

Office of the Attorney General
State of North Dakota

Opinion No. 81-90

Date Issued: August 19, 1981
Requested by: Kent Conrad
State Tax Commissioner

--QUESTION PRESENTED--

I.

Whether the amendments to Section 28-32-01(2) contained in 1981 House Bill No. 1044 are reconcilable with the amendments to that same section contained in 1981 Senate Bill No. 2044, a later enacted measure, and therefore effective.

II.

Whether various forms, newsletters, guidelines, and federal regulations used by the State Tax Department in the administration of North Dakota tax laws are 'rules' which must be adopted and published in accordance with the provisions of Chapter 28-32, N.D.C.C.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that the provisions of 1981 House Bill No. 1044 and 1981 Senate Bill No. 2044 which amend Section 28-32-01(2), N.D.C.C., are reconcilable and therefore the amendments made by House Bill No. 1044 are effective.

II.

It is my further opinion that Chapter 28-32, N.D.C.C., does not impose a substantive obligation on agencies to adopt and publish rules, but only provides the procedure to be followed in the adoption and publication of rules which are to have the force and effect of law. The question of whether particular forms, newsletters, guidelines and federal regulations must be adopted and published in the North Dakota Administrative Code must be answered by each administrative agency after carefully considering the content and purpose of the statements and the applicable statutory and constitutional requirements.

--ANALYSIS--

I.

The 1981 Legislative Assembly enacted two bills which amend the provision of Section 28-32-01(2) of the North Dakota Century Code relating to the definition of the term 'rule' for the purposes of Chapter 28-32, N.D.C.C., the Administrative Agencies Practice Act. House Bill No. 1044 which was passed by the second house on February 20, 1981, deletes the former language in its entirety and substitutes a new definition of the term 'rules.' Senate Bill No. 2044 which was approved by the second house on February 26, 1981, basically changes the definition of 'rules and regulations' in the plural to a definition of 'rule' in the singular, and also make some other technical amendments to the prior existing language.

Section 1-02-09.1, N.D.C.C., provides as follows:

1-02-09.1. MULTIPLE AMENDMENTS TO THE SAME PROVISION, ONE WITHOUT REFERENCE TO THE OTHER.--If amendments to the same statute are enacted at the same or different sessions of the legislature, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment prevails.

Under this section, if the two 1981 bills are irreconcilable, the provisions of Senate Bill No. 2044 prevail and the provisions of House Bill No. 1044 are impliedly repealed. The North Dakota Supreme Court has held on numerous occasions that implied repeals are not favored and are to be avoided when possible. See, for example, *Kessler vs. Board of Education of City of Fessenden*, 87 N.W.2d 743 (ND 1958) and *Walsvik vs. Brandel*, 298 N.W.2d 375 (ND 1980).

Although the North Dakota Supreme Court has not addressed the provisions of Section 1-02-09.1, N.D.C.C., it has on numerous occasions set forth guidelines to determine whether two statutes are irreconcilable under Section 1-02-09, N.D.C.C., relating to irreconcilable statutes as opposed to irreconcilable amendments. In order for two statutes to be so irreconcilable as to result in the implied repeal of the first enacted, there must be a clear repugnancy between the two to such an extent that a necessary implication arises that the Legislature, by enactment of the later, intended to repeal the former. See *Rodgers vs. Freborg*, 240 N.W.2d 63 (ND 1976) and *Tharaldson vs. Unsatisfied Judgment Fund*, 225 N.W.2d 39 (ND 1974). The court has also said in *Herman vs. Magnusson*, 277 N.W.2d 445 (ND 1979) that the fundamental test in all cases pertaining to implied repeals is the intent of the Legislature.

Although the specific language of the two versions of Section 28-32-01(2) approved by the 47th Legislative Assembly cannot be reconciled in the sense of including language of both in a composite statute, it is our opinion that the Legislature did not intend to impliedly repeal the provisions of House Bill No. 1044 by its adoption of Senate Bill No. 2044. The amendments contained in Senate Bill No. 2044 do not alter the substance of the former text of the section. The purpose of the bill as represented in the 1981 Report of

the North Dakota Legislative Council at page 149 and in testimony of a Legislative Council representative before the House and Senate State and Federal Government Committees is to clarify the date on which administrative rules are to take effect following their adoption. In contrast, the stated purpose of House Bill No. 1044 as found at page 152 of the 1982 Report of the North Dakota Legislative Council and the testimony of a Legislative Council representative before the House and Senate Judiciary Committee is to provide a new definition of the term 'rule' to include all statements of general application which implement, interpret, or prescribe law or policy except as otherwise specifically provided. Furthermore, a representative of the Legislative Council office testified before the House Judiciary Committee that the two bills were not in conflict with each other. Thus although the better legislative drafting practice might have been to have not included the amendments to Section 28-32-01(2), N.D.C.C., in Senate Bill No. 2044 in light of the provisions of House Bill No. 1044 or at least to have deleted those amendments in committee once passage of House bill No. 1044 became apparent, the intent of the Legislature in enacting the two bills was not in irreconcilable conflict and therefore the provisions of both must be given effect.

II.

Section 28-32-01(2), N.D.C.C., as amended, provides that any 'statement of general applicability that implements, interprets, or prescribes law or policy, or the organization, procedure, or practice requirements of an agency' is a 'rule' unless within one of the listed exceptions. Each administrative agency must determine for itself whether forms, statements, or guidelines fall first within the general definition and then within one of the listed exceptions. In each instance, the subject matter of and statutory authority for the particular form, statement, or guideline must be examined along with the definition of 'rule' and the listed exceptions thereto. If the proposal is within the definition and is not excepted, the statement must be adopted and published as a rule pursuant to Chapter 28-32, N.D.C.C., if it is to have the force and effect of law.

It is our opinion, however, that Chapter 28-32, N.D.C.C., as it relates to the rule making functions of administrative agencies, is a procedural statute only and does not substantively impose upon any agency a duty to adopt and promulgate rules. Section 28-32-02(1), N.D.C.C., provides that with certain exceptions, 'rules not published in the Administrative Code shall be invalid.' However, the statute Provides no definition of 'invalid.' Webster's New World Dictionary defines 'invalid' as 'not valid; having no force; null and void.' In our opinion, the declaration that unpublished rules are invalid is but another way of saying that unpublished rules do not have the force and effect of law.

Our opinion that Chapter 28-32, N.D.C.C., does not impose an affirmative duty on agencies to adopt rules does not, however, mean that there is no obligation on the part of the agencies to adopt rules under the procedures established by the chapter. First, if an agency statement is to have the force and effect of law, or is to be binding upon members of the general public or any class of constituents of the agency, it must be adopted and published as a rule. Furthermore, there are many instances in which other statutes which

create, authorize or assign duties and responsibilities to agencies require the agency to proceed by rule making. Constitutional doctrines of due process, equal protection, and the delegation of Legislative powers must also be considered in each instance to determine whether a particular agency statement must be adopted and published as a rule. But in and of itself Chapter 28-32, N.D.C.C., including the 1981 amendments thereto, does not impose an affirmative duty to adopt and promulgate rules but only provides the procedures to be followed in adopting and publishing rules which are to have the force and effect of law.

In regard to the specific questions raised in your request, we offer the following observations concerning the definition of 'rule' in Section 28-32-01(2), N.D.C.C., and the exceptions contained therein.

You first ask whether tax forms and accompanying schedules and instructions must be adopted and published as a rule before their use by taxpayers can be required. While such forms appear to be 'statements of general applicability that implement law' within the definition of 'rule' we also note that subdivision g excepts from the definition of rule 'a form whose contents or substantive requirements are prescribed by rule or statute or are instructions for the execution or use of the form.' While the language of this subdivision is not clear, it is our opinion that subdivision g excepts from the definition of rule forms whose contents or substantive requirements are prescribed by rule or statute and the instructions for those forms. Therefore, if the forms to which your request refers are ones for which the contents or substantive requirements are prescribed by statute, the forms are not within the definition of 'rule.' If the contents or substantive requirements are not prescribed by statute, they would appear to be within the definition of 'rule', but it is possible to prescribe the contents or substantive requirements by rule rather than publishing the form itself. Although subdivision g does not define 'substantive requirements,' it is my opinion that if a statute provides for the preparation and use of a form by an agency and further provides the ultimate or final disclosure which must be made on the form, as opposed to incidental information or intermediary information which is disclosed only in the process of arriving at the final result, the substantive requirements of the form are prescribed by statute and the form is within the exception.

As to a guideline or newsletter that the Tax Department wishes to prepare and distribute to taxpayers or other affected persons, the definition of 'rule' seems to apply and there is no exception provided in such an instance. However, if the guideline or newsletter merely repeats or condenses policies otherwise found in statutes or rules, it would not 'implement, interpret or prescribe' law or policy and therefore would not be a rule.

You also ask whether audit guidelines must be published. It appears that subdivision b in most instances would except audit guidelines from the definition of rule.

Your final inquiry concerns the publication of federal income and estate tax rules and regulations as a result of the federalization of North Dakota's income and estate tax laws. In this regard, note that Section 1-02-38, N.D.C.C., provides that in enacting a statute a just

and reasonable result is intended and a result feasible of execution is intended. Assuming that the tax department desires these rules and regulations to have the force and effect of law and to be binding on members of the general public, it appears that the same are within the definition of 'rule.' However, an interpretation of the definition and the exceptions thereto which would require publication of some 6,100 pages of federal tax rules and regulations, is not a just, reasonable or feasible result. Therefore, we would suggest that the rules be adopted by reference or, in the alternative that the office of the Legislative Council and the Tax Department agree pursuant to Section 28-32-01(3), N.D.C.C., that the federal rules and regulation be omitted from the code.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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