

**OPINION
71-376**

August 26, 1971 (OPINION)

Mr. L. A. Koehler

State Food Commissioner and Chemist

State Laboratories Department

RE: Statutes - Uniform Controlled Substances Act - Schedules - Revis

This is in reply to your letter of August 18, 1971, with regard to proceedings by your department under North Dakota's Uniform Controlled Substances Act, Chapter 19-03 of the 1971 Supplement to the North Dakota Century Code, in relation to proceedings under the Federal Drug Abuse Prevention and Control Act, Title 21, USCA 801 through 965.

You inform us that you have been advised by the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs, that certain amphetamines and methamphetamines are being rescheduled from Schedule 3 to Schedule 2 of the Comprehensive Drug Abuse Prevention and Control Act of 1970. You indicate that you are also given notice to similarly reschedule these substances unless you oppose same within thirty days of publication in the Federal Register. You indicate further that the publication date of the Federal Register July 7 and you have not registered opposition to the rescheduling.

You call to our attention the fact that Section 19-03.1-02 of the 1971 Supplement to the North Dakota Century Code provides certain procedures for your department to delete or reschedule substances under this Act. You indicate that this raises a question as to the proper procedure to follow in rescheduling the items referred to above which are being rescheduled in the federal Act.

You further call to our attention the fact that subsection 1 of Section 19-03.1-02 sets forth procedures for deletion or rescheduling according to procedures of Chapter 28-32. You indicate that you would construe this procedure to followed if the State Laboratories Department were to initiate on its own the deletion or rescheduling of any substances covered by this Act.

You indicate further that subsection 4 of Section 19-03.1-02 refers to notices given under the federal law to the State Laboratories Department directing them to similarly control any substances after a thirty-day period if the Department raises no objections.

You ask whether, since you have raised no objections to the rescheduling, you can simply acquiesce to the notices of rescheduling by the Bureau of Narcotics and Dangerous Drugs and simply issue a statement that you have rescheduled the drugs in question in the same manner as the federal Act.

This state's Uniform Controlled Substances Act does adopt "schedules" of various "controlled substances". It further provides, however,

administrative authority in your department to make changes in these schedules pursuant to legislative standards contained in the Act, and in one type of situation described in your letter permits changes in such schedules to become part of these schedules by your department's taking no action to object to designated federal action. On such basis, it is entirely possible, due to administrative actions, or inaction, that the "schedules" as currently printed in the 1971 Supplement to the North Dakota Century Code, at some time in the future, may not be the precise schedule as amended. We note that Section 19-03.1-14 of the 1971 Supplement to the North Dakota Century Code provides that "the state laboratories department shall revise and republish the schedules semiannually for two years from the effective date of this chapter, and thereafter, annually." This, of course, gives the means to make schedules as currently amended available.

The sentence of Section 19-03.1-02 of the 1971 Supplement to the North Dakota Century Code here concerned is that provision of subsection 4 thereof, that:

"If any substance is designated, rescheduled, or deleted as a controlled substance under federal law and notice thereof is given to the state laboratories department, the state laboratories department shall similarly control the substance under this chapter after the expiration of thirty days from publication in the federal register of a final order designating a substance as a controlled substance or rescheduling, or deleting a substance, unless within that thirty-day period, the state laboratories department objects to inclusion, rescheduling, or deletion,* * *"

A procedure is thence given for the action to be taken if the State Laboratories Department objects to such changes, which procedure does differ from that provided in subsection 1 of said Section 19-03.1-02 of the 1971 Supplement to the North Dakota Century Code for the State Laboratories Department to add substances to or delete or reschedule substances enumerated in the schedules.

The basic differences between the procedure for state laboratories department adding substances, deleting substances or rescheduling substances under subsection 1 of said Section 19-03.1-02 and objection to federal rescheduling under subsection 4 of said Section 19-03.1-02 would appear to be that the subsection 1 procedures appear to involve no requirement that the State Laboratories Department hold a hearing, and that the conclusion of such procedure is the issuance of a "rule," whereas the subsection 4 procedures apparently contemplate the State Laboratories Department affording an opportunity for a hearing to interested parties, and that the conclusion of such procedure is that the department "publishes" its "decision." In both instances, we note that the basic elements of a particular procedure is specifically included in the provisions for same.

Looking to the statutory provisions, we note no requirement for "issuance" of a rule", "affording a hearing" or "publishing" a "decision" where the change is initiated on the federal level, and the State Laboratories Department does not "object" to same. We

would assume, of course, that the next "revision" and "republication" of the schedules pursuant to the provisions of Section 19-03.1-14 would reflect the changes in schedules thus created, but find no further specific requirement in this chapter for any further action by the State Laboratories Department in this situation.

Insofar as the statute is quite specific as to the procedural requirements for either State Laboratories Department initiated changes, or for State Laboratories Department objections to federal action, we would not feel justified in concluding that the enactment is any less complete in specifying the procedure to be utilized where the action is initiated on the federal level and the State Laboratories Department takes no action to object to same.

There might be some doubts as to the validity of a state statutory delegation of authority to a federal agency to make changes in the state laws, particularly where the federal agency is not necessarily bound by state legislative standards. However, this does not appear to be the effect of this enactment. Here, before it becomes a part of the state law, the State Laboratories Department must in effect determine not to object to same. Presumably, if the federal change would violate the state legislative standards the State Laboratories Department would be required to utilize the objection procedure specified in the statute.

The ultimate result of same would thus be very similar to the result of the exercise of state rulemaking power. We do note, of course, that a rule adopted by an administrative agency under the prior provisions of Chapter 28-32 of the North Dakota Century Code must first be approved by this office and filed in various places prior to its taking effect as law of the state. However, this determination not to object, in this situation, is not designated as rulemaking or requiring the issuance of a rule, on which basis we would assume further that such action would not require formal compliance with these provisions of said Chapter 28-32.

Obviously, of course, persons interested in such action could check State Laboratories Department records, under our public records statutes, to determine whether the State Laboratories Department had or had not objected, further, of course, under the provisions of the hereinbefore quoted Section 19-03.1-14 the schedules thus changed, would be published by the State Laboratories Department, at least within the semiannual or annual period therein.

It would thus be our conclusion that while for administrative purposes, it would probably be convenient to adopt a memorandum of facts upon which the conclusions leading to the State Laboratories Department's determination not to object are based, to be kept on file in the State Laboratories Department and copy mailed to this office for the convenience of those inquiring in this regard, we find no requirement in the law for such memorandum, and find no authorization in the law for utilizing either rulemaking procedures, or objection procedures found in this act at the time such determination is made.

HELGI JOHANNESON

Attorney General