

LETTER OPINION
95-L-150

July 7, 1995

Mr. Ken Purdy
Acting Director
Central Personnel Division
600 East Boulevard Avenue
Bismarck, ND 58505-0120

Dear Mr. Purdy:

Thank you for your letter asking about the effect of 1995 House Bill 1501 on State Personnel Board administrative rules concerning employer actions subject to appeal, and how the administrative appeal procedures of House Bill 1501 apply to appeals begun before August 1, 1995, but which may not be concluded before that date.

House Bill 1501, effective on August 1, 1995, amended N.D.C.C. § 54-44.3-07 by deleting all of subsection 2 and most of subsection 3. Subsection 2 allows the State Personnel Board to hear comments on Central Personnel Division rules and disapprove those rules, thus repealing them. This provision currently conflicts with N.D.C.C. ch. 28-32 procedures for repeal of administrative rules, but its deletion will resolve that conflict. N.D.C.C. § 54-44.3-12(1) retains a provision making establishment of Central Personnel Division rules subject to prior State Personnel Board approval.

Subsection 3 of N.D.C.C. § 54-44.3-07 currently gives the State Personnel Board authority to hear and decide appeals from agency grievance procedures on specified subjects. 1995 House Bill 1501 deletes all of subsection 3 except for a portion allowing the State Personnel Board to hear and determine appeals by nonprobationary classified employees on position classifications and pay grade assignments.

Appeals for the subject areas deleted from subsection 3 of N.D.C.C. § 54-44.3-07 will be governed by amendments to N.D.C.C. § 54-44.3-12.2. Discrimination appeals by job applicants are also added to N.D.C.C. § 54-44.3-12.2. The amendments to this section by House Bill 1501 add the duty to certify appeals on the specified topics from nonprobationary employees in the classified service and the duty to request an administrative hearing officer from the Office of Administrative Hearings to the duties of the Central Personnel Division. The amendments to N.D.C.C. § 54-44.3-12.2 made by House Bill 1501 require the administrative hearing officer to issue findings of fact, conclusions of law, and a final decision which is appealable to district court. Under House

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Bill 1501, the State Personnel Board will no longer hear or decide appeals except for classification and pay grade appeals. Effectively, the two sections of 1995 House Bill 1501 related to this opinion simply remove the State Personnel Board from considering administrative hearing officers' recommendations on appeals from agency internal grievance procedures, and make the hearing officer's decision final for purposes of appeal to district court. The State Personnel Board loses its jurisdiction to hear and decide such appeals, other than classification and pay grade appeals, on August 1, 1995.

Your first question asks whether State Personnel Board administrative rules continue to apply to appeals from agency grievance procedures after August 1, 1995, until amended or repealed by the Board. The State Personnel Board has adopted administrative rules to define and regulate matters that are appealable, the time to appeal, and its own procedures for hearing and considering those appeals by review of recommended findings, conclusions, and orders of administrative hearing officers. N.D. Admin. Code art. 59.5-03. After August 1, 1995, the State Personnel Board, under N.D.C.C. § 54-44.3-07 as amended, will continue to have the primary responsibility to foster and assure a system of personnel administration in the classified service of state government, and authority to promulgate rules necessary to properly perform the duties and powers vested in it by law. Administrative rules have the force and effect of law until amended or repealed by the agency adopting them, declared invalid by a final court decision, or determined repealed by the office of the Legislative Council because authority for their adoption is repealed or transferred to another agency. N.D.C.C. § 28-32-03(3). To the best of our knowledge, the Office of Legislative Council has not made a determination on the repeal of these rules.

Your second question asks how the administrative appeal procedures required by House Bill 1501 apply to appeals begun before August 1, 1995, but which the State Personnel Board will not be able to consider and determine before that date.

Generally, all statutes enacted by the Legislature, whether substantive or procedural, are to be applied prospectively, unless the Legislature clearly declares they are to be applied retroactively. N.D.C.C. § 1-02-10, Reiling v. Bhattacharyya, 276 N.W.2d 237, 240-41 (N.D. 1979). However, statutes that change remedies or procedure may be applied to future steps in pending actions without violating the rule against retroactivity because the statute is applied only in a prospective way. 82 C.J.S. Statutes § 422, p. 1000 (1953);

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Gutierrez v. DeLara, 188 Cal.App.3d 1575, 1579, 234 Cal.Rptr. 158, 160 (Ct. App. 1987); Holt v. City of Bloomington, 391 N.E.2d 829, 832 (Ind. App. 1979). As a California appellate court has explained:

[T]he distinction between "substantive" and "procedural" is a misdirection. Both types of statutes may affect past transactions and be governed by the presumption against retroactivity. The only exception which we can discern from the cases is a subcategory of procedural statutes which can have no effect on substantive rights or liabilities, but which affect only modes of procedure to be followed in future proceedings. As Aetna pointed out, such statutes are not governed by the retroactivity presumption, but not because they are "procedural" but simply because they are not in fact retroactive.

Russell v. Superior Court, 185 Cal.App.3d 810, 816, 230 Cal.Rptr. 102, 105 (Ct. App. 1986), citing Aetna Casualty and Surety Co. v. Industrial Accident Commission, 30 Cal.2d 388, 182 P.2d 159 (1947).

In Fairmount Township Board of Supervisors v. Beardmore, 431 N.W.2d 292 (N.D. 1988), the North Dakota Supreme Court considered the issue of whether applying a new township ordinance on paying township costs for landfill permit application expenses to an application filed before the effective date of the new ordinance constituted an unlawful retroactive application of the ordinance. After citing the general rule on retroactivity and the Reiling case, the North Dakota Supreme Court determined that an ordinance is retroactive "if it takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or considerations already passed." 431 N.W.2d at 295. The court held that applying the new ordinance only to future costs incurred in the pending application proceeding after the effective date of the ordinance was not a retroactive application of the ordinance. In reaching this conclusion, the court also relied on its statement in State v. J.P. Lamb Land Company that a "statute receives retroactive application when it operates on transactions which have occurred . . . before its enactment." 401 N.W.2d 713, 717 (N.D. 1987).

When the State Personnel Board, under House Bill 1501, loses its jurisdiction to finally decide appeals from agency grievance procedures for all but classification and pay grade

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appeals on August 1, 1995, and the administrative hearing officers assume that jurisdiction upon certification by the Central Personnel Division, no vested rights are impaired or taken away and no new duties, obligations, or liabilities are imposed with respect to transactions already passed. A level of review is simply removed, and a hearing officer's decision becomes final and appealable to the district court. The substantive right to appeal continues, and there is no vested right in a remedy or a procedure. 73 Am. Jur.2d Statutes § 388, p. 507 (1974).

Therefore, it is not a retroactive application of House Bill 1501 to allow an administrative hearing officer, after August 1, 1995, to issue a final decision in an appeal begun before that date. However, under the standard expressed in J.P. Lamb Land Company, supra, it would be a retroactive application of House Bill 1501 to change the legal effect of a hearing officer's order from a recommendation to a final decision if the order was issued but not acted on by the State Personnel Board before August 1. Therefore, on that date a previously issued recommended decision would become ineffective rather than final, and a new final order from the hearing officer would be required.

It is therefore my opinion that:

1. State Personnel Board rules in N.D. Admin. Code chs. 59.5-03-03 and 59.5-03-04 will continue to be in effect until amended or repealed by the State Personnel Board or determined repealed by the Office of Legislative Council.
2. It is not an unlawful retroactive application of 1995 House Bill 1501 to allow the Office of Administrative Hearings administrative hearing officers to issue a final decision on or after August 1, 1995, in a case begun before that date under N.D.C.C. ch. 54-44.3 and State Personnel Board rules.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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