

LETTER OPINION
2004-L-43

June 17, 2004

Honorable Tony Clark
Honorable Susan E. Wefald
Honorable Kevin Cramer
Public Service Commission
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Commissioners Clark, Wefald, and Cramer:

Thank you for your letter asking whether the Information Technology Department (ITD) is required to use the administrative rulemaking procedures contained in N.D.C.C. ch. 28-32 in establishing policies, standards, and guidelines for executive branch agencies with respect to procuring information technology hardware, software, and services under N.D.C.C. ch. 54-59.

For the reasons discussed below, it is my opinion ITD is required to follow the administrative rulemaking requirements of N.D.C.C. ch. 28-32 in establishing policies, standards, and guidelines for executive branch agencies with respect to purchasing computer software and computer systems because both ITD and its advisory committee qualify as administrative agencies and no exception applies in this instance.

ANALYSIS

The 58th Legislative Assembly passed House Bill 1505 dealing with certain requirements for the Information Technology Department. See 2003 N.D. Sess. Laws ch. 665. Section 7 of ch. 665 provides, in part:

After receiving input from executive branch state agencies, departments, and institutions, the information technology department shall establish information technology equipment and software product specifications and shall provide the product specifications to the office of management and budget to be used in procuring equipment and software. . . . The office of management and budget, in conjunction with the information technology department, shall aggregate information technology equipment and

software purchases and administer contracts to achieve the most cost-effective results for the state.

Section 16 of ch. 665 requires ITD, through an advisory committee, to establish policies, standards, and guidelines for executive branch agencies to be used in the purchase of computer software and systems. Section 16, codified at N.D.C.C. § 54-59-02.1, provides:

The department shall appoint an advisory committee consisting of representatives of state agencies for the purposes of prioritizing major computer software projects and establishing policies, standards, and guidelines for executive branch state agencies, departments, and institutions, excluding institutions under control of the state board of higher education and agencies of the judicial and legislative branches with respect to the purchase of computer software and computer systems. The chief information officer shall submit recommendations of the advisory committee regarding major software projects to the information technology committee for consideration by the committee and the drafting of appropriate legislation to implement the recommendations. The judicial and legislative branches shall annually notify the advisory committee on their major computer software projects and priorities. The chief information officer may exempt an agency from the policies, standards, and guidelines established by the committee to address situations unique to that agency.

(Emphasis added.)

In your letter you note that ITD has developed a set of information technology procurement standards and you attached a copy to your letter. You indicate that the standards were developed without following administrative rulemaking processes under N.D.C.C. ch. 28-32.

Under N.D.C.C. § 28-32-01(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, 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 must be treated as part of the agency to the extent it purports to exercise authority subject to this chapter.

Neither ITD nor any committee established under N.D.C.C. ch. 54-59 is specifically excepted from the definition of administrative agency. N.D.C.C. § 28-32-01(2).

A rule is defined as “the whole or a part of an agency statement of general applicability which implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency.” N.D.C.C. § 28-32-01(11).

You indicate in your letter that Senate Bill 2039 was also introduced in the 2003 legislative session and that it would have exempted policies, standards, and guidelines adopted under N.D.C.C. ch. 54-59 from the rulemaking requirements of N.D.C.C. ch. 28-32. You also indicate that Senate Bill 2039 was defeated. However, as I recently noted in N.D.A.G. 2003-L-32:

[A]s a matter of law, courts generally do not determine legislative intent based on the Legislature’s failure to act on a measure. “[T]he defeat of legislation is not indicative of legislative intent, for public policy is declared by the Legislature’s action, not by its failure to act.” Warner and Company v. Solberg, 634 N.W.2d 65, 71 (N.D. 2001) (citing James v. Young, 43 N.W.2d 692 (N.D. 1950)). See also Coles v. Glenburn Public School District No. 26, 436 N.W.2d 262, 265, n.2 (N.D. 1989).

Consequently, the defeat of Senate Bill 2039 does not, in and of itself, necessarily indicate a legislative intent to require ITD to go through rulemaking in order to establish policies, standards, and guidelines for the purchase of hardware, software, and services.

However, there is nothing in the text of House Bill 1505, or in particular N.D.C.C. § 54-59-02.1, indicating the Legislature intended to except ITD from the rulemaking requirements of N.D.C.C. ch. 28-32 in establishing its policies, standards, and guidelines for executive branch agencies with respect to the purchase of computer software and computer systems. Thus, it is necessary to examine the specific exemptions to rulemaking contained in N.D.C.C. § 28-32-01(11). The two most pertinent exceptions are contained in N.D.C.C. § 28-32-01(11)(a) and (k). Section 28-32-01(11)(a), N.D.C.C., exempts a rule “concerning only the internal management of an agency which does not directly or substantially affect the substantive or procedural rights or duties of any segment of the public.” The information technology procurement standard you attached to your letter (STD-ITD-001) (Jan. 12, 2004) states that it was intended to apply “to all executive branch state agencies and institutions, excluding the institutions under the control of the board of higher education.” Id. at p. 3. Thus, it does not appear that this exception would apply since it goes beyond the internal management of ITD and extends to all executive branch state agencies and institutions other than those under the control of the Board of Higher Education. Consequently, it is my opinion that the internal management exception would not apply to the ITD standards. See Mullins v. North Dakota Department of Human Services, 454 N.W.2d 732 (N.D. 1990); Illies v. Illies, 462 N.W.2d 878 (N.D. 1990).

The other potentially applicable exception to the rulemaking requirements is contained in N.D.C.C. § 28-32-01(11)(k) which excepts “[a]ny material, including a guideline,

interpretive statement, statement of general policy, manual, brochure, or pamphlet, which is explanatory and not intended to have the force and effect of law.” Although N.D.C.C. § 54-59-02.1 uses the terms “policies, standards, and guidelines” and does not use the term “rules,” it might be argued this exception to rulemaking would apply to ITD. However, as you noted, it was apparently intended that the ITD procurement standard have the force and effect of law since the last provision of the standard entitled “Non-Compliance” states “[n]on-compliance with this standard shall be reported to the Office of the State Auditor. Non-compliance to this standard represents a violation of State law. This standard communicates guidance for actions to be taken by agencies to remain in compliance.” STD-ITD-001 at p. 4. Thus, it is my opinion that ITD intended that this standard have the force and effect of law, and therefore the rulemaking exception in N.D.C.C. § 28-32-01(11)(k) is not applicable.

Finally, it must be considered whether the Legislature intended that the establishment of ITD policies, standards, and guidelines under N.D.C.C. § 54-59-02.1 would impliedly amend the requirements of N.D.C.C. ch. 28-32 with respect to ITD. As I explained in N.D.A.G. 2004-L-29:

An “implied amendment” is an act that makes a material modification to a statute without specifically amending the statute in question. Tharaldson v. Unsatisfied Judgment Fund, 225 N.W.2d 39, 45 (N.D. 1974). There is a presumption against implied amendments. In order to overcome that presumption, there must be an irreconcilable conflict between the implied amendment and the applicable statute. Id.

I find nothing in the text of N.D.C.C. § 54-59-02.1¹ which reasonably could be characterized as an irreconcilable conflict with the rulemaking requirements contained in

¹ The statute does provide for the creation of an “advisory committee consisting of representatives from state agencies” for the purpose of establishing the policies, standards, and guidelines. While it might be argued the Legislature was establishing an alternate procedure for promulgating the standards, I do not believe this language is enough to constitute an “irreconcilable conflict” between N.D.C.C. § 54-59-02.1 and the chapter 28-32 rulemaking provisions.

It might also be argued that because N.D.C.C. § 54-59-09 generally provides that unless exempted by the director of ITD, all executive branch agencies and institutions must follow statewide information technology policies, standards, and guidelines, such policies, standards, and guidelines as are developed would conflict with chapter 28-32 rulemaking. However, it is doubtful that this language creates the kind of “irreconcilable conflict” needed to impliedly amend chapter 28-32 and, in any event, N.D.C.C. § 54-59-09 refers to general policies, standards, and guidelines jointly developed by ITD and the Office of Management and Budget, not to computer software and systems standards required to be established by an advisory committee under N.D.C.C. § 54-59-02.1.

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N.D.C.C. ch. 28-32; the requirements to establish policies, standards, and guidelines for executive branch state agencies with respect to the purchase of computer software and computer systems can co-exist with the administrative rulemaking provisions of N.D.C.C. ch. 28-32 without doing violence to either. Because implied amendments are not favored in the law and there is a presumption against them, and because I find no irreconcilable conflict between the legislative act and existing law, it is my opinion that the provisions of N.D.C.C. § 54-59-02.1 do not impliedly amend ND.C.C. ch. 28-32 and the two must be construed together.

Thus, it is my opinion that ITD is required to follow the administrative rulemaking requirements of N.D.C.C. ch. 28-32 in establishing policies, standards, and guidelines for executive branch agencies with respect to the purchase of computer software and computer systems since ITD qualifies as an administrative agency and no exception applies in this instance.

Sincerely,

Wayne Stenehjem
Attorney General

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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 question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).