

## ADMINISTRATIVE AGENCIES AS DEFINED BY THE ADMINISTRATIVE AGENCIES PRACTICE ACT

The Administrative Agencies Practice Act (North Dakota Century Code (NDCC) Chapter 28-32) governs administrative rulemaking and administrative hearing procedures of administrative agencies. The chapter defines "administrative agency" in Section 28-32-01(2) as follows:

2. "Administrative agency" or "agency" means each board, bureau, commission, department, or other administrative unit of the executive branch of state government, including one or more officers, or employees, or other persons directly or indirectly purporting to act on behalf or under authority of the agency. An administrative unit located within or subordinate to an administrative agency shall be treated as part of that agency to the extent it purports to exercise authority subject to this chapter. The term administrative agency does not include:

- a. The office of management and budget except with respect to rules made under section 32-12.2-14, rules relating to conduct on the capitol grounds and in buildings located on the capitol grounds under section 54-21-18, rules relating to the state building code as authorized or required under section 54-21.3-03, rules relating to the Model Energy Code as required under section 54-21.2-03, rules relating to the central personnel system as authorized under section 54-44.3-07, rules relating to state purchasing practices as required under section 54-44.4-04, rules relating to records management as authorized or required under chapter 54-46, and rules relating to the central microfilm unit as authorized under chapter 54-46.1.
- b. The adjutant general with respect to the division of emergency management.
- c. The council on the arts.
- d. The state auditor.
- e. The department of economic development and finance.
- f. The dairy promotion commission.
- g. The education factfinding commission.
- h. The educational telecommunications council.
- i. The board of equalization.
- j. The board of higher education.
- k. The Indian affairs commission.
- l. The industrial commission with respect to the activities of the Bank of North Dakota, the North Dakota housing finance agency, the North Dakota municipal bond bank, the North Dakota mill and elevator association, and the North Dakota farm finance agency.
- m. The department of corrections and rehabilitation except with respect to the activities of the division of adult services under chapter 54-23.4.
- n. The pardon advisory board.
- o. The parks and recreation department.
- p. The parole board.
- q. The state fair association.
- r. The state department of health with respect to the state toxicologist.
- s. The board of university and school lands except with respect to activities under chapter 47-30.1.
- t. The administrative committee on veterans' affairs except with respect to rules relating to the supervision and government of the veterans' home and the implementation of programs or services provided by the veterans' home.
- u. The industrial commission with respect to the lignite research fund except as required under section 57-61-01.5.
- v. The secretary of state with respect to rules adopted for the presidential preference contest under section 16.1-11-02.2.

The definition of administrative agency was amended into this format as a result of passage of 1981 House Bill No. 1042, recommended by the Legislative Council's interim Administrative Rules

Committee. Before passage of 1981 House Bill No. 1042, the definition of administrative agency consisted only of a three-part test which required that an administrative agency must be an officer, board, commission, bureau, department, or tribunal other than a court:

1. Having statewide jurisdiction; and
2. Authority to make any order, finding, determination, award, or assessment which has the force and effect of law; and
3. Which by statute is subject to review in the courts of this state.

The definition that existed before 1981 created uncertainty about which agencies were subject to the Administrative Agencies Practice Act. The report of the interim Administrative Rules Committee indicates that the most troubling aspect of the definition was the requirement that an agency decision must be subject to review in the courts of this state. This determination required a review of statutory authority outside the Administrative Agencies Practice Act to determine whether court review of decisions would apply to agencies. As a result, a history of Supreme Court decisions and opinions of the Attorney General had developed to interpret statutory provisions and which concluded whether or not certain agencies were administrative agencies. In some cases, the conclusions were agencies were administrative agencies for certain purposes but not for other purposes. The 1979-80 interim committee identified 23 state agencies that were determined not to be administrative agencies and three agencies that were determined to be administrative agencies for some purposes. The committee contacted each of the agencies identified and discussed with agency representatives the status of these agencies under the Administrative Agencies Practice Act. Of the 26 agencies identified, the agencies that had adopted rules outside the Administrative Agencies Practice Act were the Dairy Products Promotion Commission, Board of Higher Education, Highway Corridor Board, Director of Institutions, Laboratories Department, Motor Vehicle Department, Parks and Recreation Department, Superintendent of Public Instruction, Seed Commission, Board of University and School Lands, and Administrative Committee on Veterans Affairs.

Under 1981 House Bill No. 1042 as recommended and enacted, an administrative agency was defined to

include every administrative unit of the executive branch of state government with listed exceptions for those agencies that previously had been excepted from the definition due to the opinion of the Attorney General or decision of the Supreme Court. The interim Administrative Rules Committee recommended a separate bill that was enacted which subjected the Seed Commission, Laboratories Department, Highway Corridor Board, and hazardous materials regulation of the Motor Vehicle Department to the procedural requirements of the Administrative Agencies Practice Act. This separate bill also removed interest rate determinations made by the State Banking Board from the definition of administrative agency to eliminate public notice and hearing requirements, due to the frequency of emergency rule declarations regarding interest rate determinations.

Since 1981, the definition of administrative agency under NDCC Section 28-32-01 has been amended on several occasions regarding activities of an entire agency or individual functions within an agency. There has been no comprehensive revision of the definition and changes have been reviewed and approved by the Legislative Assembly on an individual basis.

It appears that each agency or program excluded from the definition of administrative agency under NDCC Section 28-32-01 has been excluded as a result of legislative consideration and action. Those agencies excluded by 1981 legislation had specific legislation elsewhere in law which was interpreted by the Attorney General or Supreme Court to exclude them. Those agencies excluded since 1981 were excluded by specific legislation for that purpose. Because the Administrative Agencies Practice Act governs administrative rulemaking and administrative hearings and other proceedings, perhaps consideration could be given to classifying some agencies as administrative agencies for rulemaking purposes but not for other administrative proceedings. This would subject their rulemaking to standard procedures but preserve their freedom from court review of their decisions. As it now stands, the statutory definition either includes or excludes agencies for all purposes from the requirements that apply to an "administrative agency."