

N.D.A.G. Letter to Rydell (April 21, 1988)

April 21, 1988

Honorable Cathy Rydell
State Representative
535 Assiniboin Drive
Bismarck, ND 58501

Dear Representative Rydell:

Thank you for your letter of February 1, 1988, requesting an Attorney General's opinion regarding the effect of House Bill No. 1272 on public school districts. As previously indicated to you, we did not receive your letter until March 29, 1988.

N.D.C.C. § 23-12-09 establishes facilities affected by the designation of smoking requirements. N.D.C.C. § 23-12-09(1)(b) states as follows:

23-12-09. Smoking in places of public assembly -- Definitions. In sections 23-12-09 through 23-12-11, unless the context or subject matter otherwise requires:

1. "Place of public assembly" means:

....

b. Any building or other enclosed structure owned or leased by the state, its agencies, or political subdivisions, and all public education buildings.

Clearly all buildings owned or operated by the school district are affected by the statute and must meet the requirements imposed therein. N.D.C.C. § 23-12-10 states:

23-12-10. Designation of smoking areas. Every place of public assembly is an area where smoking is not permitted outside of designated smoking areas. Smoking areas must be designated by the proprietor or other person with general supervisory responsibility over the place of public assembly, except in a place in which smoking is prohibited by the state fire marshal, by other governing law, rule, or ordinance, or by corporate or private policy. A sign must be posted in any designated smoking area which states "Designated Smoking Area" or words to that effect.

Except as otherwise provided, designated smoking areas in a place of public assembly may not occupy more than fifty percent of the total area available to the public and must be situated to minimize smoke drift. The

proprietor of a food establishment with the seating capacity for fifty or more persons may temporarily, during the course of daily business, expand the designated smoking area beyond fifty percent of the total available area if the smoking area becomes fully occupied and the additional space needed for the expansion is vacant or available.

N.D.C.C. § 15-29-08(2) and (9) states:

15-29-08. General powers and duties of school board. The powers and duties of the school board of a public school district shall be as follows:

....

2. To organize, establish, operate, and maintain such elementary and high schools as it may deem requisite and expedient, to acquire sites and construct buildings and other facilities in connection therewith, and to change the location of or discontinue such schools and liquidate the assets thereof in the manner prescribed by law; provided, that no site shall be acquired or building constructed, or no school shall be organized, established, operated, maintained, discontinued, or changed in location without the approval of the state board of public school education if outside the boundary of the district.

....

9. To have the custody and control of a11 school property belonging to the district, and, when the school district is located within a city, to see that the ordinances and bylaws of the city in relation to such school property are observed.

Thus, the school board is responsible for designation of smoking areas within school buildings in accordance with N.D.C.C. § 23-12-10. The designated smoking area may not occupy more than fifty percent of the total area available to the public and must be situated to minimize smoke drift. The State Department of Health and Consolidated Laboratories has encouraged supervisors of places of public assembly to not designate entry ways to buildings or gymnasiums as designated smoking areas because such designation does not minimize smoke drift. Note the requirements of N.D.C.C. § 23-12-10.1 regarding requirement to post an appropriate sign in any designated smoking area.

You also asked whether a school district may implement a total ban on smoking within school buildings and school property. N.D.C.C. § 23-12-10 states that smoking may be prohibited by the State Fire Marshal or other governing law, or rule, or ordinance. In addition, N.D.C.C. § 23-12-10.2 states:

- 23-12-10.2. Complaints and enforcement.

. . . .

Authorities other than state agencies may conduct inspections and report violations to state agencies, or enforce smoking policies, rules, or ordinances more stringent than those contained in sections 23-12-09 through 23-12-11.

Thus, although N.D.C.C. ch. 23-12 does not grant authority to any supervisory body beyond that which already exists, it does anticipate some authorities imposing requirements more stringent than those found in N.D.C.C. ch. 23-12. The North Dakota State Department of Health and Consolidated Laboratories has imposed a smoking ban in its office areas. Other agencies which has imposed smoking bans include:

- Office of State Auditor
- Public Service Commission
- Commissioner of Insurance
- Highway Department
- Highway Patrol
- State Historical Board, State Historical Society
- Department of Human Services
- Secretary of State
- Tax Commissioner
- State Treasurer's Office
- Vocational Education

It appears that any public supervisory authority would be able to impose a similar ban on smoking in the work place. The authority could be altered if smoking is addressed in the agreement between the school district and the appropriate bargaining unit.

Sincerely,

Nicholas J. Spaeth

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