STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 92-15

Date issued: September 25, 1992

Requested by: Senators James C. Yockim and William G. Goetz

- QUESTION PRESENTED -

Whether North Dakota Century Code (N.D.C.C.) ' 27-05-02.1(2), which authorizes the supreme court to abolish district court judgeships based on certain criteria, is unconstitutional as either an invalid delegation of legislative authority or imposition of a nonjudicial duty.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that N.D.C.C. ' 27-05-02.1(2), which authorizes the supreme court to abolish district court judgeships based on certain criteria, is not unconstitutional as either an invalid delegation of legislative authority or imposition of a nonjudicial duty.

- ANALYSIS -

N.D.C.C. ' 27-05-02.1 provides:

> 1. Notwithstanding section 44-02-03, when a vacancy occurs in the office of district court judge, the supreme court shall determine within ninety days of receiving notice of the vacancy from the governor and in consultation with district court judges and attorneys in the affected judicial district, whether or not that office is necessary for effective judicial administration. The supreme court may, consistent with that determination, order that:

a. The vacancy be filled in the manner provided pursuant to chapter 27-25;

b. The vacant office be abolished; or

c. The vacant office be transferred to a judicial district in which an additional judge is necessary for effective judicial administration, and that the vacancy be filled in the manner provided pursuant to chapter 27-25 with respect to that judicial district.

2. Subject to subsection 3, the supreme court may, after consultation with district court judges and attorneys in the affected judicial district, abolish one or more offices of district court judge if the supreme court determines that the office is not necessary for effective judicial administration and abolition of the office is necessary to reduce the number of district court judges as required in subsection 2 of section 27-05-01. At least one year before the end of the term of office of a district court judge holding the judgeship, the supreme court shall notify the judges of the affected judicial district of a determination that the judgeship will be abolished. The abolition of an office of district court judge under this subsection is effective at the end of the term of office of the district court judge holding that judgeship. The district court judge holding the judgeship to be abolished may petition the supreme court, within thirty days after receiving notice that the judgeship will be abolished, for a hearing on the determination. The supreme court shall hold the hearing within thirty days after receipt of the petition. Within thirty days after the hearing, the supreme court shall affirm, reverse, or modify its previous determination.

3. The authority conferred upon the supreme court in subsection 2 may be exercised:

   a. From July 1, 1995, until June 30, 1997, if on July 1, 1995, the number of district court judges is more than forty-eight:

   b. From July 1, 1997, until June 30, 1999, if on July 1, 1997, the number of district court judges is more than forty-six; and

   c. From July 1, 1999, until December 31, 2000, if on July 1, 1999, the number of district court judges is more than forty-four.

4. The supreme court shall notify the governor of its determinations made pursuant to this section.

N.D.C.C. ' 27-05-01(2) provides in pertinent part:

> The supreme court shall reduce the number of district judges pursuant to section 27-05-02.1 to forty-two before January 2, 2001.

When a statute has been regularly enacted by the legislature, the only test of its constitutional validity is whether it directly violates any of the expressed or implied restrictions of the state or federal constitutions. Law v. Maercklein, 292 N.W.2d 86, 89-90 (N.D. 1980); Asbury Hospital v. Cass County, 7 N.W.2d 438, 454 (N.D. 1943). A statute is conclusively presumed to be constitutional unless it is clearly shown that it contravenes the state or federal constitution. State v. Hegg, 410 N.W.2d 152, 154 (N.D. 1987); State ex rel. Lesmeister v. Olson, 354 N.W.2d 690, 694 (N.D. 1984); Hall GMC, Inc. v. Crane Carrier Co., 332 N.W.2d 54, 61 (N.D. 1983). The North Dakota Constitution gives great deference to legislative enactments. It provides: "[T]he supreme court

shall not declare a legislative enactment unconstitutional unless at least four of the [five] members of the court so decide." N.D. Const. art. VI, ' 4.

N.D. Const. art. VI, ' 9, provides in pertinent part:

> The state shall be divided into judicial districts by order of the supreme court. In each district, one or more judges, as provided by law, shall be chosen by the electors of the district.

Pursuant to this constitutional scheme the judicial districts are to be designated by rule of the supreme court. N.D.C.C. ' 27-05-01(1); N.D. Const. art. VI, ' 9. The number of judges in each district is to be provided by law subject to the constitutional edict that there be at least one judge in each district. N.D.C.C. ' 27-05-02; N.D. Const. art. VI, ' 9.

The supreme court in County of Stutsman v. State Historical Soc., 371 N.W.2d 321 (N.D. 1985) instructed regarding the constitutional limitations of the delegation of legislative power.

> Unless expressly authorized by the State Constitution, the Legislature may not delegate its purely legislative powers to any other body. Ralston Purina Company v. Hagemeister, 188 N.W.2d 405 (N.D. 1971). However, the Legislature may delegate powers which are not exclusively legislative and which the Legislature cannot conveniently do because of the detailed nature. Simply because the Legislature may have exercised a power does not mean that it must exercise that power. In Ralston Purina Company, supra, we pointed out that the true distinction between a delegable and non-delegable power was 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. The power to ascertain certain facts which will bring the

> provisions of a law into operation by its own terms is not an unconstitutional delegation of legislative powers."

Id. at 327. (Emphasis in original) Accord, North Dakota Council of School Administrators v. Sinner, 458 N.W.2d 280, 285 (N.D. 1990). Thus, North Dakota follows "the modern view of the delegation doctrine which recognizes that, in a complex area, it may be necessary and appropriate for the legislature to delegate in broad and general terms, as long as there are adequate procedural safeguards and adequate standards." Lawrence v. Lawrence, 432 N.W.2d 897, 897-898 (N.D. 1988) (enactment of statutes allowing courts to dissolve a marriage on the grounds of "irreconcilable differences" is not an unconstitutional delegation of legislative power to the judiciary).

In the event of a vacancy in a district court judgeship, the supreme court is to determine "whether or not that office is necessary for effective judicial administration." N.D.C.C. ' 27-05-02.1(1). The Supreme Court is required to consult with district court judges and attorneys in the affected judicial district before deciding to abolish the vacant office. Id. If an office of a sitting judge is to be abolished, the supreme court is also required to consult with district court judges and attorneys and to notify the judges of the affected judicial district of the determination at least one year before the end of the term of the district court judge holding the judgeship to be abolished. N.D.C.C. ' 27-05-02.1(2). The district court judge holding the judgeship to be abolished may petition for a hearing with respect to the court's determination. The supreme court may affirm, reverse or modify its determination after the hearing. Id.

The United States Supreme Court has held that the principle of separation of powers does not prevent the legislative branch from obtaining the assistance of its coordinate branches. Mistretta v. United States, 488 U.S. 361, 372 (1989). So long as the legislative branch lays down by legislative act an intelligible principle to which the body authorized to exercise the delegated authority is directed to conform, such

legislative action is not a forbidden delegation of legislative power. Id.

N.D.C.C. ' 27-05-02.1(2) provides that the supreme court may abolish one or more offices of district court judge "if the supreme court determines that the office is not necessary for effective judicial administration and abolition of the office is necessary to reduce the number of district judges as required in subsection 2 of section 27-05-01." This subsection clearly delineates the principle the supreme court is to follow in determining whether an office of district judge is to be abolished. It further sets a boundary of the delegated authority by incorporating N.D.C.C. ' 27-05-01(2), which quantifies the reduction, and N.D.C.C. ' 27-05-02.1(3) which sets out the time schedule for the exercise of the authority.

In Mistretta, supra, the Supreme Court advised that the inquiry is two-fold when the legislature has delegated nonadjudicatory powers to the judicial branch: first, whether the judicial branch has been assigned or allowed tasks that are more properly accomplished by other branches; second, whether the delegated power threatens the institutional integrity of the judicial branch. 488 U.S. at 383.

N.D. Const. art. VI, ' 10 provides in pertinent part:

> No duties shall be imposed by law upon the supreme court or any of the justices thereof, except such as are judicial. . . .

The North Dakota Supreme Court observed that "it is difficult, if not impossible, to define judicial powers . . . in a way which will be applicable to every case." State ex rel. Standard Oil Co. v. Blaisdell, 132 N.W. 769, 776 (N.D. 1911). The court has however offered some guidance in this area. The supreme court has instructed that "[a]ll powers, however, even though not judicial in their nature, which are incident to the discharge by the courts of their judicial functions are

inherent in the courts, and the exercise of such powers by the courts is not forbidden by constitutional provision for the division of the powers of government among the several departments." State ex rel. Mason v. Baker, 288 N.W. 202, 204 (N.D. 1939) (quoting 12 C.J. 873). Thus, rigid application of the definition of judicial power is not appropriate.

The North Dakota Supreme Court determined that ' 10 of art. VI does not alter the general principle of separation of powers. Baker, 288 N.W. at 204. The court further stated that the North Dakota Constitution "is not to be construed as rigidly classifying all the functions of government as being either legislative, executive or judicial." Id. at 205. See also Mistretta, 488 U.S. at 380-81. On another occasion, the supreme court advised:

> [T]hough in our state Constitution the three departments of government, executive, legislative, and judicial, are primarily separately invested with powers to be so classified respectively, 'it is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link or dependence the one upon the other in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments. Story's Constitution (5th Ed.) 393.' 'Again, indeed, there is not a single Constitution of any state in the Union which does not practically embrace some acknowledgement of the maxim [separation of the powers of government to be administered by the three arms of government separately], and at the same time some admixture of powers constituting an exception to it. Story's Constitution, 395.'

Minneapolis, St. P. & S. Ste. M. Ry. Co. v. State Board of Ry. Comm'rs, 152 N.W. 513, 515 (N.D. 1915) (quoting Winchester Ry. Co. v. Commonwealth, 106 Va. 264-270, 55 S.E. 692, 694 (1906).

In Baker, the court addressed the constitutionality of the Recodification Act which authorized and directed the supreme court to appoint up to three persons to the Code Revision Commission, which had the purpose of revising the code. 288 N.W. at 203. The court explained that because the purpose of the Recodification Act was to make all constitutional provisions, statutes and judicial decisions easily available for the courts and attorneys, it was appropriate for "the legislature to authorize the supreme court to exercise such functions as are necessarily connected with the performance of its judicial duties, although such acts may be of a ministerial or executive nature. Id at 205.

In North Dakota, the judicial power is vested in a "unified judicial system consisting of a supreme court, a district court, and such other courts as may be provided by law." N.D. Const. art. VI, ' 1. The supreme court is the highest court of the state and the chief justice is the administrative head of the unified judicial system. N.D. Const. art. VI, " 2, 3. N.D.C.C. ' 27-02-05.1 provides that "[t]he supreme court shall have and exercise administrative supervision over all courts of this state and the judges, justices, or magistrates of such courts. . . ." N.D.C.C. ' 27-05-02.1(2) is entirely consistent with the exercise of administrative supervision of all courts by the supreme court pursuant to N.D.C.C. ' 27-02-05.1.

The requirement that the supreme court determine whether to retain a vacant district judgeship or to abolish a district judgeship on the basis of whether "the office is necessary for effective judicial administration" is a judicial function more properly exercised by the judiciary than any other branch of government because it directly affects the administration of the unified judicial system. Authority to abolish the office of district court judge does not pose a threat to the integrity and independence of the supreme court. Section 27-05-01(2) addresses the issue of effective judicial administration, which is properly the province of the judiciary. State v. Baker, 288 N.W. at 204.

A constitutional challenge to a Minnesota statute similar to

N.D.C.C. ' 27-05-02.1(1) authorizing the Minnesota supreme court to continue, abolish or transfer vacant judgeships after determining whether the judgeship is "necessary for effective judicial administration" was rejected in In Re Public Hearing on Vacancies in Judicial Positions, 375 N.W.2d 463 (Minn. 1985). In that case, it was claimed that "the statute, which permits the Supreme Court to terminate a judicial position, constitutes an unlawful delegation of legislative authority to the judiciary." Id at 470. The Minnesota supreme court declared that the statute "recognizes the legitimate role of the Supreme Court in the orderly and effective administration of justice. . . . [A] statute which authorizes the removal of judges under certain circumstances, acknowledges the legitimate role of the judiciary in supervising the conduct of judges." Id. at 470. The court concluded that the legislature "properly delegated the authority to terminate judicial positions to the Supreme Court." Id at 470.

In my opinion, the delegation of authority contained in N.D.C.C. ' 27-05-02.1(2) is within the power of the legislature to make. The authority given the supreme court to abolish district court judgeships if "necessary for effective judicial administration" and to reduce the number of district court judgeships within the limits imposed by the legislature is not an impermissible delegation of legislative authority to the judiciary. It is my further opinion that N.D.C.C. ' 27-05-02.1(2) does not impose nonjudicial duties upon the supreme court in contravention of N.D. Const. art. VI, ' 10.

- EFFECT -

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.

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