FORMAL OPINION
2001-F-03

DATE ISSUED: April 23, 2001

REQUESTED BY: Lee Armstrong, Williams County Assistant State's Attorney

QUESTIONS PRESENTED

I.

Whether the county government has authority to prohibit smoking in court chambers located in the county courthouse.

II.

If so, whether N.D.C.C. §23-12-07 provides enforcement authority against individuals smoking outside of a designated smoking area in a place of public assembly in light of 1987 House Bill No. 1272.

III.

Whether the county is required to provide a designated smoking area in the courthouse.

ATTORNEY GENERAL'S OPINIONS

I.

It is my opinion that the county commission has authority to prohibit smoking in the county courthouse, including in court chambers.

II.

It is my further opinion that N.D.C.C. § 23-12-07 provides enforcement authority against individuals smoking outside of a designated smoking area in a place of public assembly as a result of 1987 House Bill No. 1272.

III.

It is my further opinion that the county is not required to designate a smoking area in any county building.

ANALYSES

I.

The board of county commissioners has the power "[t]o make all orders respecting property of the county." N.D.C.C. § 11-11-14(2). The public official having general supervisory responsibility for a government building has authority to designate smoking areas in that building. N.D.C.C. § 23-12-10. Therefore, because the board of county commissioners is comprised of the public officials having general supervisory responsibility for all county property, it is the board of county commissioners which has authority to designate smoking areas within any county building. Letter from Attorney General Nicholas Spaeth to John Brindle (Sept. 25, 1987). See also Letter from Attorney General Nicholas Spaeth to Jerry Green (May 12, 1987) (similar conclusion regarding air national guard facilities).

Each county is required by law to provide the district court in that county "with adequate chamber, court, and law library quarters, and lights and fuel and appropriate facilities for clerk of court services that are state funded." N.D.C.C. § 27-01-01.1. While the county is required to provide quarters for the district court and the clerk of court's use, N.D.C.C. § 27-01-01.1 does not cause the facilities provided by the county to become the property of the district court or the state court system. Further, there is no statute taking control of the county courthouse away from the county commission and placing control in the hands of another entity, including the district courts or the state court system. Therefore, it is my opinion that the county commission has authority to prohibit smoking in the court chambers located in the county courthouse.

II.

"Smoking is not permitted outside of designated smoking areas in places of public assembly." N.D.C.C. § 23-12-10. Any buildings owned or leased by political subdivisions are defined as places of public assembly. N.D.C.C. § 23-12-09(1)(b). Smoking areas may be designated for public buildings only by public officials having general supervisory responsibility for the government building. Id. Although there is no specifically designated penalty for a person smoking outside of a designated smoking area in a government building, the Legislature has established a general penalty: "[a]ny person who willfully violates any provision of this title [23], if another penalty is not specifically provided for such violation, is guilty of an infraction." N.D.C.C. § 23-12-07.

State law previously provided a fine of up to $100 per violation for a person smoking in a nonsmoking area, but 1987 H.B. No. 1272 removed this penalty from the law. 1987 N.D.

Sess. Laws ch. 301, § 5. One isolated statement within the legislative history concerning that change implies the belief that there would not be any penalty for a smoker violating the law. Hearing on H.B. 1272 Before the House Comm. on Human Services and Veterans Affairs, 1987 N.D. Leg. (Jan. 30) (prepared testimony of Dr. Stephen L. McDonough, Chief, Preventive Health Section, State Department of Health). This statement was not discussed by any committee members during that hearing, and it was not repeated by that individual when he presented otherwise similar testimony in the Senate hearing later in the legislative session. Hearing on H.B. 1272 Before the Senate Comm. on Human Services and Veterans Affairs, 1987 N.D. Leg. (March 20) (prepared testimony of Dr. Stephen L. McDonough, Chief, Preventive Health Section, State Department of Health). An isolated statement in the legislative history is insufficient to contradict the plain provisions of N.D.C.C. § 23-12-07 that create a penalty for any violation of any provision in Title 23 when another penalty is not specifically provided.

The Legislature is presumed to know the law when enacting legislation and may be charged with knowledge of principles of the law. See State v. Clark, 367 N.W.2d 168, 170 (N.D. 1985). Therefore, the Legislature is presumed to have known that removing the specific penalty for smoking outside a designated smoking area in violation of N.D.C.C. §§ 23-12-09 through 23-12-11 would cause N.D.C.C. § 23-12-07 to apply and make the offense an infraction.

When a statute's language is clear and unambiguous, the legislative intent is presumed clear on the face of the statute. Northern X-Ray Co., Inc. v. State, 542 N.W.2d 733, 735 (N.D. 1996). See also Republican Com. v. Democrat Com., 466 N.W.2d 820, 824-25 (N.D. 1991); Douville v. Pembina County Water Resource Dist., 612 N.W.2d 270, 274 (N.D. 2000). Where a statute is unambiguous, it is improper for the court to attempt to construe the provisions so as to legislate that which the words of the statute do not themselves provide. State v. Bower, 442 N.W.2d 438, 440 (N.D. 1989). The use of legislative history and other extrinsic aids to interpret statutes is limited to clarifying the meaning of the law. Extrinsic aids such as legislative history are employed when interpreting an ambiguous statute. Northern X-Ray, 542 N.W.2d at 735. When litigants argued that the legislative history contradicted the letter of a law which was clear and free of ambiguity, the Supreme Court stated it would look no further than the statutory language and "it is neither necessary nor appropriate to delve into legislative history to determine legislative intent." Metric Construction, Inc. v. Great Plains Properties, 344 N.W.2d 679, 683 (N.D. 1984) quoting Born v. Mayers, 514 N.W.2d 687, 689 (N.D. 1994). See also Bower 442 N.W.2d at 440.

The meanings of N.D.C.C. §§ 23-12-07, 23-12-09, or 23-12-10 individually, and when interpreted together to provide an infraction for smoking in a no-smoking area, are not ambiguous or doubtful. See Kallhoff v. N.D. Workers' Compensation Bureau, 484 N.W.2d

510, 512 (N.D. 1992), Kroh v. American Family Ins., 487 N.W.2d 306, 308 (N.D. 1992). The provision of the mildest criminal penalty for a violation of a public health law is neither absurd nor ludicrous, and does not create an unjust consequence. See Ames v. Rose Township, 502 N.W.2d 845, 850 (N.D. 1993). It is reasonable to conclude that an isolated statement in the legislative history is not a sufficient ground to contradict the plain meaning of these statutes.

Therefore, it is my opinion that an infraction under N.D.C.C. § 23-12-07 may be charged against any individual smoking outside of a designated smoking area in a place of public assembly, including individuals smoking in a no-smoking area in a county courthouse.

III.

N.D.C.C. § 23-12-10 states that smoking is not permitted in places of public assembly except in areas which have been designated as smoking areas. Smoking areas may be designated only by certain individuals who either are the owner or operator of a privately owned building or by the public official having supervisory responsibility of a public building. Id. Nothing in the law requires the designation of a smoking area. The use of the word "may" is permissive and indicates it is a matter of discretion whether to designate a smoking area. See Bernhardt v. Bernhardt, 561 N.W.2d 656, 658 (N.D. 1997).

Prohibitions against smoking have generally been upheld. The federal Americans With Disabilities Act specifically does not prohibit restrictions on smoking. 42 U.S.C. § 12201(b). A county resolution banning smoking in all county public buildings, including the jail, was upheld against an inmate's suit asserting an alleged right to smoke. Doughty v. Board of County Comm'rs, 731 F.Supp. 423 (D. Colo. 1989). A New York law prohibiting smoking in private workplaces has been upheld against constitutional due process and equal protection claims. Fagan v. Axelrod, 550 N.Y.S.2d 552 (N.Y. Sup. Ct. 1990).

Therefore, it is my opinion that a county is not required to designate a smoking area in its courthouse or any other county buildings.

EFFECT

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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