

## IMPOSITION OF CRIMINAL AND CIVIL PENALTIES, FINES, FEES, AND FORFEITURES BY ADMINISTRATIVE RULES - BACKGROUND MEMORANDUM

The most significant principle regarding administrative rules is that the power to make laws is vested in the legislature and the legislative power to make laws cannot be delegated except in controlled circumstances. The principle is based on constitutional separation of powers requirements and places restraints on the amount of lawmaking authority that may be given to administrative agencies to be exercised through administrative rules. Exceeding these restraints is unconstitutional and is commonly referred to as an unlawful delegation of legislative authority. Most courts have concluded that some delegation is permissible to provide an administrative agency discretion as to implementation, administration, and enforcement of the law as long as the legislature by statute provides sufficient standards to guide the agency.

Although the North Dakota Supreme Court has not dealt with the validity of a statute providing a civil or criminal sanction for violation of rules and regulations, it has set out the requirements for delegation of powers to administrative agencies in the case of *Ralston Purina Company v. Hagemeister*, 188 N.W.2d 405 (N.D. 1971), as follows:

It is elementary that . . . the Legislature may not delegate purely legislative powers to any other board, body, commission, or person. However, although it may not delegate purely legislative power, it has been held that the Legislature may authorize others to do certain things and to exercise certain powers which are not exclusively legislative and which the Legislature itself might do but cannot because of the detailed nature of the things to be done. . . . If the law sets forth reasonably clear guidelines which will enable the administrative board to ascertain the facts, so that the law takes effect on such facts under its own provisions and not according to the discretion of the administrative board, the power so delegated is not legislative. The Supreme Court went on to say:

Society in recent years has become more and more complex, and the courts have held that the vesting in other bodies of some powers ordinarily exercised by the Legislature so that this complex society may function, is not unconstitutional so long as the Legislature itself retains the right to revoke the power which it delegates. The power to make a law is legislative, but the conferring of authority as to its execution, which authority is to be exercised under the provisions of the law itself, as enacted by the Legislature, may be delegated. The true distinction between the powers which

the Legislature may delegate and those which it may not is to be determined by ascertaining whether the power granted gives authority to make a law or whether the power pertains only to the execution of the law which was enacted by the Legislative Assembly.

The Supreme Court concluded:

It is only where a statute purports to vest arbitrary discretion in a public officer, commission, or board, without establishing rules for the guidance of such public officer, commission, or board, that a statute will be declared unconstitutional.

Imposition of civil sanctions by an administrative agency under a statutory provision that clearly identifies proscribed conduct and the appropriate sanction avoids the issue of unlawful delegation of legislative authority. It is when statutory authority leaves it to the discretion of an administrative agency to determine what conduct subjects a person to sanctions and what sanctions will apply to proscribed conduct that the issue of unlawful delegation of legislative authority comes into play.

The federal Administrative Procedure Act provides that no sanction may be imposed except within jurisdiction delegated to the agency and as authorized by law (5 U.S.C.A. 558). The North Dakota law governing administrative agency action (North Dakota Century Code (NDCC) Chapter 28-32) contains no similar provision.

It has been ruled that an administrative agency has "broad latitude in fashioning sanctions within legislatively designated limits" (*Neutron Products, Inc., v. Department of the Environment*, 890 A.2d 858 (Md. 2006)). In most instances, courts have upheld the authority of administrative agencies to impose civil sanctions. It has also been held that "[i]t is clear that an administrative officer or agency cannot impose criminal penalties, inasmuch as civil procedure is incompatible with accepted rules and constitutional guarantees covering the trial of criminal prosecutions." (*Ford v. Environmental Protection Agency*, 292 N.E.2d 540 (Ill. App. 1973), quoting *Helvering v. Mitchell*, 303 U.S. 391 (1938)).

It has been ruled that administrative sanctions and criminal sanctions are independent lines of inquiry which must not be confused or integrated (*State ex rel. Stump v. Johnson*, 619 S.E.2d 246 (W.Va. 2005)). The point being made by the West Virginia court was that criminal penalties and civil penalties may both apply in a set of circumstances and they must be separate determinations because different burdens of proof and procedures apply.

The apparent consensus among courts is stated at *C.J.S. Public Administrative Law and Procedure* § 59 as follows:

There is no absolute and universal formula for determining the power which must be exercised by the legislative body itself, and may not be delegated to an administrative agency, and each case must be controlled by the application of the general principle to the given situation. . . . The true distinction . . . is between the grant of power to make the law, which necessarily involves discretion as to what the law is to be, and conferring authority or discretion as to the execution of the law.

## NORTH DAKOTA ADMINISTRATIVE CODE

Several sections of the North Dakota Administrative Code impose criminal or civil penalties for violations. The following listing shows several Administrative Code sections imposing penalties, followed by a note regarding the statutory provision listed as general authority or law implemented under the Administrative Code section.

**30-03-01.1-08. Interstate transport.** It is illegal to import fathead minnows or stickleback into the state. It is illegal to import other live baitfish or live bait into the state except with a permit issued by the director and only in the manner approved by the director. It is illegal to export live bait out of the state except with a permit issued by the director and only in the manner approved by the director. It is illegal to transport live baitfish through the state except with a permit issued by the director and only in the manner approved by the director. Permit applications must be received by the director a minimum of forty-eight hours prior to any planned import or export of live bait. Transportation of bait without the proper permits is a class B misdemeanor and may result in the revocation of the vendor's license.

**NOTE:** This section lists the same statutory authority as North Dakota Administrative Code Section 30-03-01.1-16.

**30-03-01.1-11. Stocking.** Stocking of any live fish, live fish eggs, live amphibians, or other live aquatic organism into any waters of the state shall be illegal except with the appropriate license or permit issued by the director. Violation of this section is a class B misdemeanor.

**NOTE:** This section cites NDCC Section 20.1-06-14 as general authority and law implemented. The statutory provision states that the director of the Game and Fish Department shall adopt rules to control and supervise the operations of minnow or other live bait wholesalers and retailers. However, the statutory provision makes no reference to imposition of criminal or civil penalties by rule.

**30-03-01.1-16. Violations and penalties.**

Any retail or wholesale bait vendor who violates

any section of this chapter for which a penalty is not specifically provided is guilty of a noncriminal offense and shall pay a one hundred dollar fee. The violation may result in license revocation. No one who has had a department-issued bait vendor license revoked or suspended within three years may obtain a license or be an assistant for another licensee.

**NOTE:** This section cites NDCC Section 20.1-02-05(22) as general authority and law implemented. That statutory provision gives the Director of the Game and Fish Department the power to:

Establish noncriminal penalties for any rules adopted by the director. The maximum noncriminal penalty that may be set by the director is a fine of two hundred fifty dollars. Violation of any rule not designated as having a noncriminal penalty is considered a criminal violation as established in the appropriate chapter of this title.

**33-03-11.1-16. Penalties for infraction of this chapter.** The department may invoke penalties for violations of this chapter.

1. The department, based on a determination that a licensee has violated or continues to violate this chapter, may suspend, revoke, or impose a provisional license.
2. The department may levy a civil money penalty against an electrologist in an amount not to exceed twenty-five dollars per day for noncompliance with this chapter.

**NOTE:** This section cites NDCC Section 43-38-03 as general authority and law implemented. That statutory provision allows the Health Council to establish rules but does not specifically mention imposition of civil or criminal penalties.

**33-03-23-09. Civil penalty.** Failure of a data supplier to respond to a request for data as set forth in this chapter shall constitute a violation subject to a civil penalty not to exceed five hundred dollars per day of violation. Procedures for the determination of a violation, assessment, and appeal of a penalty are governed by North Dakota Century Code chapter 28-32.

**NOTE:** This section cites NDCC Section 23-01.1-04 as general authority and Section 23-01.1-07 as law implemented. Section 23-01.1-04 allows the Health Care Data Committee to adopt rules. Section 23-01.1-07 provides that any person violating Chapter 23-01.1 or any rule adopted by the Health Care Data Committee is subject to a civil penalty not to exceed \$500 per day of violation.

**33-07-05-07. Determination of amount of civil money penalties.** A facility which has been subjected to the imposition of a sanction under subsection 7 of section 33-07-05-06 is liable to the state for each day the violation

existed or continues to exist. A violation must be presumed to continue to exist from the time it is found until the department finds it to have been corrected. The amount of the civil money penalty must be determined as follows:

1. For each class I violation, not more than fifty dollars per licensed facility bed;
2. For each class II violation, not more than twenty-five dollars per licensed facility bed;
3. For each class III violation, not more than ten dollars per licensed facility bed; and
4. For each repeat violation, not more than three times the amount otherwise provided for under subsection 1, 2, or 3.

**NOTE:** This chapter was adopted to conform North Dakota law to federal requirements. This section cites NDCC Sections 23-01-03 and 28-32-02 as general authority and Sections 23-16-01 and 23-16-11 as law implemented. Under Section 23-16-11, a violation of the chapter is an infraction and a violation of any provision of Title 23 or rules adopted by the State Department of Health under Title 23 is subject to a civil penalty not to exceed \$1,000 for each violation and for each day the violation continues plus interest and any costs incurred by the State Department of Health to enforce the penalty.

**37-10-02-02. Civil penalty for employer conviction of railroad-highway grade crossing.** Any employer who is convicted of knowingly allowing, requiring, permitting, or authorizing a driver to operate a commercial motor vehicle in violation of a railroad-highway grade crossing under North Dakota Century Code section 39-06.2-10 is subject to a civil penalty of not more than ten thousand dollars. Prior to a civil penalty being imposed, an employer has a right to an administrative hearing as provided for in North Dakota Century Code section 39-06.2-10.

**NOTE:** This section cites NDCC Section 39-06.2-14 as general authority and Section 39-06.2-10 and 49 CFR 383.37(d) as law implemented. Sections 39-06.2-10 and 39-06.2-14 allow the Department of Transportation to adopt rules but do not specifically provide authority governing imposition of civil penalties. Under 49 CFR 383.37(d) an employer is prohibited to allow, require, permit, or authorize a driver to operate a commercial motor vehicle in the United States in violation of a federal, state, or local law or regulation pertaining to railroad-highway grade crossings. The federal provision does not make any reference to a civil penalty.

**48-12-01.1-03. Penalties.**

1. The board may order any nontraditional livestock brought into this state which is not in compliance to be returned to the state of origin, or in the alternative, the board may order the animals slaughtered or destroyed.

2. If, after a hearing, the board finds that a person has brought, kept, or received any nontraditional livestock in this state and the livestock are not in compliance with the rules, a civil penalty not to exceed five thousand dollars per violation may be assessed against that person.
3. Any person who knowingly violates any rule of the board is guilty of an infraction.

**NOTE:** This section cites NDCC Section 36-01-08 as general authority and Sections 36-01-08 and 36-01-12 as law implemented. Section 36-01-08 provides that the State Board of Animal Health may make rules to carry into effect the purposes of Chapter 36-01 and any other duties prescribed in Title 36. Section 36-01-12 provides that the State Board of Animal Health may take such steps as it may deem necessary to control, suppress, and eradicate any and all contagious and infectious diseases among any of the domestic animals and nontraditional livestock of this state. This section does not specifically mention imposition of civil penalties.

**91-02-01-08. Penalty.** Any person violating any of the provisions of this chapter shall be guilty of a class B misdemeanor.

**NOTE:** This section cites NDCC Section 4-28-06 as general authority and Section 4-28-09 as law implemented. Under Section 4-28-06, the Wheat Commission is empowered to adopt rules. Under Section 4-28-09, a violation of any provision of Chapter 4-28 is a class B misdemeanor. The section does not mention that a violation of rules adopted under the chapter is a class B misdemeanor.

**108-03-01-18. Penalty.** Any person who violates any provision of this chapter is guilty of a class A misdemeanor.

**NOTE:** This section cites NDCC Section 54-21.3-08 as general authority and law implemented. Section 54-21.3-08 provides that the Department of Commerce shall adopt rules establishing a manufactured home installation program and that the rule may include penalties for noncompliance. The section also provides that any person who violates Section 54-21.3-08 or any rule adopted under that section is guilty of a class A misdemeanor.

## NORTH DAKOTA CENTURY CODE

Several statutory provisions provide that a violation of a chapter of law or rules adopted under the chapter is a criminal offense. Such provisions allow an agency to define by rule what conduct constitutes a criminal offense. Among these sections are NDCC Sections 4-09-24, 4-12.2-22, 4-21.1-16, 4-35.1-06, 19-13.1-12, 19-20.1-17, 20.1-02-05, 23-39-07, 36-01-30, and 43-15-14.

## **SUGGESTED STUDY APPROACH**

It appears there are several inquiries and decisions that should be made with regard to criminal and civil penalties established by rules to avoid a successful challenge based on constitutional grounds relating to unlawful delegation of legislative authority. In deliberating on these issues, the committee should obtain assistance from affected agencies, the Attorney General's office, and the Office of Administrative Hearings. It appears examination should be made of rules provisions and statutory provisions.

### **Rules Provisions**

Consideration should be given to the following issues:

- Whether penalties in rules have a sufficient basis in statutory provisions.
- Whether civil and criminal provisions in rules should be moved to statute. Part of the rationale for delegation of rulemaking authority relates to complexity and that the Legislative Assembly lacks time to deal with specifics when making laws. Does not this rationale imply that the Legislative Assembly will revisit these issues at some point?
- Whether agencies believe current criminal and civil penalty provisions in statutes and rules are effective, how often the penalty provisions are enforced, and whether constitutionality of penalties has been challenged.

### **Statutory Provisions**

For statutory provisions, the following issues should be considered:

- Whether the Legislative Assembly by statute has adequately described conduct subject to criminal and civil penalties. It appears that a statutory provision providing that a violation of a chapter or rule adopted under the chapter is a criminal offense would be subject to challenge because the provision may inadequately describe the statutory grounds for an offense and may delegate excessive authority to an agency to make rules defining criminal offenses.
- Whether the Legislative Assembly by statute has provided adequate guidelines to avoid a successful challenge based on constitutional delegation of legislative authority grounds for rules providing civil penalties.

It does not appear necessary to examine rules of every administrative agency. It appears that agencies having statutory or rules provisions could be invited to address these issues over the course of three Administrative Rules Committee meetings and allow the committee time to consider any recommendations it might make for 2011 legislation.