

**LETTER OPINION
2010-L-12**

September 13, 2010

The Honorable Jerry Klein
State Senator
Chairman, Administrative Rules Committee
PO Box 265
Fessenden, ND 58438-0265

Dear Senator Klein:

Thank you for asking several questions on behalf of the Administrative Rules Committee. The Administrative Rules Committee has been assigned to study criminal and civil penalties that are imposed by administrative rule. The Committee has asked:

- (1) whether authority must be provided by statute for an administrative agency to adopt administrative rules imposing criminal or civil penalties, fines, fees and forfeitures;
- (2) whether the Legislature may delegate authority to an administrative agency to define the terms or elements of an offense subject to statutory penalty;
- (3) whether courts have adopted any factors or tests concerning a legislative delegation of authority for administrative agencies to adopt administrative rules imposing criminal or civil penalties, fines, fees and forfeitures; and
- (4) whether courts have held that criminal or civil penalties are unenforceable solely because an administrative rule based upon delegated legislative authority defined the offense or specified the penalty.

For the reasons stated below, it is my opinion that:

- (1) administrative agencies do not have inherent authority to impose criminal or civil consequences for actions, but must obtain that authority through statute;

- (2) the Legislature may delegate authority to an administrative agency to define the terms or elements of an offense subject to statutory penalty;
- (3) when interpreting administrative rules, the courts consider procedural safeguards such as those contained in the Administrative Agencies Practice Act along with any standards provided by the statutory delegation, and courts consider whether the power is constitutionally delegable; and
- (4) courts have generally upheld criminal or civil penalties even when an administrative rule defined the offense or specified the penalty.

ANALYSIS

I.

Your first question is whether authority must be provided by statute for an administrative agency to adopt administrative rules imposing criminal or civil penalties, fines, fees and forfeitures. “Except as otherwise provided in the North Dakota Constitution, our Legislature may not delegate legislative powers to others.”¹ Administrative agencies do not have inherent authority to impose criminal or civil consequences for actions, but must obtain that authority through statute.² “[A]dministrative agencies are creatures of legislative action. As such, legal logic compels the conclusion that the agencies have only such authority or power as is granted to them or necessarily implied from the grant.”³ This is referred to as a delegation of legislative authority. The North Dakota Supreme Court has a long history of upholding the delegation of legislative authority to make administrative rules.⁴

The North Dakota Supreme Court has not directly addressed the delegation of authority to define crimes.⁵ However, in a case involving a delegation of authority allowing an administrative agency to add to lists of controlled substances, the Michigan Supreme Court concluded:

¹ MCI Telecommunications Corp. v. Heitkamp, 523 N.W.2d 548, 554 (N.D. 1994).

² N.D.A.G. 95-L-196.

³ First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584-85 (N.D. 1984).

⁴ See State ex rel. Gaulke v. Turner, 164 N.W. 924 (N.D. 1917) (upholding legislative delegation of authority to inspect and grade grain).

⁵ See State v. Ness, 774 N.W.2d 254 (N.D. 2009) (issue mentioned but not specifically argued).

[T]he power to define crimes, unlike some legislative powers, need not be exercised exclusively and completely by the Legislature. Provided sufficient standards and safeguards are included in the statutory scheme, delegation to an executive agency is appropriate, and often necessary, for the effectuation of legislative powers.⁶

Where authorized by the Constitution, the North Dakota Supreme Court has upheld the Legislature's delegation of even purely legislative powers to political subdivisions, including delegating the authority to create criminal penalties for violation of ordinances to a home rule county.⁷ Cities, too, may create crimes,⁸ and their authority to do so is delegated by the Legislature.⁹

Therefore, it is my opinion that administrative agencies do not have inherent authority to impose criminal or civil consequences for actions, but must obtain that authority through statute.

II.

Your second question is whether the Legislature may delegate authority to an administrative agency to define the terms or elements of an offense subject to statutory penalty. While the North Dakota Supreme Court has decided many cases concerning the delegation of legislative authority, it has not decided a case directly on this point. There is, however, a close analogy. In State v. Ness,¹⁰ an individual was prosecuted for violating the Governor's deer hunting proclamation. The Legislature has delegated authority to the Governor to issue a proclamation setting out certain details for each deer hunting season, and a violation of that proclamation is a class B misdemeanor.¹¹ The defendant challenged the legality of his conviction based on an argument that the Governor's deer hunting proclamation was unconstitutionally vague, but the delegation of authority to define the terms of a crime was not challenged.¹² Although it is dicta, the court began its analysis by stating "[t]he Governor's deer hunting proclamation has the

⁶ People v. Turmon, 340 N.W.2d 620, 627 (Mich. 1983).

⁷ State v. Brown, 771 N.W.2d 267, 271 (N.D. 2009).

⁸ N.D.C.C. §§ 40-05-02 and 40-05-06.

⁹ See generally, State ex rel. City of Minot v. Gronna, 59 N.W.2d 514 (N.D. 1953); see also Sauby v. City of Fargo, 747 N.W.2d 65 (N.D. 2008) (home rule cities have statutory authority to enact traffic ordinances and prescribe penalties for violations but may not impose penalties for non-criminal traffic offenses exceeding state statutory limits).

¹⁰ 774 N.W.2d 254 (N.D. 2009).

¹¹ See N.D.C.C. § 20.1-08-01.

¹² 774 N.W.2d at 258.

force of law, and a violation of a provision of the proclamation is a class B misdemeanor unless a noncriminal penalty is provided in the proclamation.”¹³

Further, a criminal law may define a crime by reference to another law or regulation. In State v. Julson,¹⁴ the legal issues involved the incorporation by reference of certain federal regulations defining LSD as a hallucinogenic drug. In this instance, state law incorporated by reference the federal Food, Drug and Cosmetic Act and regulations promulgated in the conformity therewith. The court concluded that “[s]tatutes adopting by reference laws of the federal government and regulations promulgated thereunder by one of its agencies in existence at time of the enactment of adopting statute is not unlawful delegation of legislative power.”¹⁵ This case is not directly on point to your question because the Legislature was adopting by reference a document that was already in existence instead of delegating authority to an agency to promulgate regulations. However, the Julson case does inferentially point to the principal that a criminal statute does not need to include all operative terms defining the elements of a crime in and of itself, but may include reference to other documents, such as an administrative rule.

Courts in other states have held that when a crime has been created by statute, the specific elements of a crime or the facts that, if proven, constitute the crime may be provided by an administrative agency rule under a proper delegation of legislative authority.¹⁶ These cases are consistent with North Dakota case law upholding a delegation of legislative authority in non-criminal contexts. Given its past decisions, it is my opinion that the North Dakota Supreme Court would follow these precedents.

Therefore, it is my further opinion that the Legislature may delegate authority to an administrative agency to define the terms or elements of an offense subject to statutory penalty.

¹³ Id. (citing N.D.C.C. § 20.1-08-01).

¹⁴ 202 N.W.2d 145 (N.D. 1972).

¹⁵ 202 N.W.2d at 151.

¹⁶ See, People v. Holmes, 959 P.2d 406 (Colo. 1998), State v. All Pro Paint & Body Shop, Inc., 639 So.2d 707 (La. 1994), Baumgardner Oil Co. v. Pennsylvania, 606 A.2d 617 (Pa. Commw. Ct. 1992), Sheriff, Clark County v. Lugman, 697 P.2d 107 (Nev. 1985), State v. Suter, 346 N.W.2d 372 (Minn. App. 1984), State v. Union Tank Car Co., 13 Env'tl. L. Rep. 20,472 (La. 1983), State v. Sprague, 330 N.W.2d 739 (Neb. 1983), People v. Turmon, 340 N.W.2d 620 (Mich. 1983), State v. Dube, 409 A.2d 1102 (Me. 1979); State v. Cutright, 226 N.W.2d 771 (Neb. 1975), People v. Einhorn, 346 N.Y.S.2d 986 (Sup. Ct., N.Y. Cty, Sp. Narc., Pt. G. 1973).

III.

Your third question is whether courts have adopted any factors or tests concerning a legislative delegation of authority for administrative agencies to adopt administrative rules imposing criminal or civil penalties, fines, fees and forfeitures. The leading case concerning delegation of legislative authority to administrative agencies is Trinity Medical Center v. North Dakota Board of Nursing.¹⁷ Before this case, the Supreme Court analyzed the delegation of powers by only considering any safeguards and standards that were contained in the statutory delegation of authority. But in Trinity, the Supreme Court adopted the modern trend of the state delegation doctrine. This modern trend requires a consideration of procedural safeguards, such as those contained in the Administrative Agencies Practice Act,¹⁸ along with any standards provided by the statutory delegation in order to determine whether the total protection against arbitrary power is adequate and “to assure that administrative agencies are not given uncontrolled discretion.”¹⁹ The court also determined that the broad nature of the delegation of authority was to be measured in regard to the Legislature’s ultimate authority to retract the grant of authority to the Board of Nursing.²⁰

There is also a test regarding the nature of powers that may be delegated to administrative agencies under the constitution: “[t]he distinction between delegable and non-delegable powers is ‘whether the power granted gives the authority to make a law or whether that power pertains only to the execution of a law which was enacted by the Legislature.’”²¹ The Supreme Court of Nebraska made an apt analogy to traffic laws when analyzing a legislative delegation.²² That court noted the legislature permits state agencies or political subdivisions to establish or modify speed limits based on a determination of necessity and posting signs.²³ The legislature creates the offense through statute, but the agency executes the law by applying it to specific, factual conditions.

Under the modern trend of delegation, the North Dakota Supreme Court has consistently held that administrative rules may not exceed statutory authority or

¹⁷ 399 N.W.2d 835 (N.D. 1987).

¹⁸ N.D.C.C. ch. 28-32.

¹⁹ 399 N.W.2d at 844.

²⁰ Id. at 847-48. The court further considered the circumstances where medical science is advancing at a very rapid rate, and the importance of keeping standards current was another consideration supporting the delegation of authority to the Board of Nursing.

²¹ MCI Telecommunications, 523 N.W.2d at 554, quoting County of Stutsman v. State Historical Society, 371 N.W.2d 321, 327 (N.D. 1985).

²² State v. Cutright, 226 N.W.2d 771 (Neb. 1975).

²³ Id. at 774-75.

supersede statutes, and any regulation which goes beyond what the Legislature has authorized or that exceeds the agency's authority is void.²⁴ Accordingly, an administrative rule which imposes a criminal or civil penalty of any sort must be based on authority delegated to that agency from the Legislature by statute. But if that authority is so delegated, there is no legal impediment to prevent the agency from adopting such a rule and enforcing the rule in an appropriate forum.²⁵

Therefore, it is my further opinion that when interpreting administrative rules, the courts consider procedural safeguards, such as those contained in the Administrative Agencies Practice Act, along with any standards provided by the statutory delegation in order to determine whether the total protection against arbitrary power is adequate and to assure that administrative agencies are not given uncontrolled discretion, and courts consider whether the power is constitutionally delegable.

IV.

Your fourth question is whether courts have held that criminal or civil penalties are unenforceable solely because an administrative rule based upon delegated legislative authority defined the offense or specified the penalty. The North Dakota case closest on point demonstrated that the Governor's deer hunting proclamation was enforceable through a criminal prosecution even though it isn't a rule adopted with the procedural safeguards of the Administrative Agencies Practice Act.²⁶ As noted previously, courts in many states have held that a legislature may create a crime by statute and then delegate the authority to define the acts constituting the criminal offense to a state agency.²⁷ In some of these cases, the agency's action determined the severity of the criminal penalty attached to the violation.²⁸ However, if the agency's rule exceeds the scope of authority that is delegated, then the rule will be invalid.²⁹ Similarly, if the legislature inadequately defines a crime and does not provide standards to assist agencies in establishing the rules, the rule will be invalid.³⁰

²⁴ Moore v. North Dakota Workmens Compensation Bureau, 374 N.W.2d 71 (N.D. 1985), Smith v. North Dakota Workers Compensation Bureau, 447 N.W.2d 250 (N.D. 1989), Hecker v. Stark County Social Services Board, 527 N.W.2d 226 (N.D. 1994).

²⁵ For a criminal enforcement action, the forum would have to be in district court and the enforcing agency would be the county state's attorney having jurisdiction.

²⁶ Supra State v. Ness, 774 N.W.2d 254 (N.D. 2009)

²⁷ See note 16.

²⁸ See People v. Einhorn, 346 N.Y.S.2d at 992 (agency's classification of methaqualone as controlled substance increased penalty from misdemeanor to felony).

²⁹ State v. Domangue, 649 So.2d 1034,1039 (La. App. 1 Cir. 1994).

³⁰ State v. Ramos, 202 P.3d 383, 386 (Wash. App. 2009).

The Supreme Court of Florida has ruled otherwise, but its decision is distinguishable. The Florida court held that an administrative agency may not define a crime by rule based on particular, unique provisions of that state's constitution that are not found in North Dakota's constitution.³¹ The Florida Supreme Court also held that their constitution requires a strict separation of powers between the three branches of government,³² whereas the North Dakota Supreme Court has acknowledged that the three branches of government cannot be divided into "watertight compartments," and administrative agencies often perform acts that are partly legislative.³³ Therefore, the Florida decision was based on grounds not found in North Dakota, and the North Dakota Supreme Court would likely decide to follow the precedent from the majority of states that have considered this precise issue.

Therefore, courts have generally upheld criminal or civil penalties even when an administrative rule defined the offense or specified the penalty.

Sincerely,

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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.³⁴

³¹ B.H. v. State, 645 So.2d 987, 991-93 (Fla. 1994) (in particular, the Florida constitution provides "[n]o administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.")

³² Id. at 991-92.

³³ Trinity, 399 N.W.2d at 843-44, quoting Southern Valley Grain Dealers v. Bd. of Cty. Comr's, 257 N.W.2d 425 (N.D. 1977).

³⁴ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).