

LEGAL STATUS OF RULES, GUIDELINES, AND PRONOUNCEMENTS OF AGENCIES

This memorandum reviews court decisions and statutory provisions relating to the legal status of administrative rules adopted under the Administrative Agencies Practice Act (North Dakota Century Code (NDCC) Chapter 28-32), rules adopted by agencies that are not required to comply with the Administrative Agencies Practice Act, and guidelines, opinions, and other agency pronouncements that are not "rules."

Under NDCC Section 28-32-03, administrative rules adopted in compliance with the Administrative Agencies Practice Act have "the force and effect of law until amended or repealed by the agency, declared invalid by a final court decision, or determined repealed by the office of the legislative council because the authority for adoption of the rules is repealed or transferred to another agency." The significance of having the force and effect of law is that a valid administrative rule is "binding upon all persons, and on the courts, to the same extent as a statute." (2 Am. Jur. 2d, Administrative Law, Section 160).

LEGISLATIVE V. INTERPRETIVE RULES

Courts often distinguish legislative rules and interpretive rules. A "legislative" rule is issued by an agency with statutory authority and in compliance with statutory procedural requirements such as public notice and hearings before adoption. An "interpretive" rule is a statement of what an administrative agency believes a statute means, a clarification or explanation of law rather than a substantive modification, and a guide to an administrative agency in the performance of its duties, until otherwise directed by court decisions. Agency manuals, guidelines, and memoranda may be construed to be interpretive rules. (2 Am. Jur. 2d, Administrative Law, Section 161).

The United States Supreme Court has recognized a distinction between legislative and interpretive rules at the federal level in *Skidmore v. Swift and Company*, 323 U.S.134, 65 S. Ct. 161, 89 L. Ed. 124 (1944) (interpretive rules are not binding on a reviewing court but serve only as a source of guidance) and in *Martin v. Occupational Safety and Health Review Commission*, 499 U.S.144, 111 S. Ct. 1171, 113 L. Ed.2d 117 (1991) (interpretive rules are not entitled to the same deference as norms that derive from the exercise of delegated lawmaking powers).

State courts have also distinguished legislative from interpretive rules:

1. Interpretive rules only interpret the statute to guide the administrative agency in the performance of its duties until directed otherwise by decisions of the courts (*Waverly*

Press v. Department of Assessment and Taxation, 539 A.2d 223 (Md. 1988)).

2. Agencies may adopt internal policies for carrying out their duties; however, these policy statements do not have the legal force of a statute or regulation (*Town of Northbridge v. Town of Natick*, 474 N.E.2d 551 (Mass. 1985)).
3. A statement of policy does not have the force of law, is merely interpretive in nature, and is only persuasive so long as it represents an accurate interpretation of the relevant statute or other authorities from which it is derived (*Shenango Township Board of Supervisors v. Pennsylvania Public Utilities Commission*, 686 A.2d 910 (Pa. 1996)).
4. Legislative rules are those affecting private rights, privileges, or interests in what amounts to a legislative act. Legislative rules have the force of law. Interpretive rules, on the other hand, do not create rights but merely clarify an existing statute or regulation. Because they only clarify existing law, interpretive rules need not go through the legislative authorization process. Although they are entitled to some deference from the courts, interpretive rules do not have the force of law nor are they irrevocably binding on the agency or the court. (*Appalachian Power Co. v. Tax Dept.*, 466 S.E.2d 424 (W.Va. 1995)).
5. When a rule is legislative, the reviewing court has no authority to substitute its judgment as to the content of the rule, for the legislative body has placed the power in the agency and not in the court. (*General Elec. Credit Corp. v. Smail*, 584 S.W.2d 690 (Tex. 1979)).
6. Legislative rules are promulgated pursuant to specific statutory authority provided by the legislature and have the force and effect of law and a presumption of validity attached to them. Interpretive rules are not specifically authorized by legislative enactment but are promulgated by an administrative agency for the purposes of guidance and definition, and enjoy no presumption of validity, and a court considering enforcement of interpretive rules may substitute its own judgment for that of the administrative agency. (*Great American Nursing Centers, Inc., v. Norberg*, 567 A.2d 354, (R.I. 1989)).
7. Interpretive rules are, basically, those that interpret and apply the provisions of the

statute under which the agency operates. No sanction attaches to the violation of an interpretive rule as such, the sanction attaches to the violation of the statute, which the rule merely interprets. They state the interpretation of ambiguous or doubtful statutory language which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts. Legislative rules have the force of law. Interpretive rules state an agency's interpretation of a statute. Legislative rules are enforceable in and of themselves, but an agency must rely on the underlying statute to support its reading of a statute set forth in an interpretive rule. (*Ionlara v. State Bd. of Education*, 501 N.W.2d 88 (Mich. 1993)).

8. By adopting the hearing loss determination chart as a guideline rather than invoking delegated legislative power to make law through rules, the Industrial Commission chose to adopt the chart as an interpretive rule without binding force of law, and subject to less deference and weight on review than a legislative rule. (*Bader v. Norfolk Redevelopment and Housing Authority*, 396 S.E.2d 141 (Va. App. 1990)).

NORTH DAKOTA COURT DECISIONS

The North Dakota Supreme Court has not recognized, and the North Dakota Administrative Agencies Practice Act does not address, the distinction between legislative and interpretive rules. An administrative rule subject to the Administrative Agencies Practice Act is "invalid unless adopted in substantial compliance with Section 28-32-02" (NDCC Section 28-32-03). With respect to agencies subject to the Administrative Agencies Practice Act, the Supreme Court on numerous occasions has found rules to be invalid if not adopted in accordance with the Administrative Agencies Practice Act. (*Little v. Spaeth*, 394 N.W.2d 700 (1986) (personnel policies adopted by the Central Personnel Division but not published in the North Dakota Administrative Code were invalid); *Kroeplin v. N.D. Workmen's Comp. Bureau*, 415 N.W.2d 807 (1987) (Justice VandeWalle, concurring in result, said American Medical Association guidelines informally adopted by the Workmen's Compensation Bureau were invalid); *Johnson v. N.D. Workers Comp. Bureau*, 428 N.W.2d 514 (1988) (bureau directive 15-C is invalid because it was not adopted in accordance with the Administrative Agencies Practice Act); and *Mullins v. Department of Human Services*, 454 N.W.2d 732 (1990), *Huber v. Jahner*, 460 N.W.2d 717 (App. Ct. 1990), and *Illies v. Illies*, 462 N.W.2d 878 (1990) (child support guidelines and developmental disability service guidelines not formally adopted as rules by the department were invalid)).

Before the 1977 amendments requiring publication of the North Dakota Administrative Code, the North Dakota Supreme Court, quoting from Sands, III Sutherland Statutory Construction, said "where the legislature has unequivocally adopted a general standard after it had repealed a specific valuation method, it reasonably follows that the agency may use its statutory authority to promulgate rules and regulations to interpret the general standard. While such interpretive "regulations do not, and are not intended to have the force and effect of law . . . [they] are given great weight by the courts in resolving doubtful meanings of the taxing laws" This appears to be as close as the North Dakota Supreme Court has come to recognizing that interpretive rules differ from legislative rules in their force and effect.

A statement of the North Dakota Supreme Court in *Smith v. N.D. Workers Comp. Bureau*, 447 N.W.2d 250 (1989) cast doubt on the court's reliance on agency construction of a statute or interpretive rules. In that decision the court said:

In . . . a case decided after the amendments to section 28-32-02, N.D.C.C., became effective, we apparently gave some credence to administrative practice without proof of promulgation of a rule pursuant to section 28-32-02 If the amendments to the Administrative Agencies Practice Act commencing with the 1977 session of the legislature, which we have partially referred to, are to be effective, **we can no longer give credence to administrative practice or policy that has not been adopted in compliance with the Act.** (emphasis supplied)

Despite the language in the *Smith* decision, the North Dakota Supreme Court has subsequently had opportunities to discuss the weight to be given to administrative construction of statutory provisions that have not been adopted in accordance with the Administrative Agencies Practice Act. In *NL Industries, Inc. v. State Tax Commission*, 498 N.W.2d 141 (1993), quoted with approval precedent from its decisions before and after the *Smith* decision and ruled that an administrative rule subject to the Administrative Agencies Practice Act is "invalid unless adopted in substantial compliance with Section 28-32-02."

The North Dakota Supreme Court has also ruled that an "informal policy" or administrative construction of a statute by the agency administering the law is entitled to "deference," "appreciable deference," or "some weight" if that interpretation does not contradict clear and unambiguous statutory language. (*Western Gas Resources, Inc. v. Heitkamp*, 489 N.W.2d 869 (1992); *Schaefer v. Job Service North Dakota*, 463 N.W.2d 665 (1990); *True v. Heitkamp*, 470 N.W.2d 582 (1991); *Gofor Oil, Inc. v. State*, 427 N.W.2d 104 (1988)).

With regard to the question of the status of rules adopted by agencies that are not subject to the

Administrative Agencies Practice Act, it appears the most significant decision of the North Dakota Supreme Court is *Jensen v. Little*, 459 N.W.2d 237 (1990). In that decision, a Penitentiary inmate challenged the validity of the Penitentiary drug testing program and penalties as being adopted in violation of the Administrative Agencies Practice Act. The Supreme Court observed that the Department of Corrections and Rehabilitation was at that time a part of the Office of the Director of Institutions (the department became independent pursuant to 1991 legislation) and that the Director of Institutions was excluded from the definition of administrative agency and not subject to the Administrative Agencies Practice Act under Section 28-32-01. Although the court did not directly address the effect of rules adopted by an agency outside the Administrative Agencies Practice Act, and in a footnote urged the director and warden to adopt more formal approval procedures for Penitentiary rules to diminish future challenges to the rules, the court tacitly upheld the Penitentiary rules by allowing the penalty to stand.

CONCLUSION

1. The United States Supreme Court and courts of many states recognize a distinction between legislative and interpretive rules.

Legislative rules are generally regarded as having the force and effect of law. Interpretive rules are regarded as policy statements that lack the legal force of a statute or regulation and are entitled to deference but are not binding on courts.

2. The North Dakota Supreme Court has not recognized the distinction between legislative and interpretive rules.
3. The North Dakota Supreme Court has recognized that rules adopted in compliance with the Administrative Agencies Practice Act have the force and effect of law.
4. The court has ruled that policies, guidelines, and directives adopted by agencies subject to the Administrative Agencies Practice Act but not adopted in compliance with the Act are invalid. Somewhat to the contrary, the court has ruled that an "informal policy" of an agency subject to the Administrative Agencies Practice Act but not adopted under the Act as a formal rule is entitled to "some weight" or "appreciable deference."
5. Rules adopted by an agency exempt from the Administrative Agencies Practice Act have been upheld although the court has not stated whether these rules have "the force and effect of law."