

## **N.D.A.G. Letter to Flagstad (Nov. 15 1988)**

November 15, 1988

Mr. Mark A. Flagstad  
Assistant Ward County  
State's Attorney  
Ward County Courthouse  
Minot, ND 58701

Dear Mr. Flagstad:

Thank you for your October 28, 1988, letter. You have presented two questions concerning the existence of a statutory or constitutional right to a jury trial in an appeal to the county court after a determination by a municipal court that a person has committed a non-criminal traffic offense.

I am unable to provide you with a specific opinion concerning these issues. Your letter indicates these issues have been raised in pending litigation. It has been the long-standing practice and policy of this office to not knowingly give an opinion on an issue involved in pending litigation. The opinion of the Attorney General is not binding on the judiciary. See, State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1945). In addition, all legislative enactments are presumed to be constitutional and, in all cases of doubt, the doubt must be resolved in favor of the enactment's validity. Id.

This presumption of constitutionality of legislative enactments cannot be regarded lightly. In enacting a statute, it is presumed that the Legislative Assembly intended to comply with the constitutions of the state and of the United States. N.D.C.C. § 1-02-38(1). In addition, a legislative enactment may be declared unconstitutional by the Supreme Court only upon the concurrence of four justices. N.D. Const. art. VI, § 4.

This office may be required, at some time, to defend the constitutionality of a statute. In light of the strong presumption of constitutionality of a legislative enactment, the possibility that an opinion from this office may interfere with pending judicial proceedings, and the possibility this office may be required to defend the constitutionality of the statute, I cannot provide a direct response to your questions.

Although I cannot provide a formal opinion to you, I can generally discuss the issue arising in your first question pertaining to existence of a statutory right to a jury trial on a non-criminal traffic offense appeal.

N.D.C.C. §§ 39-06.1-02 and 39-06.1-03 govern the procedures for disposition of non-criminal traffic offenses. These procedures are applicable to municipal court proceedings concerning motor vehicle ordinance violations equivalent to state law violations, other than those excepted by N.D.C.C. § 39-06.1-05.

N.D.C.C. § 39-06.1-03 authorizes a person to appeal a finding by the municipal court that such person committed the traffic violation. Prior to 1983, N.D.C.C. § 39-06.1-03(5)(a) provided that, upon appeal, "the case may be tried to a jury, if requested." However, the 1983 Legislative Assembly removed this statutory right to a jury trial upon appeal. See, 1983 N.D. Sess. Laws ch. 431, 1. By this action, N.D.C.C. § 39-06.1-03(5)(a) no longer provides a statutory right to a jury trial upon an appeal from a municipal court determination that a person has committed a non-criminal traffic violation.

In addition, it appears that the procedure set forth in N.D.C.C. ch. 40-18 may be inapplicable to non-criminal traffic violation offenses as defined in N.D.C.C. ch. 39-06.1. The procedures provided for non-criminal traffic violations are specific, separate, and distinct from those set forth for criminal traffic and non-traffic offenses.

N.D.C.C. § 40-18-19 requires that appeals from a decision of municipal court be taken in accordance with the North Dakota Rules of Criminal Procedure. However, in a case of non-criminal traffic offenses, N.D.C.C. § 39-06.1-03(6) specifically states that the appeal and the parties shall follow, to the extent applicable, the North Dakota Rules of Civil Procedure.

A determination that a person has committed a non-criminal traffic offense which is subject to the procedures of N.D.C.C. §§ 39-06.1-02 and 39-06.1-03 does not result in a criminal conviction. The non-criminal traffic offense procedures set forth in these sections are neither criminal proceedings nor true civil proceedings. Rather, it appears that the Legislature has developed a hybrid non-criminal proceeding to enforce, in a timely manner, the North Dakota non-criminal motor vehicle laws and to establish an alternative providing offenders with prompt disposition of these offenses.

I am sorry that I could not directly respond to the questions presented in your letter but I hope that the general discussion of the first issue may be of some assistance to you.

Sincerely,

Nicholas J. Spaeth

cv