

N.D.A.G. Letter to Wallner (March 13, 1990)

March 13, 1990

Mr. Tom Wallner
Executive Director
State Council on Developmental Disabilities
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0250

Dear Mr. Wallner:

Thank you for your February 20, 1990 letter. You ask if the State Council on Developmental Disabilities (Council) correctly perceives that its statutory authority is limited to recommending standards and rules for the certification of developmental disability professionals. You advise that the Council is without any authority to enforce certification standards and rules that it may adopt. Accordingly, the Council has a longstanding practice of merely recommending certification standards to the Department of Human Services. The Department of Human Services is responsible for the licensing of residential care and services for the developmentally disabled pursuant to N.D.C.C. ch. 25-16.

N.D.C.C. § 25-01-01.1 in relevant part, provides: "The council shall . . . establish a committee on professional standards and certification which will develop rules for the certification of developmental disability professionals." The Legislature has not given the Council any other rulemaking authority. In particular, the Legislature has not given the Council authority to issue, deny, or revoke certificates. The absent authority would be essential to any enforcement of certification rules.

The language of N.D.C.C. § 25-01-01.1 does not operate as a mandate for the adoption of rules. The statute obliges the Council to establish a committee on professional standards and certification, and requires the committee, in turn, to "develop" rules for the certification of developmental disability professionals. However, the Legislature has not obliged the Council (or its committee on professional standards and certification) to either "promulgate" or "adopt" those rules. "[E]very legislative delegation of power does not give rise to a mandatory duty to promulgate administrative standards in order for that power to be validly exercised." Amerada Hess Corp. v. Conrad, 410 N.W.2d 124, 133 (N.D. 1987) (citation omitted).

Given the very limited nature of the statutory delegation of authority and, in particular, the lack of enforcement tools, it is difficult to see any purpose to the promulgation or adoption of rules with the force and effect of law. "It is a basic rule of administrative law that an administrative regulation may not exceed statutory authority or supersede a statute, and that a regulation which goes beyond what the Legislature has authorized is void." Moore

v. N.D. Workmen's Compensation Bureau, 374 N.W.2d 71, 74 (N.D. 1985). Thus, any provision of an adopted rule which purported to enforce the certification "requirement" would be void. In effect, the "requirement" would be no requirement at all, but merely an advisory statement. "An administrative agency cannot use its rule-making power to modify, alter, or enlarge provisions of a statute which it is charged with administering." Beatrice Manor, Inc. v. Department of Health, 219 Neb. 141, _____, 362 N.W.2d 45, 49 (1985) (quoting County of Dodge v. Department of Health, 218 Neb. 346, 355 N.W.2d 775 (1984)). In order to be valid, a regulation must be consistent with the statute under which it is promulgated. U.S. v. Larionoff, 331 U.S. 864, 873 (1977).

Given the very limited delegation of authority to the State Council on Developmental Disabilities, the Council appropriately concluded that its authority is limited to recommending rules for the certification of developmental disability professionals. Your letter indicates that these recommendations have been received by the agency with licensing authority, and used by that agency in setting standards for the providers of services to developmentally disabled persons.

You conclude your letter by asking if the Council may delegate authority for the enforcement of standards to the Department of Human Services if it is determined that the Council's statutory authority goes beyond merely recommending standards. Generally, an agency may not redelegate rulemaking authority to another agency or to any other entity. However, that rule has no application to your inquiry inasmuch as the Council has no enforcement authority which it may delegate to the Department of Human Services.

Sincerely,

Nicholas J. Spaeth

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