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MEMORANDUM

TO: Administrative Rules Committee

FROM: Edward Erickson, Assistant Attorney General *EE*

RE: Study of Criminal and Civil Penalties

DATE: March 9, 2010

The Administrative Rules Committee has been assigned to study criminal and civil penalties that are imposed by administrative rule. The Committee has asked four questions, which I will address briefly.

1. Do administrative agencies have inherent authority to impose criminal or civil penalties, fines, fees, and forfeitures, or must that authority be clearly stated in statute?

Administrative agencies do not have inherent authority to impose criminal or civil consequences for actions, but must obtain that authority through statute.¹ "[A]dministrative agencies are creatures of legislative action. As such, legal logic compels the conclusion that the agencies have only such authority or power as is granted to them or necessarily implied from the grant."² This is referred to as delegation of legislative authority. Delegation of legislative authority to make administrative rules is of longstanding duration.³

While there are constitutional limits to the Legislature's power to delegate legislative authority, the North Dakota Supreme Court has upheld the Legislature's delegation of even purely legislative powers to political subdivisions if authorized to do so by the constitution, including delegating the authority to create criminal penalties for violation of ordinances to a home rule county.⁴ Cities, too, may create crimes,⁵ and their authority to do so is delegated by the Legislature.⁶

¹ N.D.A.G. 95-L-196.

² First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584-85 (N.D. 1984).

³ See State ex rel. Gaulke v. Turner, 164 N.W.2d 924 (N.D. 1917) (upholding legislative delegation of authority to inspect and grade grain).

⁴ State v. Brown, 771 N.W.2d 267, 271 (N.D. 2009).

The leading case concerning delegation of legislative authority to administrative agencies is Trinity Medical Center v. North Dakota Board of Nursing.⁷ Before this case, the Supreme Court analyzed the delegation of powers by only considering any safeguards and standards that were contained in the statutory delegation of authority. But in Trinity, the Supreme Court adopted the modern trend of the state delegation doctrine. This modern trend requires a consideration of procedural safeguards, such as those contained in the Administrative Agencies Practice Act,⁸ along with any standards provided by the statutory delegation in order to determine whether the total protection against arbitrary power is adequate and "to assure that administrative agencies are not given uncontrolled discretion."⁹

The issue being litigated in Trinity concerned a statute granting authority to the Board of Nursing to adopt educational standards for nurses. The standards so adopted were upheld despite arguments that the delegation of authority was overly broad and, essentially, standardless. The court determined that the broad nature of the delegation of authority was to be measured along with procedural safeguards that are provided in the Administrative Agencies Practice Act, and also in regard to the Legislature's ultimate authority to retract the grant of authority to the Board of Nursing.¹⁰

Under the modern trend of delegation, the North Dakota Supreme Court has consistently held that administrative rules may not exceed statutory authority or supersede statutes, and any regulation which goes beyond what the Legislature has authorized or that exceeds the agency's authority is void.¹¹ Accordingly, an administrative rule which imposes a criminal or civil penalty of any sort must be based on authority delegated to that agency from the Legislature by statute. But if that authority is so delegated, there is no legal impediment to prevent the agency from adopting such a rule and enforcing the rule in an appropriate forum.¹²

⁵ N.D.C.C. § 40-05-06.

⁶ See generally, State ex rel. City of Minot v. Gronna, 59 N.W.2d 514 (N.D. 1953).

⁷ 399 N.W.2d 835 (N.D. 1987).

⁸ N.D.C.C. ch. 28-32.

⁹ Id. at 844.

¹⁰ Id. at 847-48. The court further considered the circumstances where medical science is advancing at a very rapid rate, and the importance of keeping standards current was another consideration supporting the delegation of authority to the Board of Nursing.

¹¹ Moore v. North Dakota Workmens Compensation Bureau, 374 N.W.2d 71 (N.D. 1985), Smith v. North Dakota Workers Compensation Bureau, 447 N.W.2d 250 (N.D. 1989), Hecker v. Stark County Social Services Board, 572 N.W.2d 226 (N.D. 1994).

¹² For a criminal enforcement action, the forum would have to be in district court and the enforcing agency would be the county state's attorney having jurisdiction.

2. Are there additional legal issues or complications prosecutors or agency counsel must address if penalties, fines, fees, or forfeitures are imposed by administrative rule rather than statute?

Generally, no. However, two North Dakota cases may help to illustrate some of the issues that are concerning the Administrative Rules Committee, but they do not directly address the issues raised.

In State v. Ness,¹³ an individual was prosecuted for violating the Governor's deer hunting proclamation. The Legislature has delegated authority to the Governor to issue a proclamation setting out certain details for each deer hunting season, and a violation of that proclamation is a class B misdemeanor.¹⁴ The defendant challenged the legality of his conviction based on an argument that the Governor's deer hunting proclamation was unconstitutionally vague, but the delegation of authority to define the terms of a crime was not challenged.¹⁵ The court began its analysis by stating "[t]he Governor's deer hunting proclamation has the force of law, and a violation of a provision of the proclamation is a class B misdemeanor unless a noncriminal penalty is provided in the proclamation."¹⁶ However, this statement is dicta that could be challenged in the future because the point was not specifically argued.

Also, a criminal law may define a crime by reference to another law or regulation. In State v. Julson,¹⁷ the legal issues involved the incorporation by reference of certain federal regulations defining LSD as a hallucinogenic drug. In this instance, state law incorporated by reference the federal Food, Drug and Cosmetic Act and regulations promulgated in the conformity therewith. The court concluded that "[s]tatutes adopting by reference laws of the federal government and regulations promulgated thereunder by one of its agencies in existence at time of the enactment of adopting statute is not unlawful delegation of legislative power."¹⁸ This case is not directly on point to the question raised by the Administrative Rules Committee because the Legislature was merely adopting by reference a document that is already in existence instead of delegating authority to an agency to promulgate regulations. However, the Julson case does inferentially point to the principal that a criminal statute does not need to include all operative terms defining the elements of a crime in and of itself, but may include reference to other documents, such as an administrative rule.

¹³ 774 N.W.2d 254 (N.D. 2009).

¹⁴ See N.D.C.C. § 20.1-08-01.

¹⁵ 774 N.W.2d at 258.

¹⁶ Id.

¹⁷ 202 N.W.2d 145 (N.D. 1972).

¹⁸ 202 N.W.2d at 151.

3. Would it be advisable for agencies to seek legislation to move rules provisions to statutory provisions with regard to rules imposing penalties, fines, fees, or forfeitures? Under what circumstances would it be advisable to use rules rather than statutory provisions for imposition of penalties, fines, fees, or forfeitures?

Generally, in my opinion this is a policy issue for the Legislature to decide. This decision could best be made in conjunction with advice from the agencies enforcing the particular subject matter involved. However, as stated previously, in Trinity Medical Center v. North Dakota Board of Nursing, the Supreme Court noted in support of the delegation of authority the facts that the field was advancing in knowledge at a "very rapid rate" and that the knowledge required of members of the nursing profession to render quality service in matters of life and death also was increasing.¹⁹ The Court specifically concluded:

It would be difficult if not impossible for the Legislature to establish more definitive standards with the flexibility necessary to keep abreast of the development in medical science. In light of the developments in educational standards it is obvious that the Legislature contemplated that in setting standards the board could require what it has done through the passage of the administrative rules also referred to herein.²⁰

It would appear that a delegation of legislative authority to define the elements of a crime or of civil penalties relating to certain actions would be highly advisable in areas where matters are rapidly changing or in areas that require an examination of the issue by subject matter experts.

4. Do you foresee legal problems enforcing penalties for rules violations by applying a statute providing that violation of rules adopted under a statutory chapter is a criminal offense? Examples can be found in North Dakota Century Code sections 4-09-24, 19-13.1-12, 20.1-02-05, and others.

No, there are no legal problems involved with such an enforcement action. After a diligent search, it appears that there are no reported cases in the United States denying enforcement of a rules violation where a statute defined a violation of the rules to be a criminal offense. To the contrary, this issue was raised once in a reported case from Pennsylvania, with the court holding that it is not an impermissible delegation of legislative authority for a legislature to delegate to an agency the power to define by rule

¹⁹ 399 N.W.2d at 848.

²⁰ Id.

what constitutes a crime.²¹ The North Dakota case closest on point demonstrated that the Governor's deer hunting proclamation was enforceable through a criminal prosecution even though it isn't a rule adopted with the procedural safeguards of the Administrative Agencies Practice Act.²²

²¹ Baumgardner Oil Co. v. Pennsylvania, 606 A.2d 617, 623-24 (Pa. Commw. Ct. 1992).

²² Supra State v. Ness, 774 N.W.2d 254 (N.D. 2009)