



Wayne Stenehjem
ATTORNEY GENERAL

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL
600 E BOULEVARD AVE DEPT 125
BISMARCK, ND 58505-0040
(701) 328-2210 FAX (701) 328-2226
www.ag.nd.gov

JUL 31 2013

July 31, 2013

Mr. John Walstad
Code Revisor
Legislative Council
600 E Boulevard Ave
Bismarck, ND 58505-0360

Dear Mr. Walstad:

I am writing to you at the request of the North Dakota Private Investigative and Security Board. Representative Kim Koppelman suggested I write to request that a matter be placed on the agenda for the Administrative Rules Committee. The issue concerns an administrative rule that potentially could be read to be in conflict with a statute.

A private investigative or private security license is renewed annually. A state statute provides that license fees "must be prorated for the portion of each license period the license is in effect."¹ This statute contains an inherent vagueness because it does not provided how the proration is to be calculated, specifically whether it should be calculated on a daily, weekly, monthly or quarterly basis. The Board addressed this issue by adopting an administrative rule stating, "license fees for providing private investigative services and private security services may be prorated on a quarterly basis for each period the license is in effect."² The Board's intention was to read this administrative rule in context with the statute. Thus, license fees must be prorated, and proration may be monthly unless otherwise specified by the Board.

However, to the best of my knowledge, the Board has never been requested to allow proration to be calculated on a basis other than the monthly basis specified in the rule. Further, it has been pointed out to the Board that if the rule were read in isolation, it could appear that the use of the word "may" in the rule would imply that the Board could choose not to prorate the license fee as required by statute. While this was not the Board's intent when adopting the rule, it may make sense to amend the rule to change "may" to "must."

This can be accomplished by agreement between the Board and the Administrative Rule Committee pursuant to N.D.C.C. § 28-32-18.1(2), which provides:

¹ N.D.C.C. § 43-30-11.

² N.D.A.C. § 93-02-03-02.

An agency may amend or repeal a rule without complying with the other requirements of this chapter relating to adoption of administrative rules and may resubmit the change to the legislative council for publication provided:

- a. The agency initiates the request to the administrative rules committee for consideration of the amendment or repeal;
- b. The agency provides notice to the regulated community, in a manner reasonably calculated to provide notice to those persons interested in the rule, of the time and place the administrative rules committee will consider the request for amendment or repeal of the rule; and
- c. The agency and the administrative rules committee agree the rule amendment or repeal eliminates a provision that is obsolete or no longer in compliance with law and that no detriment would result to the substantive rights of the regulated community from the amendment or repeal.

The Private Investigative and Security Board requests the Administrative Rules Committee consider amending N.D.A.C. § 93-02-03-02 as follows:

93-02-03-02. License fees - Proration - Refunds - Dual licensure. License fees for providing private investigative services and private security services ~~may~~must be prorated on a quarterly basis for each period the license is in effect. However, license renewals will not be issued on a prorated basis, and no refunds may be made on license fees paid. Any agency providing both private investigative services and private security services shall meet all of the requirements for licensing as a private security agency and a detective agency.

N.D.C.C. § 28-32-18.1(2)(b) requires the Board to provide notice to the regulated community of the time and place the Administrative Rules Committee will consider the request to amend this rule "in a manner reasonable calculated to provide notice to those persons interested in the rule." Unfortunately, those persons who may be interested in this particular rule change are persons who may, in the future, choose to form a private investigative service or a private security service. We have no way to reasonably determine who these people might be. I suggest that the public posting of the Administrative Rules Committee agenda on the state's website would sufficiently inform anyone who is interested in an administrative rules of this potential change.

Further, the Board requests that the Administrative Rule Committee agree with the assertion that the proposed rule amendment eliminates the provision that is obsolete

Mr. John Walstad
July 31, 2013
Page 3

because it has not been used for its intended purpose, that the provision is no longer in compliance with law in that it could be read in isolation to not comply with the law, and further that no detriment would result to the substantive rights of the regulated community from adopting this amendment, due to the fact that the amendment would conform more closely to the statutory language if it were adopted.

Sincerely,



Edward E. Erickson
Assistant Attorney General

vkk

cc: Bill Butcher, Chairman, Private Investigative and Security Board
Francine Johnson, Executive Director, Private Investigative and Security Board