

## ADMINISTRATIVE RULE INTERPRETATION CHANGE - NECESSITY OF RULEMAKING PROCEEDING

This memorandum was requested to address the issue of whether an administrative agency changing its interpretation of its own rule must institute a rulemaking proceeding before implementing the change. This is an issue that has not been addressed in any decision of the North Dakota Supreme Court or opinion of the North Dakota Attorney General.

As a general statement of the law, 73 C. J. S., Public Administrative Law and Procedure, Section 96 contains the statement:

The custom and practice of an agency in interpreting its rules may bind the agency as its policy. However, an administrative agency has the right to change a prior interpretation of a regulation, and to make the change retroactive.

This statement may leave the impression that an agency is free to change interpretations of its rules without restriction. However, examination of the case cited to support the statement (*Letellier v. Cleland*, 437 F. Supp. 936 (D.C. Iowa 1977)) and the two cases relied upon as authority within the *Letellier* decision (*Automobile Club v. Commissioner of Internal Revenue*, 353 U.S. 180, 77 S. Ct. 707, 1 L. Ed. 2d 746 (1956); *Chisholm v. Federal Communications Commission*, 538 F.2d 349 (D.C. Cir. 1976)) shows each case concludes that an agency has the right to change a prior interpretation of its rule when necessary to correct an error.

A federal court has flatly stated that under the federal Administrative Procedure Act, "when an agency creates a substantive standard, it can revoke it only through notice and comment under the Administrative Procedure Act (*Sentara Hampton General Hosp. v. Sullivan*, 799 F. Supp. 128 (D.C. Cir. 1991)). Another federal court has ruled that "an agency may not escape the notice and comment requirements for rulemaking by labeling a major substantive legal addition to a rule a mere interpretation" (*Appalachian Power Company v. Environmental Protection Agency*, 208 F.3d 1015 (D.C. Cir. 2000)).

Opinions of courts in other states are in apparent agreement with the federal court. The Supreme Court

of Maryland has concluded that when an agency changes a policy of general application, embodied in or represented by a rule, the change must be accomplished by rulemaking rather than adjudication (*CBS Inc. v. Comptroller of the Treasury*, 575 A.2d 324 (Md. 1990)). The Utah Court of Appeals concluded that an agency must engage in formal rulemaking proceedings if the change being considered is generally applicable to any persons, the policy interprets the law, and the policy would result in a change in clear law (*C.P. v. Utah Office of Crime Victim's Reparations*, 966 P.2d 1226 (Utah Ct. App. 1998)). The Minnesota Supreme Court has decided that when an agency policy purports to interpret a previously adopted agency rule and that interpretation lacks support in the rule's language, the interpretation constitutes a separate rule which must be adopted to have effect (*White Bear Lake Care Center v. Minn. Dept. of Pub. Welfare*, 319 N.W.2d 7 (Minn. 1982)).

While the Supreme Court of North Dakota has not ruled on this issue, the situation appears similar to a principle of equity which the court has recognized. To allow an agency to accomplish by interpretation what would otherwise require a rulemaking proceeding would appear to violate the principle the court has recognized that the law does not permit an agency to accomplish by indirection what cannot be accomplished directly (*Northern States Power Co. v. Hagen*, 314 N.W.2d 42 (N.D. 1981)).

### CONCLUSION

While there is no controlling legal authority with regard to this question, it appears that an agency cannot change its interpretation of its own rule without formal rulemaking procedures if that change would "permit by indirection what cannot be accomplished directly." It appears there is no clear statement of a rule to identify when interpretation changes must be a result of formal rulemaking. It appears that if the substantive effect of the interpretation is such that rulemaking would be required if it were a rule change, the agency should conduct a formal rulemaking proceeding.