IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff, vs. Matthew Henry Gibson, Defendant.	**File No. 09-2010-CR-02212**
State of North Dakota, Plaintiff, vs. Brent William Nielson, Defendant.	**MEMORANDUM OPINION AND ORDER** **File No. 09-2010-CR-02194**

In all material respects, these are identical cases.[1] Defendants maintain they are predicated on an invalid and unenforceable administrative rule. A hearing on the motions to dismiss was held on August 18. Mark Friese argued on behalf of the defendants, who were both present. Gary Euren argued on behalf of the state. Bruce Quick and Tracy Peters also appeared.[2]

At the conclusion of the hearing, the state was afforded an opportunity to

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[1]As I was completing the preparation of this opinion, notice reached my desk that the Gibson case had been resolved through "plea negotiations" and should be dismissed. I do not know if Nielson has been similarly resolved. If so, this has become (unbeknownst to me) a meaningless exercise.

[2]At some point prior to the hearing the attorney general filed a brief and exhibits in support of the rule-marking at issue. At the hearing, I granted leave for this participation. The attorney general has been intimately involved with the proceedings at issue. Therefore, his direct participation should assure the documentary record has been fully assembled.

supplement the record. It has since filed two responsive submittals. All parties agree the matter has now been fully submitted and the relevant record has been established, at least to the extent this can be accomplished.

I have carefully considered the motion briefs and arguments of counsel. I have also analyzed the various documents made part of the record, either before or after the hearing. For the reasons outlined below, I have concluded the emergency rule-making at issue was not conducted in substantial compliance with the applicable procedural requirements. Accordingly, the motions to dismiss will be granted.

Attached to this opinion are copies of all documents referenced herein. In assembling these attachments, I have simply organized the collective documentary record by eliminating duplication, placing everything in chronological order, and renumbering accordingly. Therefore, the attachments should reflect everything in the record, regardless of source. Subsequent citations to that record will be to the appropriate page number(s), as reorganized and attached.

PROCEDURAL HISTORY

In recent years, several "designer drugs" have been marketed under the guise that they are either bath salts or incense. They are available from internet sources. At least until recently, they have also been openly sold in many "head shops" throughout the state.

Most of these materials come from foreign sources, and are produced free from any constraint, regulation, or labeling requirements. The bath salts contain one or more chemical compounds designed to act like methamphetamine. The incense is apparently sprayed with one or more chemicals designed to mimic THC, the active ingredient in cannabis or marijuana. It is common knowledge that many buyers use or consume

these materials in the same manner, and for the same reasons, as the controlled substances they are designed to replicate. For obvious reasons, law enforcement personnel, starting with the attorney general, would like to outlaw their sale and use.

On February 25, 2010, the North Dakota Board of Pharmacy ("board") conducted a special telephonic meeting. At some point prior to this meeting, an eighth item had been added to the agenda. Attached Documents, p. 1 (hereafter "Att. Docs., p. __"). Although the record is silent as to dates and details, it appears the expanded agenda was prompted by the attorney general. In any event, the amended agenda indicated the board would consider an emergency rule which added unspecified "addictive, dangerous, and hallucinogenic" substances to the listing of illegal or controlled drugs. Id.

The state indicates that notice of the board's February 25 meeting was published in the Bismarck Tribune, but a copy of this notice has not been provided. It is not known if that notice contained reference to the proposed agenda. Even if the amended agenda was published in its entirety, however, this would have provided the reader with no information regarding the specific substances addressed by the proposed emergency rule.

Under North Dakota law, the February 25 board meeting was "open" to the public. Based on the minutes, members of the public could participate by either calling an 800-number or by appearing at the board's office where a speaker phone was available. Id., p. 2. The minutes further indicate participants included two media representatives and three individuals appearing on behalf of Big Willie's, a head shop located in Mandan. Id., pp. 2-3.

The meeting started at 9 p.m. The board's first action was to move the last

agenda item to the top of the list, so it could be considered first. Id., p. 3. The "hearing" on the proposed emergency rule started at 9:04 p.m. Id. The attorney general and one of his assistants spoke on behalf of its adoption. Two of the individuals representing Big Willie's questioned its need. Otherwise, the only comments came from board members or its executive director. Id., pp. 3-5. As a result of this discussion, several minor amendments were made to the initial draft of the emergency rule. Thereafter, the board voted unanimously to approve it. According to the board's minutes, "[t]he interim final rule was [thereby] passed and declared adopted." Id., p. 5.

By letter dated February 25, 2010, Governor Hoeven approved this emergency rule-making. Id., p. 10. The record does not indicate what the governor considered prior to granting his approval.

The next day, the board's executive director sent a copy of the emergency rule to John Walstad, the North Dakota Legislative Council's "code reviser." In the cover letter, Walstad was asked to "publish these rules in the North Dakota Administrative Code with the earliest possible effective date."[3] Id., p. 11. Walstad was also provided with a summary of the board's February 25 meeting, a copy of Hoeven's approval letter, and a document entitled "Notice of Intent." Id., pp. 10, 12-17.

Other than to provide a copy to Walstad, there is no indication the board took any action to publish or disseminate this notice. Moreover, the document only suggested the board was considering the "proposed adoption" of a rule "to schedule substances which have an actual or relative potential for abuse; and which bear risk to the public by unknown individuals using them by inhaling the smoke, vapors or by

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[3]The emergency rule itself bears an effective date of February 25, 2010. Att. Docs., pp. 12-13.

ingesting the substance." Id., p. 17. There was nothing in the notice to indicate the board had already adopted a rule which purported to add some new controlled substances on an interim or emergency basis. Furthermore, the specific substances at issue were not described with any particularity.

The above-described events did generate some media coverage. As the state concedes, however, this was not the result of any "direct action of the board." The state also concedes that none of the entities involved with these events issued any form of press release. Therefore, beyond the request to Walstad that it be published in the administrative code, the record reflects no action on the part of the board calculated to make this emergency rule known to any member of the public who might be affected by its adoption. Furthermore, neither Walstad, nor any other representative of the legislative council, took any steps to publish the emergency rule in any version of the administrative code.

By law, "a complete, current set of the [administrative] code, including revisions and the code supplement" must be maintained at specified locations. N.D.C.C. § 28-32-20(2). Those locations are the "office of the legislative council, each county auditor in the state, and the librarians for the supreme court library, the state library, the university of North Dakota law library" and the five libraries designated by law as official depositories. Id. As no update reflecting the emergency rule at issue has been printed, reference to any of the official versions of the code gives no clue as to the basis for these criminal proceedings.

The website maintained by the legislative council provides access to an electronic version of the administrative code (http://www.legis.nd.gov/information/rules/admincode.html). According to the home page, this internet version is derived from the

council's "data base," and is most likely to provide earliest access to "updates." At least as of this writing, the emergency rule at issue is not part of the electronic version of the administrative code posted on the council's website.

There appears to be a simple explanation. Based primarily on the emails the state has filed, I understand any version of the administrative code only reflects final rules that have been adopted by an administrative agency and thereafter approved by the administrative rules committee of the legislative council. If so, interim final rules are never published, at least as part of the administrative code.

The council's website also has a section devoted to agency rule-making notices and hearings (www.legis.nd.gov/information/rules/hearings.html). Notices are listed on the menu according to the date of the public hearing they describe. Therefore, to obtain any information using this route, the searcher must first know the hearing date and the responsible agency. In this case, that would require knowledge you were searching for information relative to a hearing conducted by the board on April 24, 2010. If that listing is selected on the menu, copies of various documents describing both the emergency rule and the final rule-making process can be located.[4]

According to the same section of its website, for an annual fee of $50 the council will forward to subscribers email notices of proposed agency rule-making. It is not clear how much information subscribers receive. In this case, if they received only the board's February 26 notice document (Id., p. 17), they would only have very general information regarding the proposed adoption of a final rule. Conversely, if subscribers received everything the council has posted in the rule-making notices and hearings section of its

[4]According to one of the emails in the state's most recent submittal, these documents were posted on March 1. They consist of the same documents attached as pages 10 through 17.

website, they would also see information regarding the emergency rule.[5]

The board has its own website (www.nodakpharmacy.com). The tool bar on the home page provides links to sections entitled "laws/rules" and "proposed laws/rules." Neither link takes the reader to any reference to an emergency rule outlawing bath salts and incense that mimic controlled substances. The same tool bar also provides a link to "board minutes." Clicking on that link takes you to a listing showing the months for which there are available minutes. Therefore, to access information using this route you would first need to know February of 2010 should be selected, as this is the month the board purported to adopt the emergency rule. Once this selection is made, you can finally locate a summary of the board's action and an imbedded text of the interim rule.

The board has taken further action since the events of February 25 and 26, but none of that action has been calculated to disseminate information regarding the "interim final" version of the rule in question. Instead, the board has simply been proceeding with the steps required to adopt a rule in "final" form. Most significant, nothing said or published by the board as part of this rule-making process provides notice that an emergency rule is already in place.

A hearing was conducted by the board in Minot on April 24. This is consistent with the board's "Notice of Intent" dated February 26. Id., p. 17. Although the record is somewhat confused, it appears notice of the hearing was published in official county newspapers, as required by N.D.C.C. § 28-32-10(1)(a). Id., pp. 19-22. A copy of the

[5]In any event, it is safe to assume that few of the people who are likely sellers or users of the substances at issue are paid subscribers to the electronic notice service provided by the legislative council.

"abbreviated" notice published in this manner has not been provided.[6] As the full notice document only references the generically described and proposed adoption of a final rule, it can safely be assumed the abbreviated notice was even less informative.[7]

The public comment period ended on May 17. Id., pp. 17, 24. That evening, the board started an extended meeting in Fargo. Id., pp. 29-44. During the opening business session, board members reviewed the minutes of the proceedings conducted on February 25 and April 24. They then proceeded "to approve Article 61-13 Controlled Substances as presented at the Rule Hearing, contingent upon approval from the Attorney General's Office." Id., pp. 33-34.

On May 28, the board forwarded various documents to the attorney general, soliciting his approval of the proposed final rule. Id., p. 45.

On June 23, Gibson was arrested for possessing one of the substances designed to mimic cannabis. The next day, Neilson was arrested for the same reason. Although Gibson and Nielson are also charged with possession of drug paraphernalia, the paraphernalia was used to smoke the synthetic cannabis. Therefore, all charges fail if

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[6]The supplemental information provided by the state includes a copy of an abbreviated notice published in connection with a public hearing held in Fargo on May 20. Att. Docs., p. 18. That hearing included consideration of a rule with a similar title, but I am satisfied it has nothing to do with this case. Id., p. 42.

[7]Based on the minutes, anyone actually attending the April 24 hearing would have heard reference to the existence of an emergency rule. Id., pp. 23-24. According to the published list of participants, a number of people attended the proceedings held that afternoon. Id., pp. 24-25. There were multiple items on the agenda, however, and there is no indication of what prompted most of the attendees to be present. In any event, it appears that only one uninvited member of the public spoke in connection with the rule-making at issue. Id., p. 24.

the emergency rule was not properly adopted.[8]

To complete the factual chronology, on July 16 the attorney general issued a formal opinion letter regarding the legality of the proposed final rule. Id., p. 46. That letter contains no reference to any existing or interim rule. It does, however, suggest some minor changes to the language of the final version. Id.

The board mailed a correspondingly amended version of its final rule to the legislative council on July 19. Id., p. 47. It was apparently received and filed on July 20. That document will be reviewed by the administrative rules committee in September. Assuming the committee does not take action to hold or void the rule, it should first be published in the October supplement to the administrative code.[9]

ANALYSIS AND ORDER

The board is vested with broad authority in terms of the addition, deletion, or rescheduling of materials on the listings of controlled substances. N.D.C.C. § 19-03.1-02. The defendants argue this is an unconstitutional delegation of legislative powers. The state counters by suggesting the board's involvement with such matters is more than appropriate, especially recognizing the technical nature of the issues and the need for rapid responses to new concerns. These are serious issues, but I do not need to decide them. Even if the board's empowerment was constitutional, it failed to meet the procedural predicates for adding new controlled substances on an emergent basis.

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[8]The supplemental submissions by the state include a summary of text messages sent or received by Nielson in the days preceding his arrest. Clearly he had repeatedly heard "on the street" that possession of "incense" was now a felony in North Dakota. Actual knowledge of an invalidly adopted emergency rule, however, does nothing to cure the fatal infirmities.

[9]This paragraph is based largely on emails from Walstad, which are part of the state's second post-hearing submittal.

Turning to those procedural requirements, the starting proposition is that all action must be "pursuant to the procedures of chapter 28-32," generally known as the Administrative Agency's Practice Act (AAPA). Id., subd. 1. Emergency rule-making is substantially controlled by N.D.C.C. § 28-32-03. There are significant differences between the requirements for an "interim final rule," and the steps needed to put a final rule into effect. Not surprisingly, in many respects emergency rule-making is more streamlined and less time-consuming.

In turn, this disposes of some of the defense's arguments, as they incorrectly incorporate requirements unique to either final rule-making or attempts to depart from federal law. By way of elaboration:

- The requirement for an opinion from the attorney general as to the legality of a rule only applies to its "final adoption." N.D.C.C. § 38-32-14. Similarly, when the board approved this rule on May 17, "contingent upon approval from the Attorney General's Office," it was clearly referring to what was then the final version. Att. Docs., p. 34.
- At least initially, defendants appeared to argue the notice requirements of N.D.C.C. § 28-32-10(1)(a) were applicable to emergency rule-making. Once again, I am satisfied this is not the case. Reading the AAPA in its entirety, the requirement for publication of an abbreviated notice in every official county newspaper seems to apply only to proposed final rules.
- The requirements of N.D.C.C. § 19-03.1-02(4) only apply if the board elects not to follow a federal law which designates, reschedules, or deletes any controlled substance. As this is not what happened here, I see no basis for applying that process.

Before addressing the concerns I do find to be dispositive, I should also comment on the balance of the defendants' arguments. The declared effective date of the interim rule becomes a moot point if the rule is otherwise invalid. The same is true for the

board's suggested failure to consult in accordance with N.D.C.C. § 19-03.1-01.1(1), or to make a specific finding of imminent peril. Furthermore, I am not convinced any of these issues raise a significant concern. Without more, I would not invalidate the interim final rule.

In my mind, the real problems have to do with lack of notice. As part of the emergency rule-making process, the responsible agency "shall take appropriate measures to make interim final rules known to every person who may be affected by them." N.D.C.C. § 28-32-03(5) (emphasis added). Furthermore, any rule "is invalid unless adopted in substantial compliance with" the AAPA. N.D.C.C. § 28-32-13. See also Mullins v. North Dakota Dep't of Human Servs., 454 N.W.2d 732, 734 (N.D. 1990); Little v. Spaeth, 394 N.W.2d 700, 703-04 (N.D. 1986).

The mandate that steps be taken to inform potentially impacted individuals is not unreasonable. Indeed, such notice is a fundamental part of procedural due process. The due process clause prohibits states from holding an individual "criminally responsible for conduct which he could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S. 612, 617 (1954). In the words of the North Dakota Supreme Court, any law "must provide a reasonable person with adequate and fair warning of the proscribed conduct." In re Maedke, 2010 ND 171, ¶ 14, ____ N.W.2d ____; City of Belfield v. Kilkenny, 2007 ND 44, ¶ 10, 729 N.W.2d 120. Although the above-cited decisions discuss the fair warning requirement in the context of a vagueness argument, I see no reason why this requirement should not extend to emergency rule-making by an agency, particularly when that rule-making purports to make previously lawful conduct a felony.

I appreciate the tension between practical reality and appropriate notice. Criminal

laws, and rules impacting the application of those laws, are being adopted, amended, or expanded on a constant and continuous basis. It is impossible for any individual, even the most diligent and informed, to stay advised of all developments on this front. Nonetheless, the state and its agencies are required to provide appropriate warning, even if it may not be heard.

Under the explicit language of the AAPA, emergency rule-making is not exempted from this requirement. N.D.C.C. § 28-32-03(5). Indeed, there are good reasons to conclude extra measures are appropriate in emergency situations. If previously lawful substances pose an imminent peril to public health or welfare, every practical attempt should be made to broadcast warning to potential users of those substances.

Furthermore, the term "appropriate measures" is presumably intended as a flexible requirement, designed to vary depending upon the circumstances. Although all duly adopted agency rules have the force and effect of law (N.D.C.C. § 28-32-06), they are not equal in terms of impact. Such rules are usually limited in scope, impact relatively few individuals, and the sanctions for noncompliance are not severe. For example, the board's rules typically apply only to the practice of pharmacy, and noncompliance is, at most, an infraction. N.D.C.C. § 43-15-42. By comparison, this rule-making criminalized previously lawful and widespread conduct. That conduct continues to be legal in most states, including Minnesota. Literally overnight, however, possession of the specified substances became a serious crime in North Dakota, punishable by imprisonment for up to five years and subjecting offenders to all the consequences of a permanent felony-level drug conviction. Because of these serious implications, it follows that a correspondingly serious attempt to provide fair warning of this change was appropriate.

To review the undisputed record, some form of notice regarding the board's

February 25 meeting was reportedly published in one newspaper, namely the Bismarck Tribune. We do not know what that notice provided. Even if the amended agenda was printed in its entirety, however, there would have been no warning or notice as to the specific substances addressed by the proposed emergency rule. Att. Docs., p. 1.

Following its "adoption," the board did forward a copy of the interim rule to the legislative council, together with the request that it be published in the administrative code. It now appears that this was a request for something that is never done, as only final rules ever appear in the code. Moreover, even that does not occur until all aspects of the rule-making process have been fully completed, and any emergency rule that may have been in place on an interim basis is no longer in effect.

The state argues any failure on the board's part was inadvertent rather than intentional. I have no doubt as to the accuracy of this characterization, but it does not change the outcome. Inadvertent reliance on an ineffectual means of providing notice does nothing to alter the simple fact that nothing was published. The AAPA mandates appropriate measures, a requirement that is not met by ineffectual and therefore wholly inappropriate attempts. Moreover, it is evident the board did nothing to follow up on its request for "publication." Had it done so, it would certainly have learned that nothing happened.

As far as the record goes, that is it. After February 25, the only notice document prepared or disseminated by the board referred to the proposed adoption of a final rule, not an interim rule that was already in effect. Id., p. 17.

In my opinion, the postings that appear on the web sites maintained by the legislative council and board do not significantly change this fact. Although these sites do contain detailed information, including the text of the interim final rule, that information is

posted in a manner that effectively defies access. Routine postings of this nature do not satisfy the requirement for appropriate measures designed to provide meaningful notice.

In summary, the board did not substantially comply with the notice requirement applicable to the adoption of an emergency rule. As that makes the rule invalid, the charges must be dismissed.[10] The motions to dismiss are hereby granted. Any bail is exonerated.

Dated this 8th day of September, 2010.

Wickham Corwin
District Judge

[10]I do not expect this ruling to have any direct impact on either revocation proceedings or drug court expulsions. Although these prosecutions may not proceed, the alleged conduct would still be a flagrant violation of drug court rules, which are incorporated by reference in the terms of probation.