

2023 HOUSE JUDICIARY

HB 1344

2023 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Room JW327B, State Capitol

HB 1344
1/30/2023

Relating to the attorney general's review of proposed administrative rules and the authority of the administrative rules committee to object to or void an administrative rule
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Chairman Klemin opened the hearing on HB 1344 at 9:00 A.M. Members present: Chairman Klemin, Vice Chairman Karls, Rep. Bahl, Rep. Christensen, Rep. Cory, Rep. Henderson, Rep. S. Olson, Rep. Rios, Rep. S. Roers Jones, Rep. Satrom, Rep. Schneider, Rep. VanWinkle, Rep. Vetter

Discussion Topics:

- Rules protection.
- Rules limitations.
- Legislative intent and history

Rep. Koppelman: Introduced the bill. Testimony #17782

Mary Kae Kelsch, Director, General Counsel Division; Office of Attorney General: In opposition to HB 1344. #17776

Hearing closed at 9:42 AM.

Delores Shimek, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Room JW327B, State Capitol

HB 1344
1/30/2023

Relating to the attorney general's review of proposed administrative rules and the authority of the administrative rules committee to object to or void an administrative rule
--

Chairman Klemin opened the meeting on HB 1344 at 3:54 PM. Members present: Chairman Klemin, Vice Chairman Karls, Rep. Bahl, Rep. Christensen, Rep. Cory, Rep. Henderson, Rep. S. Olson, Rep. Rios, Rep. S. Roers Jones, Rep. Satrom, Rep. Schneider, Rep. VanWinkle, Rep. Vetter

Discussion Topics:

- Legislative intent
- Administrative rules
- Proposed Amendments
- Committee Action

Representative Vetter Moved to amend HB 1344 with on Page 1 delete Lines 16 and 17 and on page 3 line 9 replace “and” with “or”.

Representative VanWinkle seconded the motion.

Roll Call Vote:

Representatives	Vote
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Landon Bahl	Y
Representative Cole Christensen	N
Representative Claire Cory	Y
Representative Donna Henderson	Y
Representative SuAnn Olson	Y
Representative Nico Rios	Y
Representative Shannon Roers Jones	Y
Representative Bernie Satrom	N
Representative Mary Schneider	Y
Representative Lori VanWinkle	Y
Representative Steve Vetter	Y

Motion carried 11-2-0.

Representative Karls moved to amend on page 2 line 4 delete the word “unnecessary” and on page 3 delete lines 12 and 13.

Representative Schneider seconded.

Roll Call Vote:

Representatives	Vote
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Landon Bahl	N
Representative Cole Christensen	N
Representative Claire Cory	N
Representative Donna Henderson	N
Representative SuAnn Olson	N
Representative Nico Rios	N
Representative Shannon Roers Jones	N
Representative Bernie Satrom	N
Representative Mary Schneider	Y
Representative Lori VanWinkle	N
Representative Steve Vetter	N

Motion Failed 3-10-0.

Representative Satrom moved to reinsert on Page 1 line 16 c, “the rule is contrary to legislative intent; or”

Representative Vetter seconded.

Representatives	Vote
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Landon Bahl	Y
Representative Cole Christensen	Y
Representative Claire Cory	Y
Representative Donna Henderson	Y
Representative SuAnn Olson	Y
Representative Nico Rios	Y
Representative Shannon Roers Jones	Y
Representative Bernie Satrom	Y
Representative Mary Schneider	Y
Representative Lori VanWinkle	Y
Representative Steve Vetter	Y

Motion carried. 13-0-0.

Representative Vetter moved a Do Pass as amended with 23.0825.01001

Representative Christensen seconded.

Roll Call Vote:

Representatives	Vote
Representative Lawrence R. Klemin	Y
Representative Karen Karls	N
Representative Landon Bahl	Y

Representative Cole Christensen	Y
Representative Claire Cory	Y
Representative Donna Henderson	Y
Representative SuAnn Olson	Y
Representative Nico Rios	Y
Representative Shannon Roers Jones	Y
Representative Bernie Satrom	Y
Representative Mary Schneider	Y
Representative Lori VanWinkle	Y
Representative Steve Vetter	Y

Motion carried 12-1-0.

Representative Satrom carrier.

Hearing closed at 4:22 PM.

Delores Shimek, Committee Clerk

January 30, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1344

Page 1, line 16, remove ", including the defeat of a legislative"

Page 1, line 17, remove "measure"

Page 3, line 9, overstrike "and" and insert immediately thereafter "or"

Re-number accordingly

DR
1/31
1-30-2023

REPORT OF STANDING COMMITTEE

HB 1344: Judiciary Committee (Rep. Klemin, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). HB 1344 was placed on the Sixth order on the calendar.

Page 1, line 16, remove ". including the defeat of a legislative"

Page 1, line 17, remove "measure"

Page 3, line 9, overstrike "and" and insert immediately thereafter "or"

Renumber accordingly

2023 SENATE JUDICIARY

HB 1344

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1344
3/15/2023

A bill relating to the attorney general's review of proposed administrative rules and the authority of the administrative rules committee to object to or void an administrative rule.
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2:48 PM Chairman Larson opened the meeting.

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

Discussion Topics:

- Overregulation
- Arbitrary rules
- Capricious rules
- Legislative intent
- Voided rules

2:48 PM Representative Ben Koppelman introduced the bill and provided written testimony #25325.

3:01 PM Mary Kae Kelsch, Assistance Attorney General, North Dakota Attorney General's Office testified opposed to the bill and provided written testimony #25192.

3:13 PM Chairman Larson closed the public hearing.

3:21 PM Chairman Larson closed the meeting.

Rick Schuchard, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1344
3/20/2023

A bill relating to the attorney general's review of proposed administrative rules and the authority of the administrative rules committee to object to or void an administrative rule

10:51 AM Chairman Larson opened the meeting.

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

Discussion Topics:

- Legislative intent
- North Dakota Century Code

10:52 AM The committee has discussion on the bill.

11:05 AM Chairman Larson closed the meeting.

Rick Schuchard, Committee Clerk

2023 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

HB 1344
3/21/2023

A bill relating to the attorney general's review of proposed administrative rules and the authority of the administrative rules committee to object to or void an administrative rule

10:16 AM Chairman Larson opened the meeting.

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

Discussion Topics:

- Committee action
- Legislative intent

10:16 AM The committee has discussion on the bill.

10:21 AM Senator Myrdal moves to Do Pass the bill. Motion is seconded by Senator Paulson.

10:23 AM Roll call vote was taken.

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

Motion Passes 4-3-0.

Senator Myrdal will carry the bill.

This bill does not affect workforce development.

10:23 AM Chairman Larson closed the meeting.

Rick Schuchard, Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1344, as engrossed: Judiciary Committee (Sen. Larson, Chairman) recommends **DO PASS** (4 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1344 was placed on the Fourteenth order on the calendar. This bill does not affect workforce development.

TESTIMONY

HB 1344

HOUSE JUDICIARY
1/30/2023

TESTIMONY OF MARY KAE KELSCH
OFFICE OF ATTORNEY GENERAL
HOUSE BILL NO. 1344

Mr. Chairman, members of the Committee.

I am Mary Kae Kelsch, Director, General Counsel Division, and I appear on behalf of the Attorney General in opposition to House Bill 1344.

By law, agencies must submit proposed rules to the Attorney General's office for review before final adoption. Section 1 of the bill proposes that a rule is not legal if it is contrary to legislative intent, including the defeat of a legislative measure.

- This proposed language is contrary to the principles of statutory construction. In ascertaining the meaning of a statute, we look first to the language of the statute as a whole, and construe the words in their plain, ordinary, and commonly understood sense. If a statute is clear on its face, it is inappropriate to look to legislative history.
- The late U.S. Supreme Court Justice Anthony Scalia argued that the temptation to use legislative history should be avoided because of the tendency to manufacture statements for favorable interpretations.
- It is also settled case law that it is inappropriate to require a review of a defeated legislative measure to ascertain legislative intent. The fact that a bill or measure was defeated does not indicate any intent on the

part of the legislature. A failed bill has no statutory power or authority. Public policy is declared by the action of the legislature not by its failure to act.

- The Attorney General objects to the addition of the words “unnecessary” and “unreasonable” to Sections 2 and 3 because they are discretionary terms without any legal meaning and without any guidance on their application to proposed rules.
- The rulemaking process strikes a careful balance between the branches of government. The standard of review is whether an administrative agency’s rulemaking decision is arbitrary and capricious. This is a recognizable legal standard backed by case law.
- The Legislature cannot delegate complete discretion to a committee, like the Administrative Rules Committee, to determine whether a rule is “unnecessary” or “unreasonable” without providing any guidelines whatsoever on what these terms mean.
- As we learned in the ND. Legislative Assembly v. Burgum case, the law must set forth reasonably clear guidelines to enable the appropriate body to ascertain the facts. To allow the Administrative Rules Committee to declare a rule void due to it being “unnecessary” or “unreasonable” would create a clear separation of powers issue, similar to the Burgum case.

- The Court in Trinity Medical Center v. North Dakota Board of Nursing also explained that the authority the Legislature has delegated to an administrative agency, it can also retract. Thus, if the Legislature believes an administrative agency has gone outside of its statutory guidelines it may retract the rulemaking authority or clarify the statute, rather than delegating discretionary authority to a subset of the Legislature to override the executive agency's application of the law.

Due to the significant legal and constitutional issues facing this bill, the Attorney General's office recommends a do not pass. Thank you for your time and consideration.

HB 1344

Rep. Ben Koppelman- Testimony

Mr. Chairman and Members of the Committee,

Thank You for the opportunity to introduce HB1344 to you today.

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

In North Dakota, we have delegated a narrow portion of our policy making authority to various agencies, boards, and commissions within the executive branch. However, with that delegation comes oversight by the legislative branch, as it should, through the Administrative Rules Committee. Since administrative rules have the “weight of law” once they are adopted, it is imperative that we can stand as a gatekeeper of the policy that we pass, rather than to have it undermined by de facto law through the rule-making process.

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

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

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

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

SENATE JUDICIARY
3/15/2023

TESTIMONY OF MARY KAE KELSCH
OFFICE OF ATTORNEY GENERAL
HOUSE BILL NO. 1344

Madam chair, and Committee members, I am Mary Kae Kelsch, Director, General Counsel Division, and I appear on behalf of the Attorney General in opposition to House Bill 1344.

By law, agencies must submit proposed rules to the Attorney General's office for review before final adoption. Section 1 of the bill proposes that a rule is not legal if it is contrary to legislative intent, including the defeat of a legislative measure.

- This proposed language is contrary to the principles of statutory construction. In ascertaining the meaning of a statute, we look first to the language of the statute as a whole, and construe the words in their plain, ordinary, and commonly understood sense. If a statute is clear on its face, it is inappropriate to look to legislative history.
- The Attorney General objects to the addition of the words "unnecessary" and "unreasonable" to Sections 2 and 3 because they are discretionary terms without any legal meaning and without any guidance on their application to proposed rules.
- The rulemaking process strikes a careful balance between the branches of government. The standard of review is whether an

administrative agency's rulemaking decision is arbitrary and capricious. This is a recognizable legal standard backed by case law.

- The Legislature cannot delegate complete discretion to a committee, like the Administrative Rules Committee, to determine whether a rule is “unnecessary” or “unreasonable” without providing any guidelines whatsoever on what these terms mean.
- NDCC 28-32-18 gives the administrative rules committee authority to void all or any portion of a rule if the committee makes certain findings.
- As we learned in the ND. Legislative Assembly v. Burgum case, the law must set forth reasonably clear guidelines to enable the appropriate body to ascertain the facts. To allow the Administrative Rules Committee to declare a rule void due to it being “unnecessary” or “unreasonable” would create a clear separation of powers issue, similar to the Burgum case.
- The Court in Trinity Medical Center v. North Dakota Board of Nursing also explained that the authority the Legislature has delegated to an administrative agency, it can also retract. Thus, if the Legislature believes an administrative agency has gone outside of its statutory guidelines it may retract the rulemaking authority or clarify the statute, rather than delegating discretionary authority to a subset of

the Legislature to override the executive agency's application of the law.

Due to the significant legal and constitutional issues facing this bill, the Attorney General's office recommends a do not pass. Thank you for your time and consideration.

HB 1344

Rep. Ben Koppelman- Testimony

Madame Chairman and Members of the Committee,

Thank You for the opportunity to introduce HB1344 to you today.

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

In North Dakota, we have delegated a narrow portion of our policy making authority to various agencies, boards, and commissions within the executive branch. However, with that delegation comes oversight by the legislative branch, as it should, through the Administrative Rules Committee. Since administrative rules have the "weight of law" once they are adopted, it is imperative that we can stand as a gatekeeper of the policy that we pass, rather than to have it undermined by de facto law through the rule-making process.

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

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

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- 5) Arbitrariness and Capriciousness
- 6) A failure to make a written record of its consideration of written and oral submissions respecting the rule under section 28-32-11.

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

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

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

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

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

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

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

Since the constitutional authority to make policy is vested in the legislative branch of government, it is only reasonable that we safeguard our citizens against the temptation of overreach by the executive branch when executing the very power that we delegated to them. Madame Chairman and members of the committee, I request that you give this bill a Do-Pass recommendation. I would be happy to attempt to answer any questions that you may have.