

N.D.A.G. Letter to Hoffner (July 7, 1989)

July 7, 1989

Honorable Serenus Hoffner
State Representative
1424 Atlanta Drive
Bismarck, ND 58504

Dear Representative Hoffner:

Thank you for your June 14, 1989, letter requesting my opinion on the validity of the enactment of House Bill No. 1586 by the Fifty-first Legislative Assembly.

Your letter specifically requests my opinion on three matters. First, you ask whether the Legislature complied with applicable requirements concerning fiscal notes and a retirement committee report. Second, you ask whether the fiscal notes and retirement committee report were accurate. Finally, you ask whether a failure to produce accurate fiscal notes and retirement committee reports renders the legislation invalid.

North Dakota law allows the Attorney General to provide written legal opinions to members of the Legislative Assembly only as to legal questions. N.D.C.C. § 54-12-01(8). As a result, this office has traditionally refrained from issuing legal opinions on factual questions. Your first two questions are essentially factual questions. Whether the Legislature complied with applicable requirements concerning the preparation of fiscal notes and a retirement committee report and whether such notes and report are accurate are not questions of law, but of fact. Because these issues do not involve legal questions, I cannot respond to these questions. Instead, I can only defer to your judgment and the judgment of others on these issues.

Your third question presents a legal question upon which I can provide an opinion. Your third question is whether failure to comply with applicable requirements as to fiscal notes and a retirement committee report renders House Bill No. 1586 invalid. For the purpose of answering this question, I will assume that the applicable requirements were not met.

Neither the North Dakota Constitution nor the state's statutes address the question of fiscal notes. As noted in your letter, the fiscal note requirement is a rule of procedure established by both houses of the Legislature pursuant to applicable constitutional authority, N.D. Const. art. IV, § 12. Although the constitution allows the Legislature to determine its own rules and procedure, it does not provide for enforcement of those rules nor does it describe the ramifications of noncompliance with those rules.

N.D. Const. art. IV, § 13, establishes the requirements for valid legislation. That constitutional provision does not mention fiscal notes, their preparation, or their accuracy.

Assuming House Bill No. 1586 has complied with all applicable constitutional and statutory provisions, the alleged failure to comply with applicable legislative rules with respect to fiscal notes does not affect the validity of its enactment. Instead, the enforcement of the procedural rule is left to the internal operation of the Legislature; no other branch of government, i.e., the executive or judicial branch, may enforce those rules. State ex rel. Spaeth v. Meiers, 403 N.W.2d 392, 394 (N.D. 1987).

Thus, only the issue of the failure to produce the retirement committee report remains.

In Manigault v. Springs, 199 U.S. 473 (1905), the United States Supreme Court held that a general law enacted by a legislature may be repealed, amended, or disregarded by a subsequent legislature and that a special act is not necessarily invalid because the legislature dispensed with certain formalities required by general law concerning the passage of such an act. In Manigault the Supreme Court held that rules which were adopted concerning the passage of certain legislation and which were not constitutional provisions were general statutes that could be repealed, amended, or disregarded by the legislature that enacted it. *Id.* at 487. The Court also held that such rules of legislation were not binding upon any subsequent legislature and that noncompliance with such rules would not impair or nullify the provisions of an act which passed without satisfying such requirements. *Id.*

Unlike fiscal notes, the subject of reports by the Committee on Public Employees Retirement Programs is provided by statute and may have an impact on the validity of legislation concerning the retirement programs of the employees of the state or any of its political subdivisions.

N.D.C.C. § 54-35-02.4 requires the Committee on Public Employees Retirement Programs ("Committee") to consider and report on those legislative measures and proposals over which it possesses jurisdiction and which affect the retirement programs of the employees of the state and its political subdivisions. As part of its report, the Committee must include an actuarial review. The Committee must provide its report to the Legislative Council and to the Legislative Assembly. The Committee's report concerning any legislative measure must be appended to the copy of that measure. N.D.C.C. § 54-35-02.4(4). A legislative measure affecting a public employees retirement program cannot be introduced in either house unless it is accompanied by the Committee's report. N.D.C.C. § 54-35-02.4(5). Finally, any amendment made to a legislative measure affecting the public employees retirement program may not be considered unless it is accompanied by the Committee's report. N.D.C.C. § 54-35-02.4(6). However, the determination of whether any legislative measure affects the public employees retirement program is made solely by a majority of the members of the Committee, acting through the chairman. N.D.C.C. § 54-35-02.4(5).

Where the Committee has made a proper determination that a measure affects a public employees retirement program, but the provisions of N.D.C.C. § 54-35-02.4 have not been satisfied, any resulting legislation is declared to be "invalid and of no force and effect." N.D.C.C. § 54-35-02.4(7).

However, there is substantial doubt whether the provisions of N.D.C.C. § 54-35-02.4 are binding upon any legislative assembly. As earlier noted, general statutes enacted by a legislature concerning the manner in which special legislation is to be adopted are not binding upon that or any subsequent legislature and does not impair or nullify the provisions of any act passed in violation of such requirements. Manigault v. Springs. As one treatise states,

The decisions are nearly unanimous in holding that an act cannot be declared invalid for failure of a house to observe its own rules. Courts will not inquire whether such rules have been observed in the passage of the act. The legislature by statute or joint resolution cannot bind or restrict itself or its successors to the procedure to be followed in the passage of legislation. . . . More appropriate is the rule that the constitution has conferred this rule-making power on the legislature and exclude the courts. The court without violating the separation-of-powers rule and the specific constitutional directions could not review the legislative act.

Sutherland Stat. Const. § 7.04 at 434 (4th ed. 1985).

In State ex rel. LaFollette v. Stitt, 114 Wis.2d 358, 338 N.W.2d 684 (1983), the Wisconsin Supreme Court stated that the legislature's adherence to rules or statutes prescribing procedure is a matter solely within the legislature's discretion and is not subject to judicial review unless that legislative procedure is mandated by the constitution. 338 N.W.2d at 687. The court held that the legislature's failure to follow its own procedural rules amounts to an implied ad hoc repeal of such rules. Id.; see also Illinois Gasoline Dealers Association v. City of Chicago, 119 Ill.2d 391, 519 N.E.2d 447 (1988); Patterson v. Dempsey, 152 Conn. 431, 207 A.2d 739 (1965).

In summary, the issue of fiscal notes is a matter for the Legislature to consider and is not determinative of the validity of legislation enacted in violation of rules pertaining to fiscal notes. N.D.C.C. § 54-35-02.4 provides specific requirements with respect to legislation affecting the Public Employees Retirement Program. Although the statute states that a failure to comply with its requirements renders the resulting legislation invalid, a generally accepted rule of law states that legislation not in compliance with rules of passage is not rendered invalid and, instead, amounts to an implied repeal of the rules of passage.

Therefore, a failure to comply with N.D.C.C. § 54-35-02.4 would not invalidate a statute enacted in violation of its requirements.

I hope this discussion is helpful to you.

Sincerely,

Nicholas J. Spaeth

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