

N.D.A.G. Letter to Sanstead (Oct. 17, 1988)

October 17, 1988

Dr. Wayne G. Sanstead
Department of Public Instruction
State Capitol
Bismarck, ND 58505

Dear Dr. Sanstead:

Thank you for your letter of August 29, 1988, inquiring of the authority of the North Dakota Teachers' Professional Practices Commission to issue subpoenas.

The Teachers' Professional Practices Commission (hereinafter referred to as "Commission") is established by N.D.C.C. § 15-38-17. The Commission consists of nine members appointed by the Governor. The nine members represent classroom teachers, school board members, school administrators, and one member nominated by the State Board of Public School Education. The statute provides for the terms of office for Commission members, the manner in filling vacancies, the selection of a chairman and vice chairman, and matters involving Commission meetings and rules of procedure. The statute also provides for reimbursement of expenses and compensation for Commission members.

The Commission is authorized to take action on two subjects. The first subject concerns professional codes or standards relating to ethics, conduct, and professional performance and practices of those engaging in teaching. N.D.C.C. § 15-38-18. Those professional codes and standards recommended by the Commission are referred to the Superintendent of Public Instruction. The Superintendent may, after having a hearing thereon, approve or revise such codes and standards as he deems proper and in the best interests of the public and profession. The codes and standards are then promulgated by the Superintendent as administrative rules. *Id.*

The second subject concerns complaints against members of the teaching profession with respect to potential violations of those regulations adopted by the Superintendent of Public Instruction. N.D.C.C. § 15-38-19. Following its investigation of these complaints, the Commission may dismiss the complaint as unfounded, may issue a written warning and reprimand, or, following an opportunity for the teacher to informally appear before the Commission, file a formal complaint with the Superintendent requesting the suspension or revocation of the teacher's certificate of the teacher involved. *Id.* It is this second subject matter which is discussed by your inquiry concerning the Commission's power to issue a subpoena.

Every board, bureau, commission, department, or other administrative unit of the executive branch of state government, unless specifically exempted, is included within the

term "administrative agency." N.D.C.C. § 28-32-01(1). Furthermore, an administrative unit located within or subordinate to an administrative agency shall be treated as part of that agency where it exercises authority subject to N.D.C.C. ch. 28-32. Id. Any officer, examiner, chairman, or acting chairman of an administrative agency, on the motion of the agency or any party to a hearing or proceeding conducted by the agency, shall require by subpoena the attendance and testimony of witnesses and the production of documents at that hearing or proceeding. N.D.C.C. § 28-32-09.

If the Commission is considered an administrative agency or an administrative unit located within or subordinate to an administrative agency, the authority to issue an administrative subpoena provided for in N.D.C.C. § 28-32-09 is available to any officer, examiner, chairman, or acting chairman of that Commission. However, in determining whether the Commission constitutes either an administrative agency or an administrative unit located within or subordinate to an administrative agency, a review of the subject under consideration by the Commission is required. It is not uncommon for an agency to be considered an administrative agency only in certain instances, or proceedings. See, e.g., Halldorson v. State School Const. Fund, 224 N.W.2d 814 (N.D. 1974).

As previously noted, the Commission is authorized to dismiss a complaint brought against a teacher as unfounded or may issue a written warning and reprimand. In either of these instances, the action taken by the Commission appears to be final with no further need of action by the Superintendent of Public Instruction or any other body. In this case, the Commission should be considered an administrative unit or commission of the executive branch of state government. As such, it can be considered an administrative agency and the subpoena power authority provided for in N.D.C.C. § 28-32-09 would be available.

The conclusion that the Commission acts as an administrative agency where it takes final action in dismissing a complaint or in issuing a warning or reprimand is further dictated by due process considerations. If the Commission is not considered an administrative agency, those aggrieved by the Commission's action will find themselves with no appellate remedy. Where no right to appeal exists, due process considerations may be invoked and a constitutional problem may occur. The North Dakota Supreme Court has stated that the interpretation of a statute which places it in disharmony with the constitution is to be avoided. Grace Lutheran Church v. N.D. Employment Sec. Bureau, 294 N.W.2d 767 (N.D. 1980). The conclusion that the Commission acts as an administrative agency when it undertakes such final action ensures the presence of due process remedies, as provided by N.D.C.C. ch. 28-32, and avoids constitutional attack.

The Commission is also authorized to file a formal complaint with the Superintendent of Public Instruction requesting the suspension or revocation of the teachers' certificate. In this case, the action of the Commission is viewed as an intermediate step towards further proceedings undertaken by the Superintendent of Public Instruction. Here, the agency is more appropriately viewed as an administrative unit located within or subordinate to an administrative agency (i.e., the Superintendent of Public Instruction). As an administrative unit, it may be treated as part of the administrative agency to the extent it purports to exercise authority provided for by N.D.C.C. ch. 28-32. N.D.C.C. § 28-32-01(1). Thus, in

this situation, the Commission could exercise administrative powers of the Superintendent of Public Instruction including the power to issue a subpoena.

There is some question whether the Superintendent of Public Instruction is an administrative agency. Concededly, N.D.C.C. § 28-32-01(1)(q) exempts the Superintendent from the definition of an administrative agency except with respect to "rules relating to teacher certification, and rules relating to professional codes and standards approved under § 15-38-18." However, the filing of a formal complaint by the Commission occurs where the Commission believes a violation of those rules promulgated by the Superintendent in accordance with N.D.C.C. § 15-38-18 has occurred. Thus, the underlying subject matter of the complaint filed with the Superintendent of Public Instruction is the professional codes and standards adopted by the Superintendent. The better view, and the one I adopt, is that the Superintendent of Public Instruction is an administrative agency when he responds to the complaints filed with him by the Commission alleging violations of professional codes and standards adopted by the Superintendent pursuant to N.D.C.C. § 15-38-18. With this conclusion, potential constitutional problems, resulting from the lack of due process protections where a teacher's certificate is revoked or suspended by the Superintendent, are avoided.

Assuming the Superintendent of Public Instruction is an administrative agency in these limited circumstances, the Commission, acting as an administrative unit of that agency, would then be able to use the subpoena powers provided for by N.D.C.C. § 28-32-09.

Suggestions have been made that several statutory provisions concerning the Commission infer the inapplicability of the provisions of N.D.C.C. ch. 28-32, including the power to subpoena witnesses to appear before the Commission. N.D.C.C. § 15-38-17 provides that the Commission "shall adopt its own rules of order and procedure" and "shall hold meetings." N.D.C.C. § 15-38-19 provides that a teacher may have an opportunity "to informally appear before the commission." The argument has been made that these statutory provisions contemplate an informal setting before the Commission where the rules of procedure of N.D.C.C. ch. 28-32 are inapplicable.

The purpose of the Administrative Agencies Practices Act, N.D.C.C. ch. 28-32, is to provide a uniform procedure and practice to be followed by all administrative agencies subject to the act.

Administrative agencies have become an essential and accepted part of state government, and the Act is designed to provide for consistency among the various agencies and fair procedural methods for all persons affected.

Knoefler Honey Farms v. Just, 270 N.W.2d 354, 356 (N.D. 1978). The Legislature in creating an administrative agency must establish a certain course of procedure and certain rules or decision to be used by the agency in performing its functions. Substantial compliance with these statutory requirements is essential to the validity of administrative action. First American Bank and Trust Company v. Ellwein, 198 N.W.2d 84, 92 (N.D. 1972).

It is arguable whether the statutory references to the Commission's own rules of order and procedure, Commission "meetings," and informal appearances before the Commission illustrate a legislative intent to exempt the Commission from the provisions of N.D.C.C. ch. 28-32. However, in light of the general purpose of the Administrative Agencies Practices Act providing general rules of procedure for all agencies and persons affected for purposes of consistency and uniformity, I cannot conclude as a matter of law that the Legislature has spoken with sufficient clarity to exempt this Commission from the provisions of that Act.

In summary, the Commission may be considered an administrative agency and its officers, examiners, chairman, or acting chairman may issue an administrative subpoena where the Commission responds to complaints against teachers by dismissing the complaint or by issuing a written warning and reprimand. Where the Commission files a formal complaint with the Superintendent of Public Instruction alleging a violation of professional codes and standards previously approved by the Superintendent pursuant to N.D.C.C. § 15-38-18, the Commission may be viewed as an administrative unit located within or subordinate to an administrative agency (i.e., the Superintendent of Public Instruction) and is able to utilize the subpoena power provided for by N.D.C.C. § 28-32-09.

I realize there are those persons who are not convinced of the need for subpoena power to be enjoyed by the Commission. These persons may wish to seek appropriate legislation providing for the unavailability of the subpoena power for this Commission.

I hope this information is helpful to you.

Sincerely,

Nicholas J. Spaeth

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