STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 91-11

Date issued: July 26, 1991

Requested by: Sheila Peterson, Executive Budget Analyst

- QUESTION PRESENTED -

Whether any enrolled version of S. Bill No. 2324, 52nd N.D. Leg. (1991), was constitutionally enacted.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that no enrolled version of S. Bill No. 2324, 52nd N.D. Leg. (1991), was constitutionally enacted, and that the section of law sought to be amended by that bill remains unchanged.

- ANALYSIS -

N.D. Const. art. IV, ' 13, provides, in pertinent part:

> Each house shall keep a journal of its proceedings, . . .
>
> No law may be enacted except by a bill passed by both houses, . . .
>
> The presiding officer of each house shall sign all bills passed and resolutions adopted by the legislative assembly, and the fact of signing shall be entered at once in the journal.

N.D. Const. art. V, ' 9, provides, in pertinent part:

> Every bill which shall have passed the legislative assembly shall before it becomes a law, be presented to the governor. . . .

N.D. Const. art. I, ' 24, provides:

> The provisions of this constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise.

In reviewing the procedure used by the Legislature to enact a law, the general rule is the Legislature's action may not be challenged unless it exceeds or violates constitutional authority. See State ex rel. Spaeth v. Meiers, 403 N.W.2d 392, 394 (N.D. 1987), and 1988 N.D. Op. Att'y Gen. 74. The enactmentof laws must adhere to the North Dakota Constitution in order for the enactments to be valid.

As an aid in determining whether the constitution has been followed in the enactment of legislation, states are sometimes classified as being adherents to the "enrolled bill rule" or the "journal entry rule," or some variant

thereof. 1 Sutherland, Statutory Construction, " 15.03, 15.04 (4th Ed. 1985). North Dakota is a journal entry state. 1973 N.D. Op. Att'y Gen. 477. That means that in determining whether the constitution was followed in the enactment of legislation, the enrolled bill is not absolutely conclusive, and legislative journals may be investigated to determine whether the enrolled bill is actually what was enacted by the Legislature. Id.

The basic rule on usage of legislative journals to determine the validity of legislation is that:

> Recitals in legislative journals are conclusive as to matters which the constitution requires to be entered therein, and cannot be impeached by verbal statements or other parol or extrinsic evidence, and the journals furnish controlling evidence when a statute is challenged on the ground that it has not been passed by both houses. In the event of a discrepancy between the published act and the legislative journals as to the form and terms of the statute, the journals have been held to control, and the journals have been held to be controlling in the event of a variance between the enrolled bill and the journals with respect to the title of an act.

82 C.J.S., p. 144.

The North Dakota Supreme Court adopted the journal entry rule in State v. Schultz, 174 N.W. 81 (N.D. 1919). That case involved a criminal prosecution for violation of liquor laws. The defense was that the law under which the defendant was charged was not constitutionally passed by the Legislative Assembly. The journal entries were reviewed to determine that the bill actually passed by the Legislative Assembly was not the enrolled bill as ultimately filed and printed. The court indicated in the Schultz opinion that it believed the enrolled bill rule would be contrary to the spirit and letter of the North Dakota Constitution and therefore did not adopt it. The court held it was its duty to take judicial notice of legislative journals and the history of every statute in its progress through the Legislature. The court further determined that when the people adopted the constitution they prescribed the conditions under which legislative power should be exercised, and they intended that it should be exercised only in the manner prescribed. 174 N.W. at 82-84.

In 1927, the Court reaffirmed its adherence to the journal entry rule for North Dakota in State ex rel. Sorlie v. Steen, 212 N.W. 843 (N.D. 1927). Steen involved a question of whether the newly created Highway Commission had authority to make expenditures before July 1, based on whether the bill creating the Highway Commission was an emergency measure. The court stated in Steen:

> Both parties concede the correctness of the principles laid down in State v. Schultz, . . ., to the effect that the courts may go behind the enrolled bill and inquire into the legislative records

> to determine whether or not constitutional requirements have been observed. The difficulty in the instant case arises upon the attempt to apply the principles of the Schultz Case to the facts. It is, of course, conceded that presumptions are in favor of the regularity of legislative action. This presumption so operates that, looking backward from the enrolled bill, all prior steps necessary to effect the legislative result evidenced by the enrolled bill are deemed to have been regularly taken. This will be presumed until the contrary is made to appear from the records. . . .

212 N.W. at 845. (Citation omitted.)

The events occurring in the enactment of Senate Bill No. 2324, as related to this office, are as follows. After three conference committees considered the bill to resolve conflicts between the houses, each house voted to permit payment of 10 percent of the accumulated sick leave balance to employees with 10 years of continuous service upon separation from state service. The amendment which had previously been approved by the House of Representatives, which authorized payment of the 10 percent of accumulated sick leave balance only upon actual retirement, was not adopted.

However, the bill as first enrolled contained the House amendments limiting the payment of sick leave balance to payment at actual retirement. This first enrollment, although incorrect, was prepared, signed by the legislative leadership of both houses, presented to and signed by the Governor, and filed with the Secretary of State on April 18, 1991.

A few days after the adjournment of the 1991 Legislative Assembly, the erroneous first enrollment was noticed by the enroller. A corrected second enrollment was prepared and taken to the Office of the Secretary of State and substituted for the erroneous enrollment. The signature page from the first erroneous enrollment was removed and attached to the second correct enrollment. The second correct enrollment was never signed by the legislative leadership or presented to or signed by the Governor, although the legislative leadership was informed of the substitution. The correct second enrollment now appears as 1991 N.D. Sess. Laws ch. 570.

Applying the above-cited rules of law to this factual background, it is apparent that the first erroneous enrollment of the bill conflicts with the notations in the legislative journals concerning what was actually passed by the Legislature. The first enrollment limited the payment of 10 percent of accumulated sick leave balance to actual retirement, whereas the Legislature actually passed authorization for payment of that 10 percent balance to anyone with 10 years continuous service upon separation from employment. It is my opinion that the first erroneous enrollment of the bill is constitutionally invalid and is null and void.

There remains the determination of the status of the second corrected enrollment of the bill, which was never signed by the legislative leadership,

and was never presented to nor signed by the Governor. The absence of these signatures and presentment is contrary to the above-cited provisions of our constitution. A rigid application of the journal entry rule, without applying the factual background concerning the substitution of one enrollment for the other, might make it appear that the corrected second enrollment was uncontestable because it does not conflict with the journal entries concerning what was actually passed by the Legislative Assembly. This assumption might be made from strict adherence to the rule of law concerning parol evidence as noted in the 1973 Attorney General's opinion cited above. However, it should be noted that the facts concerning the circumstances of the enactment of Senate Bill No. 2324 are quite unique and the North Dakota Supreme Court has not reviewed or considered the journal entry rule since 1927 in the Steen case.

The trend of legal opinion has broadened over the years to permit delving into the factual background behind the enactment of legislation to determine its constitutional validity. For example, the Missouri Supreme Court in State ex rel. Ashcroft v. Blunt, 696 S.W.2d 329 (Mo. 1985), described a situation where a bill was incorrectly enrolled by leaving out part of an amendment. The error was discovered after the bill was signed by the legislative leadership and by the Governor and filed with the Secretary of State. The Governor then sent a request to the Secretary of State, along with a corrected portion of the bill, and requested the Secretary of State to substitute the correction for the incorrect part of the bill. The Secretary of State believed there was no authority to make the requested alteration or substitution after a bill was signed and filed, and refused to make the substitution. The Court in Blunt held that because the bill as passed was not presented to the Governor, but was inadvertently modified en route, that the clerical error could not prevail over constitutional requirements. The court noted that not only could clerical employees not amend legislation on its way through the Legislature, but even the official officers of the Legislature could not amend legislation merely by their signature. Noting that it could not speculate on whether the Governor would have signed the bill as actually passed, the court noted that the Secretary of State's refusal to make the substitution requested by the Governor was reasonable because the Secretary of State had previously received a duly authenticated bill. The court stated that when it is shown by unassailable proof, including the journal of the houses, that the bill signed by the Governor was not passed by the houses, then the bill becomes a nullity. The court determined that the section of law sought to be amended would remain unchanged. 696 S.W.2d at 331.

The Texas Supreme Court in Association of Texas Professional Educators v. Kirby, 788 S.W.2d 827 (Tex. 1990), determined that under certain circumstances an exception existed to the enrolled bill rule which had been applied in that state for some time. Kirby involved an erroneous enrollment of a bill by the substitution of one number for another by a clerical employee in the enrollment process. The legislative leadership, as well as the Governor, signed the wrong bill. Later, legislative leaders wrote to the Texas Commissioner of Education asking him to enforce the Act as if the clerical error had never occurred. The Texas Attorney General opined that because of

the enrolled bill rule the requested interpretation could not be made.

The Texas Supreme Court in Kirby noted that the enrolled bill rule was contrary to modern legal thinking, which does not favor conclusive presumptions that may produce results which do not accord with fact. The court noted that the present tendency favors giving the enrolled version only prima facie presumptive validity and that a majority of the states recognize exceptions to the enrolled bill rule. The court held that an exception existed to the enrolled bill rule when official legislative journals, evidence from presiding legislative officers, and a stipulation from the Attorney General acting in his official capacity showed that the enrolled bill was not what the Legislature had passed. The court determined that a clerical error cannot prevail over constitutional law. 788 S.W.2d at 829-830.

Constitutional provisions must be followed in the enactment of legislation, and as these cases exemplify, courts are becoming more liberal in the evidence they will consider in making the determination of constitutional enactment. This attitude is apparent even in an enrolled bill state such as Texas, where the following of the enrolled bill rule is normally more strict and gives more presumptive validity to an enrolled bill than does the journal entry rule.

In Charleston National Bank v. Fox, 194 S.E.4, W.Va. (1937), the West Virginia Supreme Court of Appeals held that a bill that had been printed in the state session laws was a nullity because it had not been presented to the Governor for his action. The constitutional provision in West Virginia was virtually the same as that in the North Dakota Constitution. The court in Fox considered legislative records of the Legislature, the Governor, and the Secretary of State in determining that the bill which had been printed in the Session Laws was never presented to the Governor as was required by West Virginia's Constitution.

Considering the very unique circumstances present in the enactment of Senate Bill No. 2324, I believe North Dakota courts would permit review of uncontradicted facts or stipulations showing the lack of signature on the correct enrollment of the bill by legislative leadership, as well as the lack of presentment to and signature by the Governor. I do not believe the court would permit clerical error and clerical substitution in the background of the legislative process to override constitutional law. It is therefore my opinion that the second corrected enrollment of Senate Bill No. 2324 was not constitutionally adopted and is null and void. The section of North Dakota law sought to be amended by Senate Bill No. 2324, N.D.C.C. ' 54-06-14, remains unchanged.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Nicholas J. Spaeth
Attorney General

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