law Judges ("ALJs") currently issue recommendations to the Insurance Department, not final orders. Insurance regulation is complex. ALJs are not necessarily insurance experts and there is a potential for ALJs to get it wrong, and sometimes even the Insurance Department gets it wrong. Our current law and administrative procedures take into account the possibility of an incorrect recommendation and allows for corrective changes to be made before the order is final. SB 2296 will eliminate this process. Additionally, the remaining provisions included in SB 2296 are already addressed elsewhere in the administrative procedures law. SB 2296 overlaps with the current law and will insert confusing into the established law.

SB 2296 will make all ALJ decisions final and will do away with the Insurance Department's ability to reject the ALJ's recommendation. Mandating all ALJ decisions as final will force agencies to unnecessarily drag licensees into district court for appeals. Because doing away with recommendations will force a state court appeal, licensees are free to continue inappropriate activity all the way through the appeal of the administrative decision. This will expose insurance consumers to misconduct by insurance licensees.

I would like to share with you some details from an actual Insurance Department case where SB 2296 would have forced the Department to unnecessarily appeal an ALJ decision to state court.

In 2017, the Office of Administrative Hearings ("OAH") heard an Insurance Department case where an insurance agent forged the name of an insured. This insurance consumer decided to ask an acquaintance that held an insurance agent's license to assist her with an automobile insurance claim. The agent agreed to assist her but told her a Change of Agent Form would need to be completed and the form required the signature of the first person named on the insurance policy. In this case the consumer's name was not the first name on the policy. The first name on the policy was the name of the other person insured. After the agent prepared the form for the signature, this consumer instructed the agent to go ahead and sign the name of the first person listed on the policy, so the agent signed the name.

During the hearing, testimony came out that this other named insured did not want to change insurance agents or move his business to this new insurance agent, and although the new agent thought the two insureds were married, they were not. The agent never received permission from this person to sign this person's name. This person never consented to moving the insurance policy to this new agent. This person was never consulted by anyone about changing to a new agent or about this new agent signing this person's name. The new agent admitted to these facts at the hearing. Furthermore, both the insurance agency, where this new agent worked, and the insurance company testified that signing another individual's name with or without permission is against policy.

This new agent presented this change of agent form to the insurance company as if it were this person's genuine signature. Our insurance law requires agents to be honest, trustworthy and competent when acting as an insurance agent. The definition of dishonesty in the insurance law includes forging a person's name. Despite these facts,

the ALJ did not find the agent lacked competence, trustworthiness or honesty, and found the Department lacked sufficient evidence to revoke this agents license.

Now, the findings of this ALJ were a problem for a few reasons. First, the Department never attempted to revoke this agents license. The Department was seeking to put this agent on probation. Second, the ALJ's recommendation stated that because there was no harm or profit by the agent the agent's actions did not demonstrate dishonesty or untrustworthiness. The ALJ's finding failed to take into account that an insurance agent's commissions are directly linked to being the agent connected to the insurance policy. Third, proving harm was not required. Many regulations are meant to prevent against possible future harm. Also, I would argue that signing someone's name without their knowledge and switching their insurance business to an unknown agent is harmful to the consumer and the agent that lost the customer.

Fortunately, in this instance the law permitted us to reject the ALJ's recommendation. The Insurance Department issued new findings and the agent did not appeal to the district court. This agent entered into a probationary license order with the Department. Had SB 2296 been in place the only option would have been an appeal to the district court.

On the flip side, if it is the Insurance Department that gets something wrong, because it is a recommendation and not a final order the Insurance Department has an opportunity to reevaluate its position rather than force the complainant into an appeal to the district court. For example, new facts come out at a hearing and the Department now thinks that license revocation is too harsh. Because the adverse recommendation from the ALJ is not final, the Department and the licensee are able to agree to informally resolve the issue or dismiss the complaint after further discussions with the complainant.

The remaining provisions of this SB 2296 are already in the law. North Dakota Century Code section 28-32-27 allows disqualification of the ALJ for "good cause." "Good cause" would include an agency supervising the ALJ. Section 28-32-27 limits

communication of the agency with the ALJ, which would include attempts to improperly influence an ALJ with improper evidence or arguments. The requirement of findings of fact, conclusions of law, and final orders are addressed throughout NDCC Ch. 28-32. Finally, the burden of persuasion and exercising doubt in favor of liberty, as specified in the bill, are already prescribed in various statutes, rules, and court opinions. Our current process recognizes the rights of license holders and individuals.

The OAH provides a place where licensees of the Insurance Department can give their side of the story to a neutral Administrative Law Judge (ALJ). Notwithstanding the statutory option allowing the Insurance Department to hold administrative hearings in-house, we have used OAH for all licensee hearings for as long as I have served as the Insurance Commissioner, and it is my understanding the previous commissioner used OAH solely as a neutral forum for licensee hearings.

SB 2296 does away with an important step in the administrative hearing process and confuses the current law with duplicative law. I urge the committee to give SB 2296 a do not pass recommendation.

NORTH Dakota | Health & Human Services
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Testimony
Senate Bill No. 2296
Senate Judiciary Committee
Senator Diane Larson, Chairman
February 1, 2023

Chairman Larson, and members of the Senate Judiciary Committee, I am Jonathan Alm, the Chief Legal Officer with the Department of Health and Human Services (Department). The Department is providing testimony in opposition of Senate Bill 2296.

The Department is concerned with a couple of different areas of this Bill. The first concern is on page 1, lines 16 and 17, that limits the Department's ability to rewrite the findings of facts, conclusions of law, and order. The two reasons why the Department rewrites the findings of fact, conclusions of law, and proposed orders is for clarification purposes or misinterpretation of the law purposes. If page 1, lines 16 and 17, remains as is, the Department will have a fiscal impact of $65,700 for the 2023-25 biennium as the Department would be required to appeal the final decisions to District Court instead of rewriting the findings of facts, conclusions of law, and order.

The Department currently uses a hybrid approach before the Office of Administrative Hearings. In 2021 and 2022, the Office of Attorney General provided legal representation on approximately 41% of the cases and in the other approximately 59% of the cases, the Department or Human Service Zone eligibility workers appeared on behalf of the Department. If page 1, lines 16 and 17, remains as is, the Department will be using the Office of Attorney General for 100% of all cases before

the Office of Administrative Hearings as it would no longer be able to rely on rewriting a decision when necessary. Legal representation would assure that the proper legal argument and facts are made before the Office of Administrative Hearings. The Department's proposed budget to pay the Office of Attorney General would need to be increased by $458,252 for the 2023-25 biennium. The Office of Attorney General charges the Department $140.91 per hour for legal representation. The Department anticipates the Office of Attorney General will need additional staff to represent the Department. The Department must also pay the Office of Administrative Hearings to conduct hearings and issue findings of fact, conclusions of law, and order at $195.00 per hour. The Department anticipates needing an additional $120,938 which reflects a 15% increase in its proposed budget to pay the Office of Administrative Hearings as the Department expects the Office of Administrative Hearings will be spending more time on cases. Page 1, lines 16 and 17, will also increase the time and costs for individual's appealing a decision made by the Department as the case before the Office of Administrative Hearings will become more formal.

The second concern is on page 1, lines 22 through 24, and page 2, lines 1 through 3. As written, this would overturn long standing federal and state case law that allows deference for an agency's interpretation of laws and rules. If this language remains, the Department will need an additional full-time equivalent position for an attorney as it will need to greatly expand administrative rules and proposed legislation to make sure the Department's intent and interpretation is clear. The Department also expects to conduct additional rulemaking at a cost of $20,000 for public notices. Removing agency deference may lead to federal audit findings, individuals receiving assistance when they are not legally entitled to the

assistance, and it will increase the potential need to use the State's general funds to pay back the Federal government for improper spending of federal funds. In addition, the language regarding the "administrative law judge shall exercise doubt in favor of a reasonable interpretation that limits agency power and maximizes individual liberty" will most likely increase the need for additional appropriation as it may increase the number of individuals receiving assistance and services through programs and services offered by the Department.

This concludes my testimony. Thank you.

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL
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Drew H. Wrigley
ATTORNEY GENERAL

SENATE JUDICIARY COMMITTEE
FEBRUARY 1, 2023

TESTIMONY OF COURTNEY R. TITUS
OFFICE OF ATTORNEY GENERAL
SENATE BILL NO. 2296

Madam Chair, members of the Committee.

I am Courtney R. Titus, Deputy Solicitor General, and I appear on behalf of the Attorney General in opposition of Senate Bill 2296. Because this bill confuses the administrative hearing process and significantly increases the time and cost of administrative proceedings for both the State and the individuals appearing before the administrative agency, the Office of Attorney General recommends a do not pass on Senate Bill 2296.

Section 1 of the bill entirely modifies the manner in which administrative hearings are conducted by the Office of Administrative Hearings. The language in this section is ambiguous and unclear, which would result in a substantial increase in appeals from administrative matters. The language of Section 1 renders every decision of an administrative law judge as final and appealable, which means that at multiple stages of the proceedings either party would be able to appeal the matter to district court and the supreme court. Further, this bill fails to address how federal laws, regulations, or program rules that agencies are required to comply with, will be interpreted. With this bill, a final decision by an administrative law judge that does not properly address federal requirements, may place an agency in jeopardy of violating those applicable federal laws, regulations, or program rules and instead of having the ability to address these issues through amending a recommended decision, the agency has no choice but to appeal. This

would significantly increase the amount of time and cost to each agency for every administrative case. Additionally, this bill does not amend the preexisting sections of chapter 28-32, every administrative agency's relevant statutes, and so there are conflicting areas of law that will need to be worked out through litigation, all at the significant expense of both the State and the responding parties.

Section 2 of the bill seeks to remove deference to an administrative agency's interpretation of its statute or rule, upending decades of existing case law and precedent from the Supreme Court. Again, this section will result in either a substantial number of cases being appealed to district court by either party, or by the State choosing to avoid the administrative proceeding and file a lawsuit directly in district court instead; either of these options are significantly detrimental to both the State and the responding party. It would also possibly render the Office of Administrative Hearings obsolete if district court is preferred and pursued. Subsection 2 of section 2 directs the administrative law judge to essentially rule in each case in a manner that limits agency power and "maximizes individual liberty," however, there is no specification as to whose individual liberty is to be protected. Often times an agency is acting on the information of or on behalf of a complaining person. Is it their liberty or the respondent's liberty that should be given preferential treatment? In other instances, the respondent may be a private company, such as in Department of Labor cases where a hearing is requested pursuant to the request of a complaining individual. In those instances, subsection 2 of section 2 would require the administrative law judge to maximize the individual liberty of the private company because it would limit agency power, at the expense of the complaining individual. These are areas that the current draft of the bill leaves ambiguous, which will result in additional legal challenges.

The Civil Litigation Division of the Office of Attorney General represents most state agencies, boards, and commissions in administrative proceedings. Currently, there are seven

attorneys which represent the state in not only administrative proceedings, but also state and federal court cases and appellate proceedings. To put the effects of this bill into perspective, currently of the seven attorneys the Civil Litigation Division has, two are dedicated to the Department of Health and Human Services (DHHS) portfolio – they are full-time portfolios. We currently only receive 34% of DHHS' cases. To address the additional workload of just the DHHS, the Civil Litigation Division would require two additional FTEs devoted solely to that agency because of the sheer volume of cases we would receive. This does not address the additional workload of other agencies, boards and commissions the Civil Litigation Division would pursuant to its statutory duty, represent in these matters.

This bill creates significant ambiguities in the law and increases the cost and amount of litigation for both state agencies and the responding individuals. For these reasons, the Office of Attorney recommends a do not pass. Thank you for your time and consideration, and I would stand for any questions.

Good afternoon, Madam Chair and committee members. For the record, my name is Bob Paulson, and I am a State Senator from District 3 in Minot.

SB 2296 is a bill that, in essence, protects the rights of North Dakota citizens and puts them on level ground with their government. No government agency should be "judge, jury, and executioner" when it comes to disputes with citizens.

Our current administrative hearings process creates just such a disparity. When a citizen appeals a decision of an administrative agency, our current process gives agencies the right to accept or reject the findings of administrative law judges on matters involving their own agencies and usually their own actions.

This bill would make those findings by administrative law judges actual determinations, not just suggestions to a government agency.

With regard to deference, the language instructs courts to be fair when government agencies are involved.

If either party in an administrative hearing disagrees with the result, they would still have the right to take the matter to district court where, once again, a judge would make the decision.

Madam Chair, that is the bill and you will hear more specifics in the testimony that follows. I would respectfully request a Do Pass, and I will stand for any questions.

PACIFIC LEGAL FOUNDATION

THE IMPERATIVE TO END WRONGFUL JUDICIAL BIAS

THE PROBLEM: SYSTEMIC COURT BIAS AGAINST CITIZENS

Courthouses around the country feature statues of the iconic Lady Justice. She is blindfolded and holds the scales of justice, signaling to those who enter the courthouse that the law is applied impartially, without regard to wealth, power, or other status. In other words, each party is equal before the law and all arguments will be given fair, unbiased consideration.

But when it comes to government regulatory agencies in most states, Lady Justice's promise falls flat. A truer depiction would be Lady Justice peeking from her blindfold with her thumb on the scale to favor government regulatory agencies and against ordinary people. For much of the past 75 years, judges have wrongly deferred to a regulatory agency's interpretation of laws it is charged with carrying out, regulations it created, and its factual determinations when it brings enforcement actions against ordinary Americans. In showing "deference," judges abdicate their duty to "say what the law is."

Judges also fail to render independent, impartial judgments when they put a thumb on the scale in favor of the government. This subverts the adversarial system of adjudication that has been central to Anglo-American legal tradition for centuries. Judges must not only hear both sides of a case before making a decision, they must listen without systematically favoring the government.

Although unlawful judicial deference, or bias, toward the government originated as a federal mistake, many state courts followed the federal lead and adopted the practice of overly deferring to state regulatory agencies. As the doctrine has been increasingly criticized and is losing favor on the national level, some states have already abolished improper judicial deference through state Supreme Court decisions and legislative action.

THE SOLUTION: STATE LEGISLATURES CAN END THE BIAS WITH TWO SENTENCES

In interpreting a state statute, regulation, or other sub-regulatory document, a state court or an officer hearing an administrative action may not defer to a state agency's interpretation of it, and must instead interpret its meaning and effect de novo.

In actions brought by or against state agencies, after applying all customary tools of interpretation, the court or hearing officer must exercise any remaining doubt in favor of a reasonable interpretation which limits agency power and maximizes individual liberty.

The first sentence simply instructs courts to interpret statutes and regulations de novo (legalese for anew or without bias). The second sentence instructs courts to first use customary tools of judicial interpretation (instead of presumptions in favor of the government), and then to interpret truly vague statutes or regulations in favor of liberty.

THREE REASONS FOR THE PRESUMPTION OF LIBERTY

Ending unlawful and unfair bias favoring the government (the first sentence above) would be a huge victory for state citizens, but there are three reasons why courts' resolving any remaining doubt in favor of individual liberty is justified.

1. It is a bedrock principle in law that vague contract provisions are interpreted against the drafter, who, in most cases, is the more powerful party. That also incentivizes the drafter to be clear in the future. The government is the drafter of laws and regulations.

2. The courts traditionally interpret vague criminal laws against the government because it would be unfair to imprison someone for an unclear law that didn't provide fair notice of what it required. Complex civil laws and regulations can just as easily become a snare for the unwary. There is no criminal or civil justice in penalizing someone for an unknowable rule.

3. The end of government should be the protection of individual liberty. If the tie goes to the runner in baseball, the tie should also go to the people's residual rights. If the government wasn't clear about its command, individuals shouldn't suffer.

Testimony in Opposition to SB 2296

North Dakota Securities Commissioner Karen Tyler

Senate Judiciary Committee

February 1, 2023

Good Afternoon Chair Larson and members of the Committee, I am Karen Tyler, the state securities commissioner, and I oversee the North Dakota Securities Department.

My testimony today is in opposition to SB 2296, a bill that implements sweeping and detrimental changes to what is currently an effective system of adjudication for contested securities department enforcement matters – a system in which the Administrative Law Judge is entirely independent, the adjudication is fair and balanced, subject matter expertise can be considered as appropriate, the statutory authority of the Commissioner is preserved, and due process is supported for all parties.

Department Background

The Securities Department is a regulatory agency that serves the citizens of North Dakota through the administration and enforcement of the North Dakota Securities Act (10-04), the North Dakota Commodities Act (51-23), and the Franchise Investment Law (51-19).

The Department's primary regulatory policy objective is investor protection. The laws and rules we administer protect investors who are willing to take on risk and put their money to work in our country's capital markets. Among other responsibilities, and pertinent to this bill, the Department:

1) regulates the capital formation process.
2) registers and regulates the conduct of securities industry firms and professionals who want to do business in the state.
3) performs conduct focused examinations of broker-dealer and investment adviser firms and professionals.
4) investigates investment fraud and takes enforcement actions as necessary and appropriate, and we also make criminal referrals and support criminal cases. The majority of our resources are dedicated to this enforcement function.

For purposes of my testimony today, my remarks will focus primarily on the Department's investigative work involving investment fraud and the victimization of North Dakota investors.

It is worth noting that in the vast majority of the Securities Department's enforcement actions, the facts underlying the Department's findings and conclusions are not in dispute. Procedurally, after an investigation or examination and upon the finding of a violation of the Securities Act, the Commissioner issues an order to the respondent that is subject to the Securities Act and rules thereunder. Respondents typically either do not contest the Commissioner's order and it becomes a final order by statute (NDCC 10-04-16), or they negotiate a settlement and final disposition via a Consent Order.

If an investigation involves the conduct of a registered financial professional who works for a registered investment firm, the likelihood of a resolution that brings relief to the harmed investor without an administrative hearing is high. Investment firms are largely cooperative and interested in correcting conduct that has harmed a client. Our securities laws provide strong enforcement mechanisms such as the potential for revocation of a firm or professional's registration, the ability to assess significant civil penalties per violation, and the ability to order the

return of the investor's funds plus interest. These are authorities that are exceedingly effective in resolving cases involving registered firms and professionals.

If, however, an investigation involves an unregistered person with no affiliation to a brokerage firm or investment adviser firm, or an unregistered person selling unregistered securities to raise money for a company that may be operating a fraud, it is this type of case that will more likely result in the request of an administrative hearing and the appointment of an ALJ to preside.

Securities Department Cases Before an ALJ

When the Securities Department requests the designation of an ALJ, under current law (N.D.C.C. § 28-32-31) we can request to: 1. Have the ALJ conduct the hearing and issue recommended findings of fact, conclusions of law and a recommended order; 2. Have the ALJ conduct the hearing and issue findings of fact, conclusions of law, and a final order; or 3. Serve as a procedural ALJ with no recommended decision. SB 2296 appears to eliminate the recommended order alternative, thereby impairing the authority currently vested in the Securities Commissioner under NDCC 10-04-16 of the Securities Act.

It is important to clarify that in a hearing related to an order of the Securities Commissioner, an Administrative Law Judge is no more under the "supervision" of the agency attorney who appears before them, than a district court judge or a Supreme Court justice would be. Regardless of the selection on the finality of the order, the ALJ conducts a wholly independent and impartial hearing and issues a reasoned and timely decision. Due process for the agency and all parties appearing is further supported by a right to appeal any decision by the aggrieved party to the District Court, and further to the North Dakota Supreme Court if warranted.

Securities Case Example

In contested securities cases for which an Administrative Law Judge has been appointed, it is not uncommon that the related investigation has been records intensive, fact patterns are highly complex, applicable securities law nuanced, and a claim of federal securities law pre-emption introduced.

Very recently the Securities Department brought an action that resulted in the appointment of an ALJ to preside over an administrative hearing in a matter demonstrative of these case characteristics. In early 2021, based on a complaint by a North Dakota resident, the Department began an investigation into the

funding and development of a hemp processing plant to be built near Kendall, Wisconsin. Through investigative efforts, we determined that over $1.1 million dollars of investor money had been raised illegally by a North Dakota based promoter and used to pay an upfront fee in a fraudulent "fee for funding scam". There were 9 individual investors who invested money in exchange for an investment contract instrument, based on the representation that their money was being used to cover up-front closing costs on a supposed $250 million loan financing package being offered by an Atlanta, GA based money broker that would fund construction of the project. All investor funds, $1.1 million, were wired to the so-called "money broker". 2 years later, no financing package has materialized, and investor funds have not been returned. Throughout the course of this investigation, hundreds of pages of documents were secured and reviewed, including bank statements and supporting documents, promissory notes, private placement memorandums, as well as extensive communications between the investor victims and fraudulent actors.

When the Department requested the ALJ to preside over the hearing the first option outlined earlier in my testimony was selected. (Recommended Findings, Conclusions, Order) This meant procedurally that after the ALJ presided over and conducted the hearing, and after evidence was introduced and arguments were

made, the Department would receive from the ALJ a recommended order to adopt or amend and then the Commissioner would issue the final signed order. The Department's enforcement attorneys appearing before the OAH ALJ did not "supervise" the adjudicative process. The ALJ ran the hearing much as a District Court Judge handles a bench trial. The Department did not supervise the ALJ or influence the decision, but rather at the end of the proceedings, the Department has the ability to amend the findings of fact and conclusions of law to ensure that no details, facts or law were left out. This review process by the agency ensures a complete record to support a well-reasoned decision by an ALJ on a complex esoteric subject matter.

Of course any such amendment must still be contained in the record of the administrative hearing. The Department cannot simply unilaterally change the outcome of the proceeding without any support, but rather utilize the evidence that was admitted, and the testimony taken to clarify the decision and bolster the reasoning. In the matter at hand, the ALJ found in favor of the Department but did not specify the relief granted. In addition to confirming the Commissioner's earlier Order that the Respondents were liable to the investors for the return of their funds, with interest, the ALJ wrote "Respondents are jointly and severally liable for and shall pay a civil penalty an amount determined appropriate by the

Securities Commissioner based on the violations described above." Based on the findings of fact and conclusions of law, the Department will now use its securities law expertise, historical case knowledge, as well as the specific facts of the case, to determine what relief should be ordered. This allows the Department to ensure that securities law is appropriately followed and the relief is consistent and fair.

Chevron Deference Test

North Dakota case law is clear that when the North Dakota Supreme Court reviews the decision of an administrative agency, deference is given to the agency decision.[1] This legal doctrine that the North Dakota Supreme Court relies on, is derived from the landmark 1984 US Supreme Court decision in the matter of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc, which created what is now known as the Chevron deference test.

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[1] *See, for example, Delorme v. N.D. Dep't of Human Services*, 492 N.W.2d 585 (N.D. 1992). "This Court reviews the Department's decision to suspend a person's driving privileges under the Administrative Agencies Practice Act, N.D.C.C. ch. 28–32. Painte v. Dir., Dep't of Transp., 2013 ND 95, ¶ 6, 832 N.W.2d 319. When an administrative agency's decision is appealed from the district court, we review the agency's decision. Id. Generally, '[c]ourts exercise limited review in appeals from administrative agency decisions, and the agency's decision is accorded great deference.' Id.", *McCoy v. N. Dakota Dep't of Transp.*, 2014 ND 119, ¶ 6, 848 N.W.2d 659, 662–63; and "However, we give some deference to a reasonable interpretation of a statute by the agency responsible for enforcing it, and give appreciable deference to agency expertise if the subject matter is highly technical. Consol. Tel. Coop. v. W. Wireless Corp., 2001 ND 209, ¶ 7, 637 N.W.2d 699.", Grey *Bear v. N. Dakota Dep't of Hum. Servs.*, 2002 ND 139, ¶ 7, 651 N.W.2d 611, 614.

Under Section 2 of the bill, the proposed legislation appears to place restrictions on judicial decision making that would be in conflict with the Chevron deference test, and further, it appears to mandate a new legal standard that could have the effect of creating bias in favor of a respondent. In Securities Department cases this could result in a mandated deference to a respondent found by the Commissioner to have engaged in securities fraud and misappropriation of investor funds. I respectfully ask the committee to reject this requirement to favor the individual liberty of one party, who may have stolen the financial freedom of another.

In closing my remarks in opposition to this bill, I would reiterate my opening comments – this is a bill that brings sweeping and detrimental changes to what is currently an effective system of adjudication for contested securities department enforcement matters – a system in which the Administrative Law Judge is entirely independent, the adjudication is fair and balanced, subject matter expertise can be considered as appropriate, the statutory authority of the Commissioner is preserved, and due process is supported for all parties.

I respectfully request a "do not pass" on SB 2296.

23.1009.01004
Title.

Prepared by the Legislative Council staff for
Senator Paulson
February 14, 2023

PROPOSED AMENDMENTS TO SENATE BILL NO. 2296

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 28-32 of the North Dakota Century Code, relating to judicial deference; to amend and reenact sections 23.1-01-11, 28-32-31, 28-32-38, and 28-32-39, subsection 1 of section 28-32-42, section 38-19-08, subsection 9 of section 50-24.4-01.1, and section 54-23.4-11 of the North Dakota Century Code, relating to appeals, reconsideration of agency orders, duties of administrative hearing officers, separation of functions for hearing officers, and adjudicative proceedings; and to repeal sections 28-32-40 and 38-08-13 of the North Dakota Century Code, relating to reconsideration of a final order by an agency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 23.1-01-11 of the North Dakota Century Code is amended and reenacted as follows:

23.1-01-11. Appeal from permit proceedings.

1. An appeal from the issuance, denial, modification, or revocation of a permit issued under chapter 23.1-03, 23.1-04, 23.1-06, 23.1-08, or 61-28 may be made by the person who filed the permit application, or by any person who is aggrieved by the permit application decision, provided that person participated in or provided comments during the hearing process for the permit application, modification, or revocation. An appeal must be taken within thirty days after the final permit application determination is mailed by first-class mail to the permit applicant and to any interested person who has requested a copy of the final permit determination during the permit hearing process. Except as provided in this section, an appeal of the final permit determination is governed by sections ~~28-32-40,~ ~~28-32-42, 28-32-43, 28-32-44, 28-32-46, and 28-32-49. The department may substitute final permit conditions and written responses to public comments for findings of fact and conclusions of law. Except for a violation of chapter 23.1-03, 23.1-04, 23.1-06, 23.1-08, or 61-28 which occurs after the permit is issued, or any permit condition, rule, order, limitation, or other applicable requirement implementing those chapters which occurs after the permit is issued, any challenge to the department's issuance, modification, or revocation of the permit or permit conditions must be made in the permit hearing process and may not be raised on any collateral or subsequent legal proceeding, and the applicant and any aggrieved person may raise on appeal only issues that were raised to the department in the permit hearing process.

2. Notwithstanding subsection 1, the department may adopt any procedures governing appeals it determines are necessary and appropriate to develop, implement, or enforce a federally delegated, authorized, or approved program.

SECTION 2. AMENDMENT. Section 28-32-31 of the North Dakota Century Code is amended and reenacted as follows:

28-32-31. Duties of hearing officers.

All hearing officers shall:

1. Assure that proper notice has been given as required by law.

2. Conduct only hearings and related proceedings for which proper notice has been given.

3. Assure that all hearings and related proceedings are conducted in a fair and impartial manner.

4. ~~Make recommended findings of fact and conclusions of law and issue a recommended order, when appropriate.~~

~~5.~~ Conduct the hearing only and perform such other functions of the proceeding as requested, when an agency requests a hearing officer to preside only as a procedural hearing officer. If the hearing officer is presiding only as a procedural hearing officer, the agency head must be present at the hearing and the agency head shall make findings of fact and conclusions of law and issue a final order. The agency shall give proper notice as required by law. The procedural hearing officer may issue orders in regard to the conduct of the hearing pursuant to statute or rule and to otherwise effect an orderly and prompt disposition of the proceedings.

~~6.~~5. Make findings of fact and conclusions of law and issue a final order~~, if required by statute or requested by an agency~~.

~~7.~~6. Function only as a procedural hearing officer, when an agency requests a hearing officer to preside for a rulemaking hearing. The agency head need not be present. The agency shall give proper notice as required by law.

~~8.~~7. Perform any and all other functions required by law, assigned by the director of administrative hearings, or delegated to the hearing officer by the agency.

SECTION 3. AMENDMENT. Section 28-32-38 of the North Dakota Century Code is amended and reenacted as follows:

28-32-38. Separation of functions.

1. No person who has served as the agency head, investigator, prosecutor, or advocate in the investigatory or prehearing stage of an adjudicative 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 an adjudicative proceeding may serve as hearing officer.

3. Any other person may serve as hearing officer in an adjudicative proceeding, unless a party demonstrates grounds for disqualification.

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

SECTION 4. AMENDMENT. Section 28-32-39 of the North Dakota Century Code is amended and reenacted as follows:

28-32-39. Adjudicative proceedings - Findings of fact, conclusions of law, and order ~~of agency~~ - Notice.

1. In an adjudicative proceeding ~~an administrative agency~~a hearing officer shall make and state concisely and explicitly its findings of fact and its separate conclusions of law and the order ~~of the agency~~ based upon 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.~~ The ~~agency~~hearing officer shall serve a copy of the final order and the findings of fact and conclusions of law on which it is based upon all the parties to the proceeding within thirty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible, in the manner allowed for service under the North Dakota Rules of Civil Procedure.

~~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 recommended findings of fact and conclusions of law and a recommended order within thirty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible. The recommended findings of fact and conclusions of law and the recommended order become final unless specifically amended or rejected by the agency head. The agency head may adopt the recommended findings of fact and conclusions of law and the recommended order as final. 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. If a recommended order is issued, the agency must serve a copy of any final order issued and the findings of fact and conclusions of law on which it is based upon all the parties to the proceeding within sixty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible, in the manner allowed for service under the North Dakota Rules of Civil Procedure.~~

SECTION 5. AMENDMENT. Subsection 1 of section 28-32-42 of the North Dakota Century Code is amended and reenacted as follows:

1. Any party to any proceeding heard by an administrative agency, except when the order of the administrative agency is declared final by any other statute, may appeal from the order within thirty days after notice of the order has been given as required by section 28-32-39. ~~If a reconsideration has been requested as provided in section 28-32-40, the party may appeal within thirty days after notice of the final determination upon reconsideration has been given as required by sections 28-32-39 and~~

~~28-32-40. 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.~~

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

Judicial deference.

Notwithstanding any other provision of law, in interpreting or applying a state statute, regulation, or rule, an administrative law judge, judge, or hearing officer may not defer to a governmental entity's interpretation of the statute, regulation, or rule. If a rule is ambiguous, the administrative law judge, judge, or hearing officer shall resolve any ambiguity against the regulatory authority of the governmental entity.

SECTION 7. AMENDMENT. Section 38-19-08 of the North Dakota Century Code is amended and reenacted as follows:

38-19-08. Administrative procedure and judicial review.

Any proceedings under this chapter for the adoption or modification of rules or orders, including emergency orders relating to extraction of geothermal energy and determining compliance with rules of the commission, must be conducted in accordance with sections 38-08-11, 38-08-12~~, 38-08-13~~, and 38-08-14; and chapter 28-32 governs administrative practice when consistent with the provisions of this chapter and the above-referenced sections.

SECTION 8. AMENDMENT. Subsection 9 of section 50-24.4-01.1 of the North Dakota Century Code is amended and reenacted as follows:

9. The appeal determination under subsection 8 is the final administrative decision of the agency. That decision is subject to appeal to the district court~~, and for that purpose, the decision must be treated as a decision on a petition for rehearing made pursuant to section 28-32-40~~. Appeal to the district court must be taken in the manner required by section 28-32-42.

SECTION 9. AMENDMENT. Section 54-23.4-11 of the North Dakota Century Code is amended and reenacted as follows:

54-23.4-11. Attorney's fees.

~~The division shall determine and award reasonable attorney's fees, commensurate with services rendered, to be paid by the state to the attorney representing the claimant if the claimant prevails after a petition for reconsideration or rehearing under section 28-32-40 from an order reducing or denying crime victims compensation benefits.~~ A district court may award attorney's fees in an appeal pursuant to section 28-32-42 if the claimant prevails on appeal from an order reducing or denying benefits. Attorney's fees are allowable for settlement of a disputed claim. Attorney's fees are not allowable for assisting a claimant in filing a claim. An award of attorney's fees is in addition to an award of compensation. An award of attorney's fees may not exceed the lesser of twenty percent of the compensation awarded or one thousand dollars. No attorney may contract for or receive any larger sum than the amount allowed.

SECTION 10. REPEAL. Sections 28-32-40 and 38-08-13 of the North Dakota Century Code are repealed."

Renumber accordingly

23.1009.01004

Sixty-eighth
Legislative Assembly
of North Dakota

SENATE BILL NO. 2296

Introduced by

Senators Paulson, Larsen, Weston

Representatives Christensen, Satrom, Vetter

A BILL ~~for an Act to create and enact two new sections to chapter 28-32 of the North Dakota Century Code, relating to agency adjudications and judicial deference in administrative hearings.~~ for an Act to create and enact a new section to chapter 28-32 of the North Dakota Century Code, relating to judicial deference; to amend and reenact sections 23.1-01-11, 28-32-31, 28-32-38, and 28-32-39, subsection 1 of section 28-32-42, section 38-19-08, subsection 9 of section 50-24.4-01.1, and section 54-23.4-11 of the North Dakota Century Code, relating to appeals, reconsideration of agency orders, duties of administrative hearing officers, separation of functions for hearing officers, and adjudicative proceedings; and to repeal sections 28-32-40 and 38-08-13 of the North Dakota Century Code, relating to reconsideration of a final order by an agency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

~~**SECTION 1.** A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:~~

~~**Administrative hearings - Agency adjudications.**~~

~~Notwithstanding any other provision of law:~~

~~1. The administrative agency initiating a case may not supervise the administrative law judge's proceedings.~~

~~2. Except by proper evidence and legal argument, an administrative agency may not attempt to influence the findings of fact or the administrative law judge's application of the law in a contested matter.~~

~~3. Every decision made by an administrative law judge must contain findings of fact, conclusions of law, and a disposition of the case.~~

~~4. Unless a party files an appeal under section 28-32-42, every decision made by an administrative law judge is final.~~

~~**SECTION 2.** A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:~~

~~**Judicial deference.**~~

~~Notwithstanding any other provision of law:~~

~~1. When interpreting a statute, regulation, or regulatory document, an administrative law judge may not defer to an administrative agency's interpretation of a statute, regulation, or other regulatory document to determine the meaning.~~

~~2. In an action involving an administrative agency, the administrative law judge shall exercise doubt in favor of a reasonable interpretation that limits agency power and maximizes individual liberty.~~

SECTION 1. AMENDMENT. Section 23.1-01-11 of the North Dakota Century Code is amended and reenacted as follows:

23.1-01-11. Appeal from permit proceedings.

1. An appeal from the issuance, denial, modification, or revocation of a permit issued under chapter 23.1-03, 23.1-04, 23.1-06, 23.1-08, or 61-28 may be made by the person who filed the permit application, or by any person who is aggrieved by the permit application decision, provided that person participated in or provided comments during the hearing process for the permit application, modification, or revocation. An appeal must be taken within thirty days after the final permit application determination is mailed by first-class mail to the permit applicant and to any interested person who has requested a copy of the final permit determination during the permit hearing process. Except as provided in this section, an appeal of the final permit determination is governed by sections ~~28-32-40,~~ 28-32-42, 28-32-43, 28-32-44, 28-32-46, and 28-32-49. The department may substitute final permit conditions and written responses to public comments for findings of fact and conclusions of law. Except for a violation of chapter 23.1-03, 23.1-04, 23.1-06, 23.1-08, or 61-28 which occurs after the permit is issued, or any permit condition, rule, order, limitation, or other applicable requirement implementing those chapters which occurs after the permit is issued, any challenge to the department's issuance, modification, or revocation of the permit or permit conditions must be made in the permit hearing process and may not be raised on any collateral or subsequent legal proceeding, and the applicant and any aggrieved

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3. Assure that all hearings and related proceedings are conducted in a fair and impartial manner.
4. ~~Make recommended findings of fact and conclusions of law and issue a recommended order, when appropriate.~~
~~5.~~ Conduct the hearing only and perform such other functions of the proceeding as requested, when an agency requests a hearing officer to preside only as a procedural hearing officer. If the hearing officer is presiding only as a procedural hearing officer, the agency head must be present at the hearing and the agency head shall make findings of fact and conclusions of law and issue a final order. The agency shall give proper notice as required by law. The procedural hearing officer may issue orders in regard to the conduct of the hearing pursuant to statute or rule and to otherwise effect an orderly and prompt disposition of the proceedings.

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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.~~ The ~~agency~~hearing officer shall serve a copy of the final order and the findings of fact and conclusions of law on which it is based upon all the parties to the proceeding within thirty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible, in the manner allowed for service under the North Dakota Rules of Civil Procedure.
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 recommended findings of fact and conclusions of law and a recommended order within thirty days after the evidence has been received, briefs filed, and arguments~~

~~closed, or as soon thereafter as possible. The recommended findings of fact and conclusions of law and the recommended order become final unless specifically amended or rejected by the agency head. The agency head may adopt the recommended findings of fact and conclusions of law and the recommended order as final. 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. If a recommended order is issued, the agency must serve a copy of any final order issued and the findings of fact and conclusions of law on which it is based upon all the parties to the proceeding within sixty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible, in the manner allowed for service under the North Dakota Rules of Civil Procedure.~~

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1. Any party to any proceeding heard by an administrative agency, except when the order of the administrative agency is declared final by any other statute, may appeal from the order within thirty days after notice of the order has been given as required by section 28-32-39. ~~If a reconsideration has been requested as provided in section 28-32-40, the party may appeal within thirty days after notice of the final determination upon reconsideration has been given as required by sections 28-32-39 and 28-32-40. 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.~~

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

Judicial deference.

Notwithstanding any other provision of law, in interpreting or applying a state statute, regulation, or rule, an administrative law judge, judge, or hearing officer may not defer to a governmental entity's interpretation of the statute, regulation, or rule. If a rule is ambiguous, the

administrative law judge, judge, or hearing officer shall resolve any ambiguity against the regulatory authority of the governmental entity.

SECTION 7. AMENDMENT. Section 38-19-08 of the North Dakota Century Code is amended and reenacted as follows:

38-19-08. Administrative procedure and judicial review.

Any proceedings under this chapter for the adoption or modification of rules or orders, including emergency orders relating to extraction of geothermal energy and determining compliance with rules of the commission, must be conducted in accordance with sections 38-08-11, 38-08-12~~, 38-08-13~~, and 38-08-14; and chapter 28-32 governs administrative practice when consistent with the provisions of this chapter and the above-referenced sections.

SECTION 8. AMENDMENT. Subsection 9 of section 50-24.4-01.1 of the North Dakota Century Code is amended and reenacted as follows:

9. The appeal determination under subsection 8 is the final administrative decision of the agency. That decision is subject to appeal to the district court~~, and for that purpose, the decision must be treated as a decision on a petition for rehearing made pursuant to section 28-32-40~~. Appeal to the district court must be taken in the manner required by section 28-32-42.

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54-23.4-11. Attorney's fees.

~~The division shall determine and award reasonable attorney's fees, commensurate with services rendered, to be paid by the state to the attorney representing the claimant if the claimant prevails after a petition for reconsideration or rehearing under section 28-32-40 from an order reducing or denying crime victims compensation benefits.~~ A district court may award attorney's fees in an appeal pursuant to section 28-32-42 if the claimant prevails on appeal from an order reducing or denying benefits. Attorney's fees are allowable for settlement of a disputed claim. Attorney's fees are not allowable for assisting a claimant in filing a claim. An award of attorney's fees is in addition to an award of compensation. An award of attorney's fees may not exceed the lesser of twenty percent of the compensation awarded or one thousand dollars. No attorney may contract for or receive any larger sum than the amount allowed.

SECTION 10. REPEAL. Sections 28-32-40 and 38-08-13 of the North Dakota Century Code are repealed.

Dutchak, Dawson

From: Sickler, Jonathan
Sent: Wednesday, February 15, 2023 11:13 AM
To: NDLA, Intern 04 - Heier, Zak
Cc: Dutchak, Dawson; Paulson, Bob L.; Larson, Diane K.; Braunberger, Ryan; Myrdal, Janne; Luick, Larry E.; Estenson, Judy
Subject: 2296 amendment language

Replacement language for bottom of page 5 (line 30), top of page 6 (lines 1-2).

“After applying all customary tools of interpretation, the court shall resolve any remaining ambiguity against increased agency authority."

Senator Jonathan Sickler
District 17

23.1009.01005
Title.

Prepared by the Legislative Council staff for
Senator Paulson
February 17, 2023

PROPOSED AMENDMENTS TO SENATE BILL NO. 2296

Page 1, line 1, replace "two" with "a"

Page 1, line 1, replace "sections" with "section"

Page 1, line 2, replace "agency adjudications and" with "limiting"

Page 1, line 2, remove "in administrative"

Page 1, line 3, replace "hearings" with "to governmental entities; and to provide for a legislative management study"

Page 1, remove lines 5 through 17

Page 1, line 21, remove the underscored colon

Page 1, line 22, replace "1. When" with ", in"

Page 1, line 22, after "interpreting" insert "or applying"

Page 1, line 22, replace "regulatory document, an administrative law" with "rule, a"

Page 1, line 23, replace "an administrative agency's" with "a governmental entity's"

Page 1, line 23, replace "a" with "the"

Page 1, line 24, remove "other regulatory document to determine the meaning."

Page 2, remove lines 1 and 2

Page 2, line 3, replace "maximizes individual liberty" with "rule. After applying all customary rules of interpretation, the court shall resolve any remaining ambiguity against increased agency authority"

Page 2, after line 3, insert:

"**SECTION 2. LEGISLATIVE MANAGEMENT STUDY - AUTHORITY OF HEARING OFFICERS.** During the 2023-24 interim, the legislative management shall consider studying the impact of granting statutory authority under chapter 28-32 to a hearing officer, who may not be the agency head, to make findings of fact and conclusions of law, and issue orders. The study must include a review of chapter 28-32 and input from governmental entities and other interested parties. The legislative management shall report its findings and recommendations, together with any legislation necessary to implement the recommendations, to the sixty-ninth legislative assembly."

Renumber accordingly

23.1009.01005

Sixty-eighth
Legislative Assembly
of North Dakota

SENATE BILL NO. 2296

Introduced by

Senators Paulson, Larsen, Weston

Representatives Christensen, Satrom, Vetter

A BILL for an Act to create and enact ~~two~~a new ~~sections~~section to chapter 28-32 of the North Dakota Century Code, relating to ~~agency adjudications and~~ limiting judicial deference ~~in administrative hearings~~to governmental entities; and to provide for a legislative management study.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

~~**SECTION 1.** A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:~~

~~**Administrative hearings - Agency adjudications.**~~

~~Notwithstanding any other provision of law:~~

~~1. The administrative agency initiating a case may not supervise the administrative law judge's proceedings.~~

~~2. Except by proper evidence and legal argument, an administrative agency may not attempt to influence the findings of fact or the administrative law judge's application of the law in a contested matter.~~

~~3. Every decision made by an administrative law judge must contain findings of fact, conclusions of law, and a disposition of the case.~~

~~4. Unless a party files an appeal under section 28-32-42, every decision made by an administrative law judge is final.~~

SECTION 1. A new section to chapter 28-32 of the North Dakota Century Code is created and enacted as follows:

Judicial deference.

Notwithstanding any other provision of law~~:~~

~~1. When~~, in interpreting or applying a statute, regulation, or ~~regulatory document, an administrative law~~rule, a judge may not defer to ~~an administrative agency's~~a

governmental entity's interpretation of ~~a~~the statute, regulation, or ~~other regulatory document to determine the meaning.~~

~~2. In an action involving an administrative agency, the administrative law judge shall exercise doubt in favor of a reasonable interpretation that limits agency power and maximizes individual liberty~~rule. After applying all customary rules of interpretation, the court shall resolve any remaining ambiguity against increased agency authority.

SECTION 2. LEGISLATIVE MANAGEMENT STUDY - AUTHORITY OF HEARING OFFICERS. During the 2023-24 interim, the legislative management shall consider studying the impact of granting statutory authority under chapter 28-32 to a hearing officer, who may not be the agency head, to make findings of fact and conclusions of law, and issue orders. The study must include a review of chapter 28-32 and input from governmental entities and other interested parties. The legislative management shall report its findings and recommendations, together with any legislation necessary to implement the recommendations, to the sixty-ninth legislative assembly.

Lynn D. Helms

Director, North Dakota Industrial Commission Department of Mineral Resources

February 6, 2023

Senate Judiciary Committee

SENATE BILL NO. 2296

Concerns with amended version

"Notwithstanding any other provision of law, in interpreting or applying a state statute, regulation, or rule, an administrative law judge, judge, or hearing officer may not defer to a governmental entity's interpretation of the statute, regulation, or rule. After applying all customary tools of interpretation, the Court shall resolve any remaining ambiguity against increased agency authority."

Industrial Commission Cases Information

a. Since November 2021, NDIC has served 10 Complaints that initiated OAH proceedings.
    i. Of those 10 Complaints:
        - 5 were settled prior to going to hearing. (1 settled even before we sent out an OAH request)
        - 1 was issued a default judgment.
        - 4 are ongoing.
        - Only one case went to an OAH hearing during this time.

b. Proposed language is expected to increase the number of cases going to OAH.
    1. Fewer complaints would be settled before going to hearing.
    2. Fewer Complaints would be manageable at any given time.
    3. Bad actors may be less likely to be pursued due to resource constraints.
    4. Fewer resources can be allocated to pursuing other claims like reclamation costs and other major cases.

c. Administrative Law Judge may not defer to agency's interpretation of statute, regulation, or regulatory document.
    1. Agency has subject matter expertise and provides better consistency across all cases.
    2. Defeats purpose of having the agency providing expertise and knowledge through sworn testimony in its determinations.
    3. OAH would no longer be useful for agency determinations. Cases might as well be adjudicated through agency examiner hearings and commission orders with appeals going straight to a District Court. District Courts would not have the sworn expert testimony of agency subject matter experts as a part of the order.

d. Proving any ambiguity in any statute, regulation, or rule would likely result in a presumption against the agency.
    i. The last line appears to be an attempt to codify the "major questions doctrine", but instead of being limited to circumstances that would cause significant expansion of agency authority, this would apply to every single ambiguity, and always cuts against the agency as a matter of law, even for minor issues.

e. Enables bad actors to win cases by finding an ambiguity.
    i. Blue Appaloosa example:
        - What happens if an individual violates a rule, but just argues the circumstances are ambiguous?
        - In Blue Appaloosa, the Commission sought penalties from an individual who commenced construction of a treating plant in North Dakota without obtaining a permit.
        - That case hinged on whether dirt work being done could be considered to have been beginning construction of a treating plant.
        - The Commission had Mark Bohrer testify regarding the agency interpretation of N.D. Admin. Code § 43-02-03-15(6) and §43-02-03-51.3(1) to explain what the Commission considers to be "commencement of operations".
        - Under this bill, the ALJ would be required to find that any ambiguity must be determined against "increased" Commission authority.
            i. Even though there was evidence that the dirt work was for the purpose of constructing a treating plant, this bill would almost certainly result in a decision that the dirt work without a permit did not fall under Commission jurisdiction due to ambiguity.
        - The NDIC issued an order that simply reformatted the OAH order.
        - The NDIC order was appealed and affirmed in District Court.
        - The District Court's affirmation was then appealed and upheld by the Supreme Court.

Testimony
Senate Bill 2296 – Department of Water Resources
House Government and Veterans Affairs Committee
Representative Austen Schauer, Chairman
March 16, 2023

Chairman Schauer, and members of the House Government and Veterans Affairs Committee – I am John Paczkowski, State Engineer at the Department of Water Resources (Department). I am submitting testimony to oppose Senate Bill 2296, which proposes that administrative law judges may not defer to an agency's interpretation of its own statutes and regulations and that ambiguities be resolved against increased agency authority.

The Department uses the Office of Administrative Hearings (OAH) for appeals of Department decisions pursuant to section 61-03-22 and drainage appeals from water resource boards under chapter 61-32. In other matters, the Department is generally exempt from using OAH.

Under section 61-03-22, the Department has typically granted hearing requests and proceeded through the administrative hearing process since it is easier, less expensive, and less intimidating for the appellant to be able to "tell their side of the story." It also gives the Department another chance to reconsider its decision prior to going to district court. However, the Department does have the option to deny a hearing request, and force the appellant to proceed directly to district court. If SB 2296 passes as it is currently written, the Department would be less likely to grant administrative hearings and would instead proceed straight to district court. District court, under its own authority through judicial precedent, is required to grant the Department deference, particularly in technical matters.

Regarding drainage appeals under chapter 61-32, a little background is necessary. Under this chapter, a person may file a drainage complaint about unauthorized drainage with the local water resource board (board). The board is required to do an investigation and make a determination. The board's decision may be appealed to

the Department. The Department then conducts its own investigation and makes a determination about the board's decision. A person aggrieved by the Department's decision can then appeal, and that appeal is required to go through OAH.

In drainage complaints, the Department steps into the shoes of whichever individual it has determined to be "in the right". Besides defending proper hydrology and water management decisions, the Department has no vested interest in the outcome of these drainage complaints. Removing deference to agency interpretation in cases such as this punishes the individual that the Department has determined to be "in the right" based on technical expertise.

For example, if Landowner A constructs an allegedly unauthorized drain and starts draining water onto Landowner B's property, Landowner B may file a drainage complaint with the local water resource board. The board will make its decision. In this example, Landowner A wins and the board finds he hasn't been illegally draining. Landowner B is still unhappy, so he appeals to the Department. The Department may determine Landowner A didn't do anything wrong – perhaps he is just the victim of a harassing neighbor, which is not an uncommon situation with these sorts of complaints. Landowner B is still unhappy, so he appeals the Department's decision to OAH. If this bill were to pass, suddenly the balance has shifted in favor of Landowner B, as the administrative law judge is no longer able to defer to the Department's expertise or interpretation of its statutes and regulations involving technical issues like hydrology, watershed calculations, or even if a drain has been constructed. Despite having done nothing wrong, and that opinion being supported by investigations from both the local board and the Department, Landowner A would now be punished simply because the Department determined he was in the right.

Further, the bill would essentially put the administrative law judge in charge of making technical determinations about issues like hydrology and watershed acreage

calculations because he would no longer be allowed to defer to the Department’s technical expertise.

Thank you for the opportunity to comment and I'm happy to answer any questions.

PACIFIC LEGAL FOUNDATION

Testimony of Daniel Dew, Pacific Legal Foundation, on SB 2296
North Dakota House Committee on Government and Veterans Affairs
March 16, 2023

Chair Schauer, members of the House Committee on Government and Veterans Affairs:

My name is Daniel Dew and I am the legal policy director at Pacific Legal Foundation. PLF is a nonprofit law firm whose mission is to protect individual liberty from government overreach. We were organized 50 years ago by staffers in then-Governor Ronald Reagan's office. We had our thirteenth and fourteenth wins at the Supreme Court of the United States last term and we have three cases pending before the Court this term.

One of our primary concerns is the constitutional separation of powers. As the late Justice Antonin Scalia has noted, while the Bill of Rights gets a lot of the credit for protecting our liberty, it would not be worth the paper it is written on without a meaningful separation of powers.

One of the ways the separation of powers is eroding is due to judicial deference or bias doctrines. Deference doctrines, like many of our country's problems, originated in Washington, D.C. and have crept into state government.

In our constitutional form of government, the legislature makes the laws, the executive branch executes the laws, and the judiciary interprets the laws when there is a case or controversy. But the growth of the administrative state has put more and more power into the hands of executive agencies. Legislatures have delegated lawmaking authority to unelected bureaucrats through rulemaking authority. Those same bureaucrats are charged with enforcing the very regulations they wrote. They also get the first crack at the judicial authority through in-house administrative hearings. And then if the agency decision is appealed to a court of law, deference doctrines instruct courts to use the agency's interpretation of the law even if it isn't the best interpretation.

When Americans walk into a courthouse, they are often greeted by a depiction of Lady Justice, who is blindfolded and holding the scales of justice. Lady Justice signals to all who enter that they will be treated fairly on their day in court and the law is no respecter of persons. But deference instructs courts to peak from their blindfold and place a thumb on the scale of justice in favor of the government.

North Dakota courts have been inconsistent in applying deference. One North Dakota Supreme Court case held that courts will give "appreciable deference" to agencies on matters of expertise. This reform would provide consistency. And while the agencies

are experts in their highly technical areas, the courts are experts in interpreting law. This is not a responsibility they should hand over to agencies.

SB 2296 is a simple, two sentence reform. It calls for courts to review laws and regulations *de novo*—meaning anew or without bias. The legislature has already instructed courts to review different matters *de novo* dozens of times in North Dakota law. This will put the government and North Dakotans on equal footing in the courts. That does not mean that the court doesn't listen to the agencies. It just means that the agency has the burden to persuade the court like any other party before it.

The second sentence brings administrative law in line with every other area of law, going back hundreds of years. In the criminal context we have the rule of lenity, which instructs courts to rule in favor of the defendant if there is an ambiguous criminal law. We don't want to put someone in prison for violating a law when a reasonable person could not fully grasp its meaning. In contracts law, we interpret ambiguous provisions against the drafter of the contract to encourage clear drafting.

The second sentence of this reform would, after using all the normal canons of construction, resolve any ambiguities against government authority. This accomplishes two purposes: We don't want to punish people or businesses because they failed to comply with a law or regulation that is ambiguous, and we want to encourage those who write laws and regulations to write clearly to put people on notice of what the law requires or prohibits.

Tennessee enacted a law nearly identical to SB 2296 last year, joining 11 states that have rejected deference. In speaking to a group of lawyers, the Tennessee Attorney General said that the law was changing the way regulators drafted regulations because they knew they would no longer get the unjustifiable benefit of the doubt in court when it comes to aggressive interpretation or sloppy drafting. The law didn't change agency authority, it just incentivizes agencies to be better about putting the public on proper notice through clearer regulations.

In the Senate, testimony from North Dakota Health and Human Services opposed the bill in part because, "the Department will need an additional full-time equivalent position for an attorney as it will need to greatly expand administrative rules and proposed legislation to make sure the Department's intent and interpretation is clear." It is shocking that an agency with such broad authority to write regulations with the effect of law is not already doing this.

Testimony from the North Dakota State Board of Pharmacy opposed the bill because, "the Judge is likely not to have the expertise or understanding of the standard of care that may be applied in a particular matter and not have a way to meaningfully

determine that from the appointed members or staff on the Board." In other words, the Board wants to hold people accountable for violating regulations that, in their opinion, are so technical and ambiguous that North Dakota judges could not be trusted to interpret them, even after proper briefing.

There is a lot of talk from the opposition about the need to quickly resolve matters, but it always seems to be how quickly it can be resolved in favor of the government. Obviously agencies believe their interpretations to always be correct and therefore, in their view, the faster the court comes to that conclusion the better. But courts must not be rubber stamps for executive agencies.

SB 2296 would elevate the courts to their proper function to say what the law is and give North Dakota residents and businesses the fair day in court that the constitution promises them.

I'm happy to answer any questions the committee may have.

Respectfully submitted,

DANIEL J. DEW
Legal Policy Director
Pacific Legal Foundation

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STATE BOARD OF PHARMACY

State of North Dakota
Doug Burgum, Governor

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Mark J. Hardy, PharmD
Executive Director

Senate Bill No 2296 – Agency Adjudications
House Government and Veterans Affairs
9:00 AM - Thursday – March 16, 2023 – Pioneer Room

Chair Schauer, Members of the House Government and Veterans Affairs for the record I am Mark Hardy, Executive Director of the North Dakota State Board of Pharmacy. Thank you for the opportunity to testify on this important legislation.

Our office does have concerns with Section 1 of this Bill and the impacts it may have on our Board. I will admit that it is rare that the Board of Pharmacy has administrative hearings on complaints and most often can resolve them through an agreed upon stipulation with the parties involved. In that spirit, the existing law has functioned very well.

This may lead to more administrative hearings, given the provisions would change the parameters involved in those hearings. Specifically, this legislation would not allow the Board of Pharmacy to assist a judge in interpreting the proper statute or regulation involved. An increase in these hearings would come at a higher cost to all parties involved.

Another situational consequence that we see this legislation creating is judges being stricter than the administrative agency on a particular case. The Judge is likely not to have the expertise or understanding of the standard of care that may be applied in a particular matter and not have a way to meaningfully determine that from the appointed members or staff on the Board. It is important to note that any ruling of an administrative hearing can be appealed to a higher level for consideration.

We have no concerns with a study, which was added to the bill by the Senate. We see this as a meaningful way to examine the concerns we have with Section 1 of this bill.

We appreciate the opportunity to testify on this legislation and provide our concerns with the changes set forward in Senate Bill 2296.

I'd be happy to answer any questions.

2023 Engrossed SB No. 2296
House Government and Veterans Affairs Committee
Testimony of Art Thompson, Director
Workforce Safety and Insurance
March 16, 2023

Mr. Chairman and Members of the House Government and Veterans Affairs Committee:

On behalf of the Workforce Safety and Insurance Board of Directors (WSI), I appear today to oppose Engrossed Senate Bill No. 2296. The Board's opposition to this bill is its potential to frustrate the administrative appeal process, create inconsistent decisions, increase appeals, and ultimately increase costs for all participants.

WSI, employers, and injured employees subject to North Dakota workers' compensation laws participate in the administrative hearing process on a consistent basis to resolve disputes. In fiscal year 2022, WSI referred 140 requests for administrative hearing services to the Office of Administrative Hearings (OAH). Ultimately, 94 administrative hearings were completed. Under existing law, all decisions issued by administrative law judges (ALJ's) in WSI matters are final decisions. In other words, WSI cannot modify an ALJ's decision like other agencies.

WSI submits the administrative appeal process generally works well. This long-standing appeal process includes laws and procedures that are generally known by the legal professionals who practice in this area. There is also established case law to guide decision making. Interestingly, the proposed legislation does not address a systemic issue identified within the administrative appeal process utilized by administrative agencies. Rather, it is the sudden imposition of a new standard that has limited understanding and application.

The North Dakota Supreme Court has long held an administrative agency's interpretation of a statute is entitled to some deference. The Court has done so for good reason. Agencies apply the law on a daily basis and agency personnel have developed expertise on how the law is consistently applied to various situations. This expertise is especially critical in specialized, technical areas like workers' compensation insurance law. Deference to an agency's reasonable interpretation of a statute to accomplish its functions is logical to ensure consistent and predictable application of the law.

Under this bill, judicial deference will not be allowed by a judge in appeals that proceed beyond the administrative hearing level. Only 0.6% of all decisions issued by WSI resulted in advancement to an administrative hearing (fiscal year 2022). WSI litigation rates are one of the lowest in the nation. WSI fears this inconsistent standard will incentivize appeals by parties who seek to have the law reviewed under a more favorable standard, increasing costs to all parties.

Furthermore, it is unclear what this standard means and how the proposed language will be applied to appeals in WSI matters. It appears WSI could be interpreting a statute, regulation, or rule reasonably, but if the judge ultimately is required to interpret the law "against increased agency authority", WSI's reasonable interpretation could be rejected. This unprecedented language may further result in unpredictable and inconsistent rulings on appeal—awarding benefits when they are not intended, and not awarding benefits when they are intended.

As a result, the WSI Board of Directors requests a “Do Not Pass” recommendation on Engrossed SB 2296. This concludes my testimony and I would be happy to answer any questions you may have at this time.

SB 2296
House Government & Veterans Affairs Committee
Testimony of
ND Board of Nursing

Chair Schauer and members of the Committee. I am Dr. Stacey Pfenning, Executive Director of the North Dakota Board of Nursing ("Board").

I am here to provide testimony opposing **SB 2296** as this bill seeks to detract from the fundamental basis underlying the administrative agencies practices act, and to take decision making away from members of the profession.

The administrative agencies practices act, which is codified in Chapter 28-32 of the North Dakota Century Code, is based upon an understanding that administrative agencies are in the best position to make determinations about the professions they govern, and that members of a profession are best able to govern their own profession.

The North Dakota Supreme Court has confirmed on numerous occasions that the boards of administrative agencies, such as the Board of Nursing, generally consist of members of the profession being governed, and therefore have specific knowledge and experience regarding the matters that come before the board, specifically including issues raised in disciplinary proceedings before the Board.

Upon review by staff and legal counsel, the following are concerns of the Board with the proposed two sections of **SB 2296**.

Section 1. Judicial deference.

The proposed language on Page 1, Lines 8 through 10, would be a change to the current process established by the administrative agencies practices act, and confirmed by the North Dakota Supreme Court.

- The Board of Nursing, which is made up of eight nurses and one non-nursing public member, is entrusted by the Nurse Practices Act to regulate the profession of nursing in North Dakota. Given the backgrounds of the members of the Board of Nursing, which includes advanced practice registered nurses, registered nurses and licensed practical nurses, the Board should be regarded as an expert in nursing matters, and its interpretations and application of nursing laws, regulations and standards should be given deference, particularly by administrative law judges and other persons who do not have similar education, training and experience in nursing matters.
- The proposed language **lines 8 through 10** seeks to minimize the knowledge and expertise of boards which are made up of members of the profession at issue and are already entrusted to regulate that profession.
- In order to preserve the use of a board's knowledge and expertise, Chapter 28-32 should not be changed as proposed in **lines 8 through 10**
- With the proposed changes to **SB 2296**, if the Board of Nursing elects to have an administrative law judge conduct a disciplinary hearing, the Board will need to hope that the administrative law judge, without any nursing education, training and experience, is able to apply all of the laws, regulations and standards of practice to the issue at hand, because **SB 2296** seeks to take away the Board's ability to make sure that such laws, regulations and standards are correctly applied.

SB 2296
House Government & Veterans Affairs Committee
Testimony of
ND Board of Nursing

The proposed language on Page 1, Lines 10 through 11, would require an administrative law judge to resolve any doubt regarding a nursing issue in a manner that maximizes the individual liberty of the nurse and that limits an administrative agency's power.

- Such interpretation would be contrary to the basic premise of the Nurse Practice Act, and that of the practice acts of most other professions, which is to protect the public.
- The decision-making of the Board of Nursing, and that of any administrative law judge conducting a hearing on behalf of the Board, should be to resolve doubt in a manner that best protects the safety of the public.
- It would be in the public's best interest not to change Chapter 28-32 as proposed in **lines 10 through 11.**

Section 2. Legislative Management Study

The proposed language on Page 1, lines 13 through 17, would require legislative management to consider studying the administrative agencies practices act, including the authority of administrative agencies to appoint hearing officers to make recommended findings of fact and conclusions of law and to issue orders. Such study is unnecessary, as the administrative agencies practices act already contains an effective procedure for handling administrative actions.

- Currently, a board can request an administrative law judge to handle a disciplinary hearing and to then make recommended findings, conclusions, and orders. Although it could conduct its own hearings, the Board of Nursing in particular utilizes the provisions of the administrative agency's practices act allowing it to have an administrative law judge conduct hearings. This allows the hearing to be conducted by an impartial third party, but further allows the Board of Nursing to make sure that the recommended findings, conclusions and order of the administrative law judge are consistent with the laws, rules and standards applicable to the practice of nursing.
- Importantly, Chapter 28-32 already allows participants in the hearing to appeal a board's final decision to the District Court. As a result, under its current provisions, Chapter 28-32 allows the members of a profession to govern themselves and to apply their specialized knowledge and experience to make sure that findings, conclusions, and orders issued in disciplinary matters are consistent with all standards applicable to the profession, while at the same time preserving the right of hearing participants to appeal such findings, conclusions and orders to the District Court. There is no need to change Chapter 28-32 as proposed in **SB 2296** or otherwise.
- Historically, the Board of Nursing has worked diligently to negotiate settlements that are agreeable to both the Board and the nurse facing disciplinary action. A hearing is pursued as a last resort, when all efforts to negotiate a settlement have been exhausted.

SB 2296
House Government & Veterans Affairs Committee
Testimony of
ND Board of Nursing

Thank you for the opportunity to share the Board's concerns. I am happy to answer any questions the committee may have.

Dr. Stacey Pfenning DNP APRN FNP FAANP
Executive Director, NDBON
701-527-6761
spfenning@ndbon.org

(Committee members: Chairman, Rep. Austen Schauer; **Vice Chairman, Rep. Bernie Satrom**; Rep. Landon Bahl; Rep. Claire Cory; Rep. Jeff Hoverson; Rep. Jorin Johnson; Rep. Karen Karls; Rep. Scott Louser; Rep. Carrie McLeod; Rep. Karen Rohr; Rep. Mary Schneider; Rep. Vicky Steiner; **Rep. Steve Vetter**)

Bill introduced by **Sen. Bob Paulson,** (Vice Chair Judiciary Committee), **Rep. Cole Christensen** (Member Judiciary & Transportation Committees), **Sen. Doug Larsen** (Chair Industry & Business Committee), **Rep. Bernie Satrom** (Vice Chair Government & Veterans Affairs Committee), **Rep. Steve Vetter** (Member Judiciary & Government & Veterans Affairs Committees) and **Sen. Kent Weston** (Member Human Services & Agriculture & Veterans Affairs Committees)

NORTH Dakota Be Legendary.™ | Environmental Quality

Testimony in Opposition to
Senate Bill No. 2296
House Government and Veterans Affairs Committee
March 16, 2023

TESTIMONY OF
David Glatt, Director of North Dakota Department of Environmental Quality

Good morning Chairman Schauer and members of the House Government and Veterans Affairs Committee. My name is David Glatt, and I am the Director of the North Dakota Department of Environmental Quality. I am here to testify in opposition to SB 2296.

The DEQ is the state's primary environmental agency, ensuring North Dakotans have clean air, drinkable water, and livable land. DEQ implements state programs and, through Primacy Agreements with the US EPA, is responsible for implementing many federal environmental protection programs. This federal-state partnership, known as "cooperative federalism," was adopted by the US Congress because it recognized that states were in a better position to implement federal regulations at the state level due to their in-depth knowledge of their unique environmental, cultural, and economic circumstances.

Environmental laws are often complex, especially federal laws, which can be over 1,000 pages, covering highly technical engineering and scientific concepts. DEQ staff, including engineers, hydrologists, chemists, biologists, and other scientists – are experienced in interpreting and applying these laws in a scientifically sound and common-sense way. It is critical that judges are able to give DEQ deference, when appropriate, if these laws become an issue in a court case. This does not mean that judges should indiscriminately accept whatever DEQ says. But if DEQ is able to show a judge that it is reasonably applying a law with a sound scientific basis, the judge should be able to rely on DEQ's technical expertise.

Prohibiting judges from deferring to DEQ experts would harm the state's environment and economy. Because judges wouldn't be able to look to DEQ – which seeks to act in the best interests of the state – judges would instead have to be guided by polluters, special interest groups, and the US EPA. Although this bill could impact nearly every decision DEQ makes, I will focus on four areas of concern.

First, this bill would hamstring DEQ's ability to enforce environmental laws. Judges would not be able to defer to DEQ's interpretation and could look to the polluters' interpretations for compliance requirements, appropriate penalties, and cleanup. This would harm our citizens and put reputable companies who seek to comply with environmental laws at a competitive disadvantage. If DEQ is unable enforce these laws effectively, the US EPA may decide to take over environmental enforcement in the state.

Second, this bill would lead to an increase in citizen suits. Citizen suits are where an individual or special interest group can step into the shoes of DEQ and enforce the states' environmental laws. DEQ can intervene in these suits. But, with this bill, all the deference would go to the individual or special interest groups and not DEQ. As a result, North Dakota would become an attractive location for environmental litigation by these groups.

Third, this bill would cripple DEQ's ability to issue permits. There have been several instances of environmental permits being challenged by neighbors or special interest groups, but the permitting decision has been affirmed by the courts, relying on DEQ's technical expertise. These include the Devil's Lake Outlet, a large hog operation, and a refinery. DEQ staff spend thousands of hours reviewing and drafting complex permits and it makes sense to allow a judge to defer to DEQ where DEQ can justify its interpretation and application of the law. In some cases, permit opponents have retained their own experts – often from outside the state with no knowledge of the unique circumstances that exist in North Dakota. Under this bill, these hired, out-of-state experts could be relied on by a judge but DEQ's experts could not. This would result in poor decision-making and uncertainty, making North Dakota a less attractive option for new projects.

Fourth, this bill would tip the scales in favor of the US EPA on issues where it disagrees with a state decision. Sometimes, the US EPA and DEQ have different interpretations of environmental laws. If these differences can't be resolved, the issue ends up in federal court. A federal judge then must decide if they should defer to the US EPA or DEQ. It will be difficult – if not impossible – to convince a federal judge to defer to DEQ when our state courts aren't even allowed to do so. Examples of situations where this could arise are state air quality plans, such as Regional Haze and the Clean Power Plan; state environmental program delegations; complex permitting decisions; and federal enforcement cases.

There are many more examples of program interpretation, permit decisions, and implementation expertise I could provide that highlight the importance of courts giving deference to state experience and knowledge. The Legislature should want judges to defer to DEQ where DEQ has provided justification for doing so. The alternative is that judges – who generally do not have technical backgrounds – will have to rely on parties seeking to advance their own agendas, and not North Dakota's.

I am aware of possible amendments to this bill. None of the amendments I have reviewed would address these concerns.

I request that this committee vote to reject SB 2296. The unintended consequences of this legislation could be extremely detrimental to the State of North Dakota.
This concludes my testimony, and I will stand for questions.

NORTH Dakota | Financial Institutions
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MEMORANDUM

DATE: March 16, 2023
TO: House Government and Veterans Affairs Committee
FROM: Lise Kruse, Commissioner, Chair of the State Banking Board and State Credit Union Board
SUBJECT: Testimony in Opposition of Senate Bill No. 2296

Chair Schauer and members of the House Government and Veterans Affairs Committee, thank you for the opportunity to provide this testimony on Senate Bill No. 2296.

The Department of Financial Institutions is tasked with the oversight of banks, credit unions and several nonbank entities that provide financial services in North Dakota. The non-depository institutions include trust companies, collection agencies, payday lenders, money transmitters, debt settlement service providers, and all nonbank lenders (money brokers), and mortgage loan originators.

Our department was established in 1887, two years prior to statehood. The reason was to protect citizens from being taken advantage of financially. My predecessor in 1914 talked about the harm to the "savings of children and hard-working people". Over the 130 years of the department's history, unfortunately not much has changed. We are here to protect our citizens from becoming victims of financial fraud.

Financial fraud and scams have increased significantly in recent years. For example, financial exploitation of our elderly citizens is far too common with a national conservative estimate of 1 in 5 being victims with an average loss of $120,000 a person. Our legislators have passed numerous laws to make sure our department and the State Banking and Credit Union Boards have the ability to protect our citizens. We are here to

protect the rights of North Dakota depositors, borrowers, customers, and shareholders. When money is stolen from North Dakota citizens – our friends, families, and neighbors – our department and the Boards need to have the ability to step in. We need to remove bad actors from the financial industry, and defend our citizens and enforce the laws passed by our legislature to the fullest extent.

Unfortunately, Senate Bill No. 2296 would make it difficult for us to enforce the laws our legislature has put in place to protect our citizens from financial fraud. It appears that this Bill would give the bad actors a legal advantage when we make an effort to enforce laws applicable to the financial services industry. Our department, the State Banking Board, and the State Credit Union Board, each made up of industry professionals, must from time to time interpret facts which are specific to their industries. Banking law and financial regulations can be complex, and it is in everyone's best interest that these are applied fairly and consistently by industry experts. Since banking products are constantly evolving, we make informed decisions on an existing law's applicability to new products and services. If a consumer is harmed, and we are there to help a victim of financial fraud, we would lose if a judge interprets this law to say our current practice is an increase in authority. We would constantly play catch up, legislating each new industry product, with all its variations, into existing law every two years.

If we are unable to help our citizens, their only option is to seek help from the federal government. Our department has long fought against federal pre-emption, since we believe in state's rights. Also, this law would not restrict the federal government, which puts the state at a disadvantage when working for our citizens.

A couple of years ago, we were made aware of an individual attempting to send money to his family overseas. Small claims court ruled that the money never arrived. We were not aware of our out-of-state licensed entity providing services at this location – it was unregistered. In our investigation, we identified numerous violations of law and revoked the license. This has been challenged in court and is still ongoing. With the passage of this Bill, I am concerned that when we are protecting customers from financial fraud, we will lose due to a technicality in law that somehow considers it ambiguous or that we somehow increased our authority.

Although we all favor individual liberty and freedom, this Bill tries to achieve this at the victims' expense. The Bill instructs a judge to exercise doubt in favor of the individual, which in our case is often sizable out-of-state corporations with talented legal teams. Our department is here to step in to enforce laws to protect the public from bad actors. We are acting on behalf of citizens, enforcing laws passed by this legislative body. This Bill tips the legal scale in favor of bad actors at the expense of honest North Dakota citizens, therefore, we respectfully oppose Senate Bill No. 2296.

HOUSE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE
MARCH 16, 2023

TESTIMONY OF CLAIRE NESS
OFFICE OF ATTORNEY GENERAL
SENATE BILL NO. 2296

Chairman Schauer and members of the Committee:

My name is Claire Ness, Chief Deputy Attorney General, and I appear on behalf of the Attorney General in opposition to Senate Bill 2296. Because deference to administrative agencies is a constitutional doctrine established by our courts and rooted in the separation of powers doctrine that sustains our governmental checks and balances, the Office of Attorney General recommends a do not pass on Senate Bill 2296.

Deference is a Judicial Doctrine Based on the Courts' Interpretation of the Constitution.

The Supreme Court of North Dakota established our state courts' doctrine of limited deference to administrative agencies. This deference doctrine arises from a judicial interpretation of our constitution, particularly the separation of powers among the three branches of government. As recently as 2020, the North Dakota Supreme Court reiterated:

> "We have consistently held our review of an agency's decision involving the exercise of its discretion is limited under the separation of powers doctrine"[1] and "[t]he deferential standard of review for an agency's findings of fact, conclusions of law and decision is anchored in the separation of powers doctrine."[2]

Since at least 1803, constitutional interpretations, such as the court's deference doctrine, have been indisputably within the judicial branch's authority. Legislation requiring the courts to

[1] E.g., Nat'l Parks Conservation Ass'n v. N. D. Dep't of Env't Quality, 2020 ND 145 ¶ 15, 945 N.W.2d 318 (emphasis added).
[2] E.g., Jundt v. N.D. Dep't of Transp., 2020 ND 232, ¶ 4, 951, N.W.2d 243, (internal citations omitted) (emphasis added).

abandon this constitutionally based doctrine triggers concerns under the separation of powers doctrine because the legislation would curtail judicial authority to interpret the constitution.

There has been informal discussion of a few other states' recent attempts to inhibit judicial deference. However, most of those actions have been taken by the courts, not the legislatures, or have resulted from state constitutional amendments. The other few have been narrowly tailored or have not yet been subjected to judicial scrutiny for constitutionality.[3] Additionally, at least one court continued to defer to agency findings of fact regardless of the state statutory language attempting to prevent courts from granting deference.[4] Litigation regarding state legislatures' authority to limit courts' constitutional interpretations and thereby eliminate the deference doctrine may reasonably be anticipated.

Legislative and Judicial Checks on North Dakota Executive Agencies' Actions

There are multiple legislative and judicial checks to ensure North Dakota state agencies do not exceed their legislatively granted authority. First, the Legislative Assembly decides how much authority to grant agencies, so the authority for agencies to make rules and adjudicate appeals is controlled by the Legislative Assembly. Moreover, every agency rule is reviewed by the Legislative Assembly's Administrative Rules Committee after being scrutinized by the Office of Attorney General for compliance with legislative language and other legal criteria. The Administrative Rules Committee can void or otherwise dispose of agencies' proposed rules, for example, if the rules exceed an agency's lawful authority.

Second, our state courts do not defer to agency interpretations that are contrary to legislative enactments.

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[3] E.g., San Carlos Apache Tribe v. State, 520 P.3d 670 (Ariz. Ct. App. 2022) (declining to decide whether the new statute is constitutional because the question was not necessary for the appeal.)

[4] E.g., Pourshirazi v. Arizona State Board of Dental Examiners, No. 1 CA-CV-220351, 2023 WL 1113525, *1, ("We defer to the Board's factual findings if supported by substantial evidence and consider the evidence in the light most favorable to upholding the final decision.").

> "Although an administrative construction of a statute by the agency administering the law is ordinarily entitled to some deference if that interpretation does not contradict clear and unambiguous statutory language, questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative decision."[5]
>
> "We will ordinarily defer to a reasonable interpretation of a statute by the agency enforcing it, but an interpretation which contradicts clear and unambiguous statutory language is not reasonable."[6]

Courts do not defer to agency actions or rules in a vacuum. Our constitutional balance of powers limits state agencies to the authority granted to them by the constitution or the Legislative Assembly, and courts enforce that limitation on executive power. When agencies step outside those bounds, their decisions and interpretations are not granted deference.

Lack of Impact on *Chevron* Deference

In previous hearings, concerns were raised about deference to federal agencies under a long line of United States Supreme Court cases beginning with Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.[7] These cases concern the **federal** deference doctrine known as "*Chevron* deference." North Dakota courts' deference doctrine is not *Chevron* deference. When our state Supreme Court held that deference to administrative agencies was constitutionally required, it was interpreting and referring to our state constitution. *Chevron* deference instead relies on the federal constitution. Comments in hearings indicate that some believe *Chevron* deference will be overturned by this bill. However, state legislatures are unable to override United States Supreme Court holdings, such as the one that established *Chevron* deference.

Fiscal Impacts

[5] Victor v. Workforce Safety & Ins., 2006 ND 68, ¶ 12, 711 N.W.2d 188, 192 (N.D. 2006) (quoting Houn v. Workforce Safety & Ins., 2005 ND 115, ¶ 4, 698 N.W.2d 271).
[6] GO Comm. ex rel. Hale v. City of Minot, 2005 ND 136, ¶ 701 N.W.2d 865 (quoting Lee v. N.D. Workers Comp. Bureau, 1998 ND 218 ¶ 11, 587 N.W.2d 423).
[7] Chevron, U.S.A., Inc. v. Nat. Res. Council, Inc., 467 U.S. 837, (1984).

If passed, this bill would have significant effects on administrative agencies which would result in an increase in litigation. Litigation regarding the statute also may be anticipated. This office anticipates two full-time attorneys would be required to handle the increase in litigation.

For these reasons, the Office of Attorney recommends a do not pass. Thank you for your time and consideration, and I would stand for any questions.

HOUSE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE
MARCH 16, 2023

TESTIMONY OF
NORTH DAKOTA BOARD OF MEDICINE
SENATE BILL NO. 2296

Chair Schauer, members of the Committee. I'm Sandra DePountis, Executive Director of the North Dakota Board of Medicine, appearing on behalf of the Board in opposition to Senate Bill 2296.

The bill amends a core tenant of the Administrative Agencies Practice Act (28-32) and subsequent review of courts by implementing a new "judicial deference" standard in North Dakota. The proposed law would remove deference to an administrative agency's interpretation of its statute or rule. However, administrative agencies work with their laws, rules, and regulations each day and are in the best position to shed light on their interpretations which provides continuity in administration, an important consideration to be recognized by a reviewing court.

It is also unclear what the second sentence is requiring. Administrative agencies may only act in accordance with authority provided by the Legislature in law and cannot increase this authority through the court.

Before administering a change to the current deference standard, it is important to recognize why courts provide deference to an administrative agency's final determination and order.

The Administrative Agencies Practice Act and reviewing courts have long recognized that administrative agencies are in the best position to make the final determination on a matter due to their specialized knowledge and experience,

especially with an agency like the Board of Medicine. As recognized by the Supreme Court, members of the Board provide the expertise and experience that is necessary to make decisions due to the "technical" nature of its disciplinary cases. In the most recent example, NDBOM v. Hsu, 2007 ND 9, the Supreme Court ultimately found the ALJ's recommendations to be "unworkable" and affirmed the Board's departure from the recommendations based on the evidence. To support such a decision, the Court provides:

> ¶42 "**In technical matters involving agency expertise, an agency decision is entitled to appreciable deference**. The determination of a physician's standard of care and the requirements for appropriate document of that care involve technical matters. The Board is comprised mostly of practicing physicians, and the Board's determination is entitled to appreciable deference. Moreover, it is not the court's function to act as a super board when reviewing decisions by an administrative agency, and courts do not reweigh the evidence or substitute their judgment for a duly authorized agency." (emphasis added)

Medical cases hinge on the specialty area involved in the case and applicable standards of care, which a court may miss or lack the ability to provide. This is the reason for deference to be provided to the Board.

This change would also have a fiscal impact on the Board. If a reviewing court could not rely on the Board's expertise, the Board would need to instead employ outside experts to provide opinions, which are very expensive. Currently, if the Board does not have a member with expertise in the specialty area at issue in a case before it, the Board obtains an independent expert to provide such a review and opinion. Depending on the expert and specialty area – we have had quotes of $650/hour to just review medical records for an initial expert opinion, to a live court testimony costing $2,910/hour with a $4,000 "appearance fee." If the Board would need to employ an

outside expert for each case before it, the increased fees would need to be born on the whole medical community with an increased licensing fee. As a reference, last year the Board reviewed over 175 complaints, the year before that, over 200.

Finally, it's important to remember why cases are brought through the Administrative Agencies Practice Act by the Board of Medicine. It is due to concerns of substandard care or harm to the public. It is the Board's duty to fulfill its legislative mandate of protecting the public by verifying only competent and qualified health care providers are providing services to the citizens of North Dakota. This is done in part by removing any "bad actors" by meeting its burden of proof before taking away or conditioning a license through the disciplinary process.

It is due to the above reasoning that the Board of Medicine opposes this bill. Thank you for your time and attention and I would be happy to answer any questions.

NORTH Dakota | Mineral Resources
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Lynn D. Helms
Director, North Dakota Industrial Commission Department of Mineral Resources
March 16, 2023
Government and Veterans Affairs Committee
SENATE BILL NO. 2296

The NDIC has major concerns with amended version and urges a Do Not Pass from this committee.

"Notwithstanding any other provision of law, in interpreting or applying a state statute, regulation, or rule, a judge may not defer to a governmental entity's interpretation of the statute, regulation, or rule. After applying all customary rules of interpretation, the Court shall resolve any remaining ambiguity against increased agency authority."

Industrial Commission Cases Information

a. Since November 2021, NDIC has served 10 Complaints that initiated judicial proceedings.
   i. Of those 10 Complaints:
   - 5 were settled prior to going to hearing. (1 settled even before we sent out an OAH request)
   - 1 was issued a default judgment.
   - 4 are ongoing.
   - Only one case went to a hearing during this time.

b. Proposed language is expected to increase the number of cases going to trial.
   1. Fewer complaints would be settled before going to hearing.
   2. Bad actors may be less likely to be pursued due to resource constraints.
   3. Fewer resources can be allocated to pursuing other claims like reclamation costs and other major cases.

c. Judge may not defer to agency's interpretation of statute, regulation, or regulatory document.
   1. Agency has subject matter expertise and provides consistency across all cases.
   2. Defeats purpose of having the agency providing expertise and knowledge through sworn testimony in its determinations.

Bruce E. Hicks
ASSISTANT DIRECTOR
OIL AND GAS DIVISION

Lynn D. Helms
DIRECTOR
DEPT. OF MINERAL RESOURCES

Edward C. Murphy
STATE GEOLOGIST
GEOLOGICAL SURVEY

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d. Proving any ambiguity in any statute, regulation, or rule would likely result in a presumption against the agency.
   i. The last line appears to be an attempt to codify the "major questions doctrine", but instead of being limited to circumstances that would cause significant expansion of agency authority, this would apply to every single ambiguity, and always cuts against the agency as a matter of law, even for minor issues.

e. Enables bad actors to win cases by finding an ambiguity.
   i. Blue Appaloosa example:
      - What happens if an individual violates a rule, but just argues the circumstances are ambiguous?
      - In Blue Appaloosa, the Commission sought penalties from an individual who commenced construction of an oilfield waste treating plant in North Dakota without obtaining a permit.
      - That case hinged on whether dirt work being done could be considered to have been beginning construction of a treating plant.
      - The Commission had Mark Bohrer testify regarding the agency interpretation of N.D. Admin. Code § 43-02-03-15(6) and §43-02-03-51.3(1) to explain what the Commission considers to be "commencement of operations".
      - Under this bill, the judge would be required to find that any ambiguity must be determined against "increased" Commission authority.
   ii. Even though there was evidence that the dirt work was for the purpose of constructing a treating plant, this bill would almost certainly result in a decision that the dirt work without a permit did not fall under Commission jurisdiction due to ambiguity.
      - The NDIC order was appealed and affirmed in District Court.
      - The District Court's affirmation was then appealed and upheld by the Supreme Court.

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Senate Bill 2296

Presented by: **Randy Christmann, Chair**
Public Service Commission

Before: **House Government and Veterans Affairs Committee**
The Honorable Austen Schauer, Chair

Date: **March 16, 2023**

TESTIMONY

Mr. Chair and committee members, I am Randy Christmann, Chair of the Public Service Commission, and I'm submitting testimony in opposition to this bill on behalf of the Public Service Commission (Commission).

The Public Service Commission is a constitutional agency with three state-wide elected officials. Constitutional agencies are unique in that they hold executive power as prescribed by the legislature but are not subject to executive appointment. Generally, the Commission is vested with authority over a number of jurisdictions relating to economics, environmental, infrastructure protection, energy infrastructure siting, gas pipeline safety, and coal mine reclamation. Many of these jurisdictions are public interest statutes requiring decisions based on legal terms of art such as "prudent," "used and useful," "just and reasonable," "for the public convenience and necessity," or "in the public interest."

Regulatory frameworks like economic regulation of franchise monopolies and environmental siting are often not well-defined because they require the flexibility and broad authority to investigate and address a wide range of issues that may arise to protect the public and individual citizens.

The Commission also has a number of programs that are State-Federal Partnerships such as the pipeline safety and coal reclamation programs. It should be noted that these programs are audited, including enforcement and legal action, and to the extent that they do not believe that the state is adequately applying the federal interpretations and enforcements consistent with the Surface Coal Mining and Reclamation Act and the Pipeline and Hazardous Materials Safety Administration, they provide findings of inadequacy. Findings of inadequacy create risk of the federal government agencies assuming the enforcement from the state.

It is unclear what issues this bill will resolve, but there is a high likelihood that it will result in additional litigation. While the impacts are difficult to forecast, the PSC operates on a lean staff. The additional time and work engaged in addressing appeals and litigation may cripple the agency.

If the Legislature determines there is a need for this bill, I urge you to exclude agencies lead by elected officials such as the Public Service Commission. These agencies have the proper backgrounds for this decision making and are accountable to the people of North Dakota.

Chair Schauer, this concludes our testimony. I will be happy to answer any questions.

Dr. Jake Schmitz, DC, MS
4233 44th Avenue South, Fargo, ND 58104
701-770-0185
drjakedc4u@gmail.com

- Licensed Chiropractor in ND (and previously NC)
- Owner of Freedom Chiropractic Health Center in Fargo
- Founder and president of the Association of Wellness Chiropractors
- Business co-owner of several entities in ND involving land, minerals, water, and real estate
- Associates degree at Williston State College, BS in Chemistry at Dickinson State University, Doctor of Chiropractic at Northwestern Health Sciences University, Master's degree in Human Nutrition and Functional Medicine at University of Western States, and finishing Doctorate in Clinical Nutrition at University of Western States
- Married with 4 children

Chairman Schauer, Representatives of the Government and Veterans Affairs Committee,

My name is Dr. Jake Schmitz, and I am testifying on behalf of myself as a licensed chiropractor in the state of North Dakota (ND). My testimony is in support of SB 2296.

SB 2296 serves an extremely important function for ND as it pertains to administrative proceedings. As it currently stands, administrative agencies are granted deference during adjudicative proceedings. Deference shouldn't be granted for any part of the proceeding, as there are in most cases, disputes to both facts and law in question.

In the criminal system, a person is innocent until proven guilty beyond reasonable doubt. The burden, the entire burden, on any material issue of law or fact is on the prosecutor to prove guilt. Unfortunately, in ND, licensees are just the opposite--guilty unless they can prove themselves innocent. Even when licensees can prove themselves innocent, agencies can simply ignore or overrule the ALJ. This disparity is largely due to boards being granted deference.

Agencies first get to create their own rules, second get to interpret them however they see fit at that moment in time, and finally get deference at the legal level, because the current presumption is that they are the "experts". The idea that this system "works great as it is" stems from agencies liking the fact they get to tip the scales towards their position. I liken this to my children really enjoying playing card games with their grandmother, who always allows them to win.

SB 2296 prevents judges from granting deference, instead, allowing them to listen to the evidence presented by both sides and come to their own neutral conclusion. Why would anyone oppose that idea? This potentially could also save money for all parties, because if the playing field is leveled both parties have equal reason for wanting to settle out of court. In the case of most agencies (especially occupational licensing boards), if they prevail, they get reimbursed for the costs of proceeding (NDCC 43-06-15.8(f)(2), 43-12.1-13, 43-15-45, 43-17-31.1, 43-26.2-01, 43-28-18.2.7, to name a few). This means there should be minimal to no increased cost or any additional hearings for the state, and in fact there might be fewer. In fact, occupational boards are funded with license holder dues, and not state money.

Judges/Justices have been granting deference to agencies for a long time in ND (Hsu 2007 ND 9; Jones 2005 ND 22; Huff 2004 ND 225; Elshaug 2003 ND 117; and many others). The ND courts have continuously granted a long leash for agencies when they are acting in their quasi-judicial capacity and/or interpreting their own rules. If you start from Schmitz v. ND State Chiropractic Board 2022 ND 113 and work backwards, there are 23 different Supreme Court cases that use this justification for granting deference to agencies. This has been an issue and will continue being an issue unless you, as legislators, fix it. It is impossible to believe justice is being delivered where one party always has their hand on the scales of justice by virtue of being given deference for their arguments.

The Deference Doctrine (sometimes called Chevron Deference) has morphed from the original intent. After Chevron (Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)), judges attempted to refrain from making decisions regarding highly technical matters outside of their scope of expertise (i.e. brain surgery) where the law in question is ambiguous. However, in ND it has come to be interpreted as a policy of allowing agencies to run their own shows without recourse. The deference agencies are currently granted further tips the scales because the only avenue available to a license holder after a process heavily weighted in favor of the board is a costly appeal to a higher court. If all judges grant deference to the facts or legal arguments of the agency, there is no justice for the people, and no fairness for individuals through administrative hearings.

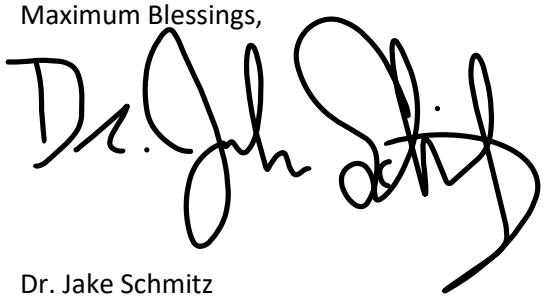
If the ALJ agrees with the licensee, the board/agency can appeal to District Court. The appeals process isn't an additional burden for the agency, but a leveling of the playing field. On one hand, agencies make the claim that a licensee can simply appeal decisions they don't agree with, using their own resources. On the other hand, they assert it is onerous when they must do the same.

The most important question to consider with this bill is why any state agency would not want a truly neutral and fair party (judge) to listen to the facts presented, make recommendations, and to decide the case, as they are trained to do. What are they afraid to lose with this bill? Agencies are claiming this bill reduces their administrative authority, but is that true? This bill only reduces their QUASI-JUDICIAL authority, not their administrative authority. I submit that would be a good thing, because if the agency is in front of an ALJ/judge/Justice, that means the licensee/citizen disagrees with their determination, asking for a third party to adjudicate and come to a neutral decision. If either party makes a compelling case, the judge will side with that party. Agencies shouldn't be given an advantage no matter the circumstances. The judicial branch, not agencies, should get to interpret the laws, as is done in all other cases heard before them. Agencies are part of the executive branch, and they need to stay in their lane.

I think it is important for me to close with a reminder. You, as individual legislators, aren't experts in every area or for every bill you hear. You listen to expert testimony, weigh the evidence, and come to a conclusion or judgment on whether you will vote for or against a bill. The court system should be no different, where judges are allowed to do their jobs with their primary function as adjudicators of each case. Agencies shouldn't be granted deference.

Please vote DO PASS on SB 2296. Thank you for your time and I will answer any questions you might have for me.

Maximum Blessings,



Dr. Jake Schmitz

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Testimony
Engrossed Senate Bill No. 2296
House Government and Veterans Affairs Committee
Representative Austen Schauer, Chairman

March 16, 2023

Chairman Schauer, and members of the House Government and Veterans Affairs Committee, I am Jonathan Alm, the Chief Legal Officer with the Department of Health and Human Services (Department). The Department is providing testimony in opposition of Engrossed Senate Bill 2296.

The Department is concerned with Section 1 and its financial impact on the State. Removing a judge's ability to defer to a governmental entity's interpretation of the statute, regulation, or rule will only increase the appropriation need of the Department. The true financial impact of this Bill is unknown as it pertains to the services and programs offered by the Department. Over the last two years, the Department received 627 requests for fair hearings, which includes adverse actions taken by the Department to either deny or terminate a service or benefit to an individual. Eliminating the judge's ability to defer to the Department's expertise interpretation of a statute, regulation, or rule which also includes the Department's knowledge of the legislative intent of a particular statute, will only result in the State having to expend additional funds and resources for services or benefits it should not be providing. Therefore, the Department's budget will increase with the passage of this Bill.

This Bill will impact the Department's use of the Office of Attorney General. The Department currently uses a hybrid approach before the Office of Administrative Hearings. In 2021 and 2022, the Office of Attorney General provided legal representation on approximately 41% of the cases before the Office of Administrative Hearings and in the other approximately 59% of the cases, the Department or Human Service Zone eligibility workers appeared on behalf of the Department. If Section 1 remains, the Department will be using the Office of Attorney General for 100% of all cases before the Office of Administrative Hearings. Legal representation would assure that the proper legal argument and facts are made before the Office of Administrative Hearings. The Department's proposed budget to pay the Office of Attorney General would need to be increased by $458,252 for the 2023-25 biennium. The Office of Attorney General charges the Department $140.91 per hour for legal representation. The Department anticipates the Office of Attorney General will need additional staff to represent the Department. The Department must also pay the Office of Administrative Hearings to conduct hearings and issue findings of fact, conclusions of law, and order at $195.00 per hour. The Department anticipates needing an additional $120,938 which reflects a 15% increase in its proposed budget to pay the Office of Administrative Hearings as hearings will take longer to conduct, increasing costs for all parties.

The Department will also need an additional full-time equivalent position for an attorney as it will need to expand administrative rules and proposed legislation to make sure the Legislative assembly's and Department's intent and interpretation is clear. The Department also expects to conduct additional rulemaking at a cost of $20,000 for public notices.

Finally, removing agency deference may lead to federal audit findings as individuals will be receiving assistance when they are not legally entitled to the assistance, and it will increase the potential need to use the State's general funds to pay back the Federal government for improper spending of federal funds.

This concludes my testimony. Thank you.

23.1009.02003
Title.

Prepared by the Legislative Council staff for
Senator Paulson
March 13, 2023

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2296

Page 1, line 2, replace "governmental entities" with "administrative agencies"

Page 1, line 7, after "**deference**" insert "**- Appeal**"

Page 1, line 9, after "rule" insert "on appeal from an order or rulemaking action"

Page 1, line 9, replace "a governmental entity's" with "an administrative agency's"

Page 1, line 10, after "rule" insert "if the complainant in the underlying action is an individual"

Page 1, line 12, remove "**AUTHORITY OF HEARING**"

Page 1, line 13, replace "**OFFICERS**" with "**ADJUDICATIVE PROCEEDING PROCEDURES**"

Page 1, line 14, replace "impact of granting statutory authority" with "adjudicative proceeding procedures"

Page 1, line 14, replace "to" with ", including the statutory authority of"

Page 1, line 14, remove ", who may not be"

Page 1, line 15, replace "the agency head, to make" with "and the procedures related to the"

Page 1, line 15, replace the first "and" with a comma

Page 1, line 15, replace "issue" with "issuance of"

Page 1, line 16, replace "governmental entities" with "administrative agencies"

Renumber accordingly