

LEGAL STATUS OF AGENCY APPLICATION OF STANDARDS THAT HAVE NOT BEEN ADOPTED AS ADMINISTRATIVE RULES - BACKGROUND MEMORANDUM

Section 1 of 2009 House Bill No. 1280 directs a study of application by administrative agencies of standards from other than state or federal law which have not been adopted as administrative rules. The sponsor of the bill, which was amended to provide for this study, told the committee considering the bill that he introduced the legislation when he discovered that some administrative agencies require regulated licensees, businesses, and individuals to comply with standards developed by a national association, commission, or other organization which have not been adopted as administrative rules. He said his concern was that standards imposed by an agency on the regulated community are not rules adopted in accordance with the laws of North Dakota; are not subjected to public review, comment, and hearing before they are implemented; do not have a regulatory or economic analysis to determine the effect on regulated entities; are not reviewed by the Attorney General to determine legality and conformity with the law; are not subject to review by the Administrative Rules Committee; and are not published in the North Dakota Administrative Code so that the regulated community and the public know what the standards are.

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) and standards, guidelines, opinions, and other agency pronouncements that are not "rules."

Under NDCC Section 28-32-06, 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adopted in compliance with the Administrative Agencies Practice Act have "the force and effect of law until amended or repealed by the agency, declared invalid by a final court decision, suspended or found to be void by the administrative rules committee, or determined repealed by the legislative council because the authority for adoption of the rules is repealed or transferred to another agency."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* §160).

LEGISLATIVE V. INTERPRETIVE RULES

Courts in other states 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* § 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. 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)).
2. 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)).
3. 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)).
4. 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 this chapter" (NDCC Section 28-32-13). 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 (N.D. 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 (N.D. 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 (N.D. 1988) (bureau directive 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 (N.D. 1990), *Huber v. Jahner*, 460 N.W.2d 717 (App. Ct. 1990), and *Illies v. Illies*, 462 N.W.2d 878 (N.D. 1990) (child support guidelines and developmental disability service guidelines not formally adopted as rules by the department were invalid)).

A statement of the North Dakota Supreme Court in *Smith v. N.D. Workers Comp. Bureau*, 447 N.W.2d 250 (N.D. 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)

In *NL Industries, Inc. v. State Tax Commissioner*, 498 N.W.2d 141 (N.D. 1993), the North Dakota Supreme Court quoted with approval precedent from its decisions before and after *Smith* 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 (N.D. 1992); *Schaefer v. Job Service North Dakota*, 463 N.W.2d 665 (N.D. 1990); *True v. Heitkamp*, 470 N.W.2d 582 (N.D. 1991); and *Gofor Oil, Inc. v. State*, 427 N.W.2d 104 (N.D. 1988)).

The North Dakota Supreme Court has ruled that "[a]n administrative regulation may not exceed statutory authority or supersede a statute, and that a regulation which goes beyond what the Legislature has authorized is void" (*Moore v. North Dakota Workmen's Comp. Bureau*, 374 N.W.2d 71 (N.D. 1985); *Little v. Traynor*, 565 N.W.2d 766 (N.D. 1997)).

The North Dakota Supreme Court has ruled in *North Dakota Department of Human Services v. Ryan*, 672 N.W.2d 649 (N.D. 2003) as follows:

[A]n administrative regulation is void if it exceeds an agency's statutory authority or conflicts with the statute it implements. . . . Since the power to make regulations is administrative in nature, legislation may not be enacted under the guise of its exercise by issuing a "regulation" which is out of harmony with, or which alters, extends, or limits, the statute being administered, or which is inconsistent with the expression of the lawmakers' intent in other statutes. The administrative officer's power must be exercised within the framework of the provision bestowing regulatory powers on him and the policy of the statute which he administers. He cannot initiate policy in the true sense, but must fundamentally pursue a policy predetermined by the same power from which he derives his authority.

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 recognized that rules adopted in compliance with the Administrative Agencies Practice Act have the force and effect of law.
3. 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."

4. The court has ruled that an administrative regulation is void if it exceeds an agency's statutory authority.

SUGGESTED STUDY APPROACH

1. It will be necessary to identify agencies that apply standards that have not been adopted as administrative rules.
2. For agencies identified as applying standards that have not been adopted as administrative rules, agency representatives should be invited to address the committee with regard to status of the standards and whether statutory authority exists to require compliance with those standards.