

N.D.A.G. Letter to Henegar (Sep. 26, 1991)

September 26, 1991

Honorable Dale L. Henegar
State Representative
2421 Avenue C East
Bismarck, ND 58501

Dear Representative Henegar:

Thank you for your August 15, 1991, letter requesting my opinion regarding the smoking ban in effect at the State Capitol.

North Dakota Century Code (N.D.C.C.) section 23-12-10 provides, in pertinent part:

Every place of public assembly is an area where smoking is not permitted outside of designated smoking areas. Smoking areas must be designated by the proprietor or other person with general supervisory responsibility over the place of public assembly, except in a place in which smoking is prohibited by the state fire marshal, by other governing law, rule, or ordinance, or by corporate or private policy. A sign must be posted in any designated smoking area which states "Designated Smoking Area" or words to that effect.

(Emphasis added.)

N.D.C.C. § 23-12-09 defines place of public assembly. Included in that definition under subsection l(b) is "any building or other enclosed structure owned or leased by the state, its agencies, or political subdivisions, and all public education buildings."

April 16, 1990, Governor George A. Sinner executed Executive Order 1990-2:

I, George A. Sinner, Governor of the State of North Dakota, by the authority vested in me, do hereby order that, beginning May 1, 1990, a smoking cessation policy will be in effect and, beginning October 1, 1990, smoking will be prohibited, with exceptions specified, in all buildings under my control or under the control of gubernatorial appointees. Attached and made a part of this order are the specifics of that policy.

Executive Order 1990-2. A copy of the full Executive Order is attached. The smoking policy adopted by the Executive Order phased in the smoking prohibition. A part of the prohibition went into effect on May 1, 1990, and the final phase began October 1, 1990. On July 13, 1990, the smoking policy was amended so that phase II provides:

Beginning October 1, 1990, all government agencies and buildings, under the jurisdiction of the Governor and gubernatorial appointees, including private offices, restrooms, lobbies, hallways, meeting rooms, state government sponsored meetings in places of public assembly, State Fleet vehicles and other places of public assembly, will be "no smoking" areas.

Beginning October 1, 1990, smoking will not be permitted within state buildings under the jurisdiction of the Governor and gubernatorial appointees. Smoking by employees will be prohibited in buildings of state institutions which house residents on a twenty-four hour basis and exposure to smoke by employees and residents will be minimized to the extent possible. Ashtrays will be provided outside building entrances for convenience.

Smoking cessation assistance will be offered during Phase II for smokers who wish to quit.

All state agencies are encouraged to help defray costs for employees for employees first smoking cessation attempt after May 1, 1990, to a maximum of \$15 per person.

A designated smoking area exists within the Capitol Building in the Legislative Wing.

Article V, Section 1, of the North Dakota Constitution vests in the Governor executive authority. In April of 1990, when the Executive Order was executed, the care and control of the Capitol and the State Office Building were vested in the Director of Institutions pursuant to N.D.C.C. § 54-21-18. The Director of Institutions was appointed by the Governor under the authority of N.D.C.C. § 54-21-06. N.D.C.C. § 54-21-18 was amended effective July 3, 1991, to place the Capitol building and State Office Building under the charge and control of the director of the Office of Management and Budget. 1991 Sess. Laws ch. 592, § 32. The director of the Office of Management and Budget is appointed by the Governor and is directly responsible to him. N.D.C.C. §§ 54-44-03, 54-44-02.

During the 1991 Legislative Assembly, House Bill No. 1299 was introduced to amend N.D.C.C. § 23-12-10. The proposed amendment would have changed the language of the statute to provide:

If smoking areas are designated, the proprietor, public official, or other person with general supervisory responsibility over the place of public assembly shall designate the smoking areas. No smoking area may be designated in a place in which smoking is prohibited by the state fire marshal, by other governing law, rule, or ordinance or by corporate or private policy.

House Bill 1299 was defeated by the House of Representatives on February 20, 1991, by a vote of 66-36. The defeat of House Bill No. 1299, however, had no effect on the

Executive Order executed by the Governor on April 16, 1990.

N.D.C.C. § 23-12-10 anticipates that smoking will be completely prohibited in some places of public assembly.

It is my opinion that Executive Order 1990-2 is another "governing law" or "rule" which removes the requirement for designation of a smoking area under N.D.C.C. § 23-12-10.

Sincerely,

Nicholas J. Spaeth

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