

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 93-F-19

Date issued: November 3, 1993

Requested by: Doug Mattson, Ward County State's Attorney

- QUESTION PRESENTED -

Whether the remedial sanctions set out in N.D.C.C. ? 27-10-01.4 are conditional in nature such that a court may not impose the remedial sanctions unless the contemnor has the ability to purge himself or herself of the contempt.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the remedial sanctions set out in N.D.C.C. ? 27-10-01.4(1)(b)-(e) are conditional in nature and may not be imposed unless the contemnor has the ability to purge himself or herself of the contempt.

- ANALYSIS -

N.D.C.C. ? 27-10-01.1 defines "punitive sanction" and "remedial sanction" for the purpose of chapter 27-10. That section provides in relevant part:

3. "Punitive sanction" includes a sanction of imprisonment if the sentence is for a definite period of time. A sanction requiring payment of a sum of money is punitive if the sanction is not conditioned upon performance or nonperformance of an act, and if the sanction's purpose is to uphold the authority of the court.
4. "Remedial sanction" includes a sanction that is conditioned upon performance or nonperformance of an act required by court order. A sanction requiring payment of a sum of money is remedial if the sanction is imposed to compensate a party or complainant, other than the court, for loss or injury suffered as a result of the contempt.

N.D.C.C. ? 27-10-01.1(3),(4).

With regard to remedial sanctions, N.D.C.C. ? 27-10-01.4 further provides:

1. A court may impose one or more of the following remedial sanctions:
 - a. Payment of a sum of money sufficient to compensate a party or complainant, other than the court, for a loss or injury suffered as a result of the contempt, including an amount to reimburse the party for costs and expenses incurred as a result of the contempt;
 - b. Imprisonment if the contempt of court is of a type included in subdivision b, c, d, or e of subsection 1 of section 27-10-01.1. The imprisonment may extend for as long as the contemnor continues the contempt or six months, whichever is shorter;
 - c. A forfeiture not to exceed two thousand dollars for each day the contempt continues;
 - d. An order designed to ensure compliance with a previous order of the court; or
 - e. A sanction other than the sanctions specified in subdivisions a through d if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt.

N.D.C.C. ? 27-10-01.4(1).

The above sections plainly provide that remedial sanctions include two types of sanctions -- sanctions that are conditioned upon performance or nonperformance of an act required by court order, or sanctions requiring payment of a sum of money imposed to compensate a party or a complainant for loss or injury suffered as a result of the contempt. N.D.C.C. ? 27-10-01.4(1)(a) specifically authorizes the latter type of sanction, while subdivisions (b) through (e) of N.D.C.C. ? 27-10-01.4(1) authorize sanctions that are conditional in nature. Subdivision (b) authorizes imprisonment for contempt and specifically provides that "[t]he imprisonment may extend for as long as the contemnor continues the contempt or six months, whichever is shorter." Thus, this sanction is conditional, lasting only as long as the contemnor continues the attempt. Similarly, subdivision (c) provides for forfeiture for each day the contempt "continues." Subdivision (d) authorizes the court to issue an order designed to ensure compliance with a previous order of the court, and subdivision (e) authorizes the court to use other sanctions in an effort to terminate the continuing contempt.

N.D.C.C. ? 27-10-01.4(1)(b)-(e) contemplate sanctions with the purpose of inducing the contemnor to comply with a previous court order. Subsection 4 of section 27-10-01.1 specifically provides that remedial sanctions are conditional, except for remedial sanctions imposed for the purpose of compensating a party or complainant for loss or injury suffered as a result of the contempt. Accordingly, the sanctions authorized in subdivisions (b) through (e) of section 27-10-01.4(1) may only be imposed if the contemnor has the ability to comply with the previous court order.

In addition to the plain language of N.D.C.C. ?? 27-10-01.1 and 27-10-01.4, the legislative history of these sections support the conclusion that remedial sanctions are conditional in nature and may only be imposed if the contemnor has the ability to purge the contempt. Sections 27-10-01.1 and 27-10-01.4 were enacted by the 1993 Legislative Assembly by passage of House Bill 1077. 1993 N.D. Sess. Laws ch. 89. The legislative history of House Bill 1077 indicates that the purpose of the Bill was to incorporate the Supreme Court's analysis regarding the distinction between criminal and civil contempt. 1993 Senate Standing Committee Minutes, Bill No. 1077, at 1. Testimony offered on behalf of House Bill 1077 by

Gerhard Raedeke, Staff Attorney, Joint Procedure Committee, North Dakota Supreme Court, explains that "[t]he Bill incorporates the analysis of the courts by focusing on the nature and purpose of the sanction to determine whether the constitutional guarantees applicable to criminal or civil cases attach to the proceeding." Testimony of Gerhard Raedeke regarding House Bill 1077, at 1.

The analysis of the courts that was intended to be incorporated by House Bill 1077 makes a clear distinction between civil and criminal contempt, the purpose of civil contempt being coercive and the purpose of criminal contempt being to punish. As explained by the North Dakota Supreme Court in Baier v. Hampton, 417 N.W.2d 801 (N.D. 1987):

Generally, in distinguishing civil from criminal contempt, we look at the sanction and its nature and purpose, rather than the conduct. If the sanction's purpose is coercive, that is, to induce performance of an act primarily for another's benefit, the contempt is civil. If the contemptuous conduct has been concluded and the purpose of the sanction is to punish the offender and vindicate the authority of the court, the contempt is criminal. Merely because a coercive sanction incidentally benefits another person does not change the contempt from civil to criminal. So too, a punitive sanction that incidentally coerces does not transform criminal contempt into civil contempt.

Id. at 804-05 (citations omitted). The court further explained that usually in civil contempt the sanction is conditional in nature, the contemnor having the ability to purge the contempt. Id. at 805. "Conversely, because the purpose of the sanction for criminal contempt is to punish the offender and vindicate the authority of the court, the sanction for criminal contempt is, ordinarily, unconditional." Id. See also Shillitani v. United States, 384 U.S. 364 (1966); State v. Stokes, 240 N.W.2d 867 (N.D. 1976). The fact that the above doctrine was intended to be incorporated into N.D.C.C. ?? 27-10-01.1 and 27-10-01.4 supports the finding the remedial sanctions are conditional and may not be imposed unless the contemnor has the ability to purge him or herself of the contempt, with the exception of remedial sanctions imposed to compensate a party or a complainant for loss or

injury suffered as a result of the contempt.

Before a remedial sanction under N.D.C.C. ? 27-10-01.4(1)(b)-(e) can be imposed, a court must specifically find that there is actually a present ability to comply with the previous order, which justifies the imposition of remedial sanction. See Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401 (1948); United States v. Rylander, 460 U.S. 752, 103 S.Ct. 1548 (1983); DeVore v. DeVore, 393 N.W.2d 739 (N.D. 1986). A specific finding that the contemnor has the present ability to purge him or herself of the contempt is also required. See In re. Marriage of Hartt, 603 P.2d 970 (Colo. Ct. App. 1979); Palmer v. Palmer, 530 So.2d 508 (Fla. Dist. Ct. App. 1988). See also 17 Am.Jur.2d Contempt ? 213 et seq. (1990).

It is my opinion that, with the exception of subdivision (a), the remedial sanctions outlined in N.D.C.C. ? 27-10-01.4(1) are conditional sanctions and may not be imposed upon a contemnor unless the contemnor has the ability to purge himself or herself of the contempt. Remedial sanctions imposed pursuant to N.D.C.C. ? 27-10-01.4(1)(a) are not conditional sanctions, but may only be imposed to compensate a party or a complainant for his or her actual loss or injuries suffered as a result of the contempt.

- 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 questions presented are decided by the courts.

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