

N.D.A.G. Letter to Olson (Sep. 6, 1989)

September 6, 1989

Hon. John M. Olson
North Dakota State Senator
District 49
P.O. Box 2674
Bismarck, ND 58502

Dear Senator Olson:

Thank you for your July 25, 1989, letter concerning the ability of the Commissioner of Labor to amend a recently issued wage order.

The Commissioner of Labor is authorized to determine and prescribe minimum wage standards for employees in any occupation in this state pursuant to the procedures outlined in N.D.C.C. ch. 34-06. N.D.C.C. § 34-06-03(3). Those provisions provide that if the Commissioner of Labor believes employees in an occupation are receiving wages inadequate to supply them with the necessary cost of living and to maintain them in good health, he may call for a conference for the purpose of considering and reporting on this subject. N.D.C.C. § 34-06-09.

The conference is composed of three employer representatives in that occupation, an equal number of employee representatives in that occupation, and not more than three disinterested persons representing the public interest, and the Commissioner or his representative. All members of the conference are named by the Commissioner. After completing its consideration of any inquiry submitted to it by the Labor Commissioner, the conference must make and transmit to the Commissioner its report containing its findings and recommendations on the subject at hand. Id.

Upon receipt of the conference report, the Commissioner must consider and review the report's recommendations. He may approve or disapprove of any of the recommendations. The Commissioner may resubmit to the same conference or to any new conference any subject covered by any recommendations that he has disapproved. If the Commissioner approves the recommendations of the conference report, he is to give notice to the public and allow a hearing on the recommendations. N.D.C.C. § 34-06-11.

Following the public hearing, the Commissioner may make and render such order as may be necessary and proper to adopt the recommendations and to carry them into effect. All employers in the occupation affected must observe and comply with the recommendations and order. The Commissioner's order becomes effective on the 60th day following its issuance. All orders issued by the Commissioner must be reviewed annually. N.D.C.C. § 34-06-12.

One of your questions is whether the Commissioner may arbitrarily select those segments of the employer community who will be subject to the wage order and those segments which will not be subject to the order. As noted, the conference's inquiry and the Commissioner's refer to minimum wage standards for employees "in any occupation." Occupation is defined to mean a business or industry, or a trade or branch thereof. N.D.C.C. § 34-06-01(5). Thus, the Commissioner has discretion to restrict a wage order to a portion of a business or industry; he may restrict a wage order to any "occupation" within a business or industry. This conclusion is supported by a literal reading and definition of the phrase "in any occupation."

A more difficult question is whether the Commissioner may amend an order issued pursuant to N.D.C.C. § 34-06-12. Neither that statute nor N.D.C.C. ch. 34-06 provides for an amendment of the Commissioner's order.

N.D.C.C. § 34-06-04 authorizes the Commissioner to prepare, adopt, and promulgate rules and regulations to implement the various provisions of N.D.C.C. ch. 34-06. Furthermore, N.D.C.C. § 28-32-01(6) defines "rule" to mean the whole or a part of an administrative agency's statement of general applicability that prescribes law or policy. The Commissioner of Labor is an administrative agency as it is a department of the administrative unit of the executive branch of state government. N.D.C.C. § 28-32-01(1). Thus, any agency statement of general applicability issued by the Commissioner prescribing a law or policy must take the form of an administrative rule. N.D.C.C. § 28-32-01(6).

The North Dakota Supreme Court has held that if an administrative agency's statement prescribes law or policy but does not take the form of an administrative rule, although it is required to be in such a form, that statement is null and void. Little v. Spaeth, 394 N.W.2d 700 (N.D. 1986). Therefore, if the wage order issued by the Labor Commissioner pursuant to N.D.C.C. § 34-06-12 is required to be in the form of an administrative rule adopted pursuant to the provisions of N.D.C.C. ch. 28-32, and if it further appears that such a wage order was not issued in compliance with the provisions of N.D.C.C. ch. 28-32, the Commissioner's wage order is null and void.

North Dakota law does not provide for minimum wages and hours. Instead, the Legislature has authorized the Labor Commissioner to issue orders providing these standards utilizing the procedures described in N.D.C.C. ch. 34-06. Once those procedures have been followed and the Commissioner of Labor issues the order provided for by N.D.C.C. § 34-06-12, the provisions of the Commissioner's order have the effect of law. Violations of the provisions of the Commissioner's order are punishable as a class B misdemeanor. N.D.C.C. § 34-06-19.

In establishing the minimum standards for wages and hours, the Commissioner of Labor is, therefore, prescribing law or policy. As such, a wage order issued by the Commissioner pursuant to N.D.C.C. § 34-06-12 must be issued as an administrative rule in compliance with the provisions of N.D.C.C. ch. 28-32.

Having concluded that a wage order issued by the Commissioner of Labor pursuant to N.D.C.C. § 34-06-12 must take the form of an administrative rule adopted in compliance with the provisions of N.D.C.C. ch. 28-32, the question of modification is easily resolved. N.D.C.C. § 28-32-01(6) includes within the definition of administrative rule the amendment, repeal, or suspension of an existing rule. Thus, any administrative agency, including the Commissioner of Labor, may amend, repeal, or suspend the operation of an existing administrative rule, such as a wage order issued pursuant to N.D.C.C. § 34-06-12, simply by the adoption of an additional administrative rule. However, the provisions of N.D.C.C. ch. 28-32 must be satisfied in the adoption of an administrative rule which amends, repeals, or suspends an existing administrative rule.

A review of the administrative rules adopted by the Commissioner of Labor, as distributed within the North Dakota Administrative Code, does not reveal any administrative rule providing for the minimum standards for wages and hours. Indeed, I have learned that the Commissioner of Labor has not complied with the provisions of N.D.C.C. ch. 28-32 in issuing the wage order that prompted your inquiry. As a result of the conclusions reached earlier in this response, it is my opinion that any wage order issued by the Commissioner of Labor pursuant to N.D.C.C. § 34-06-12 which does not take the form of an administrative rule and which has not been adopted in compliance with the provisions of N.D.C.C. ch. 28-32, is invalid and has no legal effect. Once the wage order is properly adopted as an administrative rule, approved as to its legality by this office, and published in the North Dakota Administrative Code, it will have the force and effect of law. Finally, the Commissioner is authorized to adopt a subsequent administrative rule amending, repealing, or suspending the previous administrative rule with respect to the minimum standards for wages and hours.

I hope this discussion is helpful to you.

Sincerely,

Nicholas J. Spaeth

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