

LETTER OPINION
95-L-170

July 24, 1995

Mr. Warren R. Emmer
Director
Division of Parole and Probation
Department of Corrections and
Rehabilitation
P.O. Box 5521
Bismarck, ND 58502-5521

Dear Mr. Emmer:

Thank you for your letter asking whether the North Dakota Highway Patrol may assist the Division of Parole and Probation in managing court-ordered conditions of home confinement and electronic surveillance for offenders convicted of third, fourth, or subsequent driving under the influence (DUI) violations, if this assistance has been ordered by the court. You also ask whether a court has the authority to credit time an offender serves in home confinement as part of a sentence of imprisonment required pursuant to North Dakota Century Code (N.D.C.C.) § 39-08-01.

Under N.D.C.C. § 12.1-32-07(1), when a court has imposed probation upon a defendant for conviction of a class A misdemeanor, the court may place the defendant under the supervision and management of the Department of Corrections and Rehabilitation or other responsible party selected by the court. A person who has violated the provisions of N.D.C.C. § 39-08-01 is guilty of a class B misdemeanor for the first or second conviction in a five-year period and is guilty of a class A misdemeanor for a later conviction in a five-year period or for a fourth or subsequent conviction in a seven-year period. N.D.C.C. § 39-08-01(2). Therefore, the court may place a person who has been convicted of a class A misdemeanor under N.D.C.C. § 39-08-01 under either the supervision and management of the Department of Corrections and Rehabilitation or other responsible party selected by the court.

However, N.D.C.C. § 12.1-32-07(1) does not provide that the court may place a defendant under the supervision and management of the Department of Corrections and Rehabilitation and another responsible party selected by the court upon conviction for a class A misdemeanor. For a class B

Mr. Warren R. Emmer
July 24, 1995
Page 2

misdemeanor, the court may place the defendant under the supervision and management of a responsible party selected by the court. N.D.C.C. § 12.1-32-07(1). The court may still place a defendant who has been convicted of a class B misdemeanor under the supervision and management of the Department of Corrections and Rehabilitation. Id. The court may impose such conditions of probation as it deems appropriate, and the court may also include as conditions of probation any one or more of the conditions under N.D.C.C. § 12.1-32-07(4).

The first question you asked is whether the Highway Patrol may assume any part of the supervision and management of a defendant who is subject to conditions of probation upon conviction for a violation of N.D.C.C. § 39-08-01.

In American Federation of State, County, and Mun. Employees v. Olson, 338 N.W.2d 97 (N.D. 1983), the North Dakota Supreme Court stated, "[i]t is well-settled that public officials have only such authority as is expressly given them by the constitution and statutes together with those powers and duties which are necessarily implied from the express grant of authority." Id. at 100. Similarly, the court has stated that state administrative agencies are creatures of legislative action and, as such, have only such authority or power as is granted to them or necessarily implied from the grant. First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584 (N.D. 1984).

The North Dakota Highway Patrol is a governmental agency with the authority to exercise the statutory powers specified in N.D.C.C. ch. 39-03, as well as those powers which are necessarily implied from the express grant of authority. The express powers of the Highway Patrol are set out in N.D.C.C. §§ 39-03-03 and 39-03-09. When the court imposes probation on a defendant upon conviction for a class A misdemeanor under N.D.C.C. § 39-08-01, the Highway Patrol does not have the explicit statutory authority under N.D.C.C. §§ 39-03-03 or 39-03-09 to assume any part of the supervision and management of the defendant who is subject to any conditions of probation that the court has imposed.

The question then becomes whether the authority of the Highway Patrol to assume any part of the supervision and management of a defendant subject to conditions of probation imposed upon conviction for a violation of N.D.C.C. § 39-08-01 is necessarily implied from the express powers and duties granted to the Highway Patrol under N.D.C.C. §§ 39-03-03 and 39-03-09.

Mr. Warren R. Emmer
July 24, 1995
Page 3

The duties of the superintendent of the Highway Patrol are to enforce the provisions of the laws of the state of North Dakota relating to the protection and use of the highways in this state and the operation of motor and other vehicles upon such highways. N.D.C.C. § 39-03-02. The duties of the Highway Patrol are to enforce the provisions of the laws of the state of North Dakota relating to the protection and use of highways and to patrol the highways and cooperate with sheriffs and police in enforcing the laws regulating the operation of vehicles and the use of highways. N.D.C.C. § 39-03-02.

A fair reading of N.D.C.C. ch. 39-03 does not support the proposition that assumption of any part of the supervision or management of persons subject to conditions of probation imposed upon conviction for a violation of N.D.C.C. § 39-08-01 is necessarily implied to enable the superintendent of the Highway Patrol and each member of the Highway Patrol to exercise their express powers and duties under N.D.C.C. §§ 39-03-03 and 39-03-09.

Therefore, it is my opinion that the Highway Patrol does not have the express or implied authority under N.D.C.C. ch. 39-03 to assume any part of the responsibility for the supervision and management of a defendant subject to conditions of probation imposed upon conviction for a violation of N.D.C.C. § 39-08-01. Specifically, the Highway Patrol does not have the express or implied authority to provide electronic monitoring services or otherwise manage or supervise home confinement for a defendant who is subject to electronic surveillance and home confinement as conditions of probation imposed upon conviction for a violation of N.D.C.C. § 39-08-01. This opinion is not meant to preclude the Highway Patrol from otherwise assisting the Department of Corrections and Rehabilitation in the exercise of the Department's or the Highway Patrol's official and statutory duties. See, e.g., Letter from Attorney General Allen I. Olson to Colonel James D. Martin (April 20, 1979) (copy enclosed).

You also asked whether a court has the authority to credit time an offender serves in home confinement as part of a sentence of imprisonment required by N.D.C.C. § 39-08-01.

Enclosed is a copy of 1991 N.D. Op. Att'y Gen. 24 which discusses in detail the question of whether a court may impose home confinement as an alternative to incarceration under the mandatory minimum sentencing provisions of N.D.C.C. § 39-08-01(4). While that opinion dealt with N.D.C.C. § 39-08-01(4)(b), the provisions that are the subject of your request, namely §§ 39-08-01(4)(c) and (4)(d) are more

Mr. Warren R. Emmer
July 24, 1995
Page 4

restrictive and do not include provisions for community service and, in the case of N.D.C.C. § 39-08-01(4)(d), in-patient treatment for which the offender will receive credit toward the sentence of imprisonment. N.D.C.C. § 39-08-01(4). Consequently, the 1991 opinion is also applicable to your question. There have not been any statutory changes to the pertinent statutory provisions since the 1991 opinion by former Attorney General Nicholas J. Spaeth; therefore, that opinion remains the opinion of this office.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

krs/pg
Enclosures