

N.D.A.G. Letter to Hanson (Nov. 19, 1990)

November 19, 1990

Honorable Robert E. Hanson
State Treasurer
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Hanson:

Thank you for your August 27, 1990, letter concerning the authority of the State Treasurer to (1) order North Dakota licensed beer and liquor wholesalers to stop selling alcoholic beverages to any retail outlet when that outlet is in violation of law or rules of the state or federal government, and (2) suspend or revoke a North Dakota licensed wholesalers license for selling to such an outlet after being ordered not to do so.

The authority of administrative agencies:

must be exercised in accordance with the statute bestowing such powers and they can act only in the mode described by the statute. . . . They cannot rightfully dispense with any of the essential forms of proceedings which the Legislature has prescribed for the purpose of investing them with power to act. A commission may not assert the general power given it and at the same time disregard the essential conditions imposed upon its exercise.

Northern Pac. Ry. Co. v. McDonald, 42 N.W.2d 321, 335 (N.D. 1950) (quoting 42 Am. Jur. Public Admin. Law, 368 pg. 379). See also, Northern Pac. Ry. Co. v. Warner, 45 N.W.2d 196, 199 (N.D. 1950) ("statute speaks for itself and not through the Commission.") More recently, the court has stated that "[b]asically, administrative agencies are creatures of legislative action. As such, legal logic compels the conclusion that agencies 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, 584-85 (N.D. 1984).

The statutory authority for beer and liquor wholesaler regulation, N.D.C.C. ch. 5-03, relates primarily to the collection of taxes. The State Treasurer issues wholesaler licenses which authorize the sale of beer or liquor at wholesale to only "licensed retailers, licensed wholesalers, regular retail outlets on federal military reservations, and sale for export from a federally bonded warehouse or foreign trade zone, to an export bonded warehouse." N.D.C.C. § 5-03-01.

The State Treasurer may adopt administrative rules governing retailers, wholesalers, and manufacturers to ensure efficient collection of beer and liquor taxes. N.D.C.C. § 5-03-05. The treasurer has exercised this authority by adopting N.D. Admin. Code. ch. 84-02-01.

N.D.C.C. § 5-03-06, concerning the examination of wholesaler records for the purpose of determining the proper assessment and collection of taxes, authorizes the treasurer to suspend or revoke the license of a wholesaler, after a hearing, for violation of any of the provision of N.D.C.C. tit. 5.

The administrative rules adopted by the State Treasurer cover matters relating to the documentation of liquor purchases by wholesalers as well as other reporting requirements. These provisions, with the exceptions noted below, center around the accurate collection of taxes. In particular N.D. Admin. Code § 84-02-01-01 provides for suspension of a wholesaler's license after a hearing as provided in N.D.C.C. § 5-03-06, if the licensee violates any of the provisions of that administrative code chapter.

The conduct of retail outlets is not addressed in N.D.C.C. ch. 5-03. However, the treasurer has adopted administrative rules pursuant to N.D.C.C. § 5-03-05 authorizing the prohibition of sales to certain retailers where a wholesaler has been paid with a nonsufficient funds check or not been paid by a retailer for 30 days. N.D. Admin. Code §§ 84-02-01-10 and 84-02-01-11. These administrative rules are the only current authority the State Treasurer has to ban the sale of alcoholic beverages to those outlets otherwise eligible to purchase under N.D.C.C. § 5-03-01.

Therefore, because an administrative agency only has the authority granted to it by law, and because penalties may be applied only to situations falling within the law, it is my opinion that under current statutes and rules the treasurer may only prohibit sales by wholesalers to retailers under the conditions noted in N.D. Admin. Code §§ 84-02-01-10 and 84-02-01-11, and may only sanction those wholesalers failing to comply therewith. Without specific authority authorizing the control of sales by licensed wholesalers, the general authority contained in the wholesalers license issued under N.D.C.C. § 5-03-01 permits sales by those licensed wholesalers to any of the entities listed in that section. If authority to ban sales to authorized retail outlets for reasons other than those listed in N.D. Admin. Code §§ 84-02-01-10 and 84-02-01-11 is desired, then further rulemaking will be necessary.

Sincerely,

Nicholas J. Spaeth

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