

LETTER OPINION
2000-L-138

August 24, 2000

Ms. Julie Kubisiak
Director
Student Loans of North Dakota
Bank of North Dakota
PO Box 5509
Bismarck, ND 58506-5509

Dear Ms. Kubisiak:

Thank you for your letter requesting my opinion on whether the Bank of North Dakota, acting as an extension of the Industrial Commission (Bank), is required to follow the Administrative Agencies Practice Act (AAPA), N.D.C.C. ch. 28-32, in adopting and amending rules governing the creation and operation of a college savings plan.

I am aware that the Bank is interested in amending the college savings plan rules which it has previously adopted pursuant to the AAPA. See N.D.A.C. ch. 12.5-01-01. If the Bank was not required to follow the AAPA in adopting the current rules, you further ask about the legal status of the Bank's current rules and any amendments to the rules which the Board may adopt in the future.

The 1999 Legislative Assembly gave the Bank the responsibility of creating and administering an Internal Revenue Code section 529 college savings plan. N.D.C.C. § 6-09-38. The enabling legislation, in its entirety, states as follows:

The Bank of North Dakota shall adopt rules to administer, manage, promote, and market a North Dakota higher education savings plan. The Bank shall ensure that the North Dakota higher education savings plan is maintained in compliance with internal revenue service standards for qualified state tuition programs.

Id. Since the Industrial Commission is charged with the Bank's operation, the Bank of North Dakota would be acting as an extension of the Industrial Commission in fulfilling the responsibility mandated by N.D.C.C. § 6-09-38. See N.D.C.C. §§ 6-09-02, 54-17-01, and 54-17-07.

Thus, the Bank is to fulfill the above responsibility by adopting rules under N.D.C.C. § 6-09-38. However, this does not mean the Bank is required to follow the AAPA in adopting those rules. N.D.C.C. § 28-32-01(2)(1) plainly and unambiguously states the "industrial commission with respect to the activities of the Bank of North Dakota"

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is not an "administrative agency" under the AAPA.¹ Since N.D.C.C. ch. 28-32 only applies to administrative agencies within the meaning of the AAPA, the Bank's adoption of rules under N.D.C.C. § 6-09-38 is not required to be done pursuant to the AAPA. See Jensen v. Little, 459 N.W.2d 237, 239 (N.D. 1990) (stating that an entity exempt from the definition of an "administrative agency" is not subject to the AAPA). Accordingly, it is my opinion that the Bank is not required to follow the AAPA in adopting or amending rules to create and operate a college savings plan pursuant to N.D.C.C. § 6-09-38.²

Rules adopted pursuant to the AAPA have the force and effect of law. N.D.C.C. § 28-32-03(3). Since the Bank is not required to adopt the college savings plan rules pursuant to the AAPA, you also question whether college savings plan rules adopted by the Bank other than pursuant to the AAPA would likewise have the force and effect of law.

"The authority of an administrative agency to adopt administrative rules is authority delegated by the legislative assembly." N.D.C.C. § 28-32-02(1). Although this provision is found in the AAPA, it nonetheless accurately reflects the underlying idea of the delegation of authority to non-AAPA agencies that have been legislatively charged with adopting rules to guide their operations. In the Bank's situation, the Legislature not only authorized the Bank to "adopt rules to administer, manage, promote, and market a North Dakota higher education savings plan," but actually required the Bank to do so. N.D.C.C. § 6-09-38 (the "Bank . . . shall adopt rules. . ."). Further, the Legislature has stated the "industrial commission shall . . . make and enforce orders, rules, regulations and bylaws for the transaction of [the Bank's] business." N.D.C.C. § 6-09-02 (emphasis added). Thus, similar to other non-AAPA agencies, the Industrial Commission has not only the authority to make rules, but also the authority to enforce those rules. See Jensen v. Little, 459 N.W.2d 237 (N.D. 1990) (upholding the enforceability of rules adopted by a non-AAPA agency, the Director of Institutions, other than pursuant to the AAPA); Letter from Attorney General Nicholas Spaeth to Serenus Hoffner (Aug. 30, 1985) (opining the rules adopted by a non-AAPA agency, the Superintendent of Public Instruction, other than pursuant to the AAPA are nonetheless enforceable).

¹ Where the language of a statute is plain and unambiguous, courts will not delve further into other sources. Little v. Tracy, 497 N.W.2d 700 (N.D. 1993).

² My opinion that the Industrial Commission is not an "administrative agency" under the AAPA does not, of course, affect its statutory status as an agency of the state of North Dakota pursuant to N.D.C.C. ch. 54-17.

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The authority to make rules is a quasi-legislative power the Legislature specifically delegates to state agencies. Little v. Traynor, 565 N.W.2d 766, 771 (N.D. 1997). In contrast, an agency's authority to enforce the law, as well as the agency's rules, flows from the fact it is a part of the executive branch of government. An agency's power to enforce the rules it was delegated the authority to adopt indicates those rules enjoy the legal status of having the force and effect of a law. Cf. Yamaha Corp. v. State Bd. Of Equalization, 960 P.2d 1031, 1036 (Cal. 1998) ("Because agencies granted such substantive rulemaking power are truly 'making law,' their quasi-legislative rules have the dignity of statutes."); Doyle v. Ohio Bureau of Motor Vehicles, 554 N.E.2d 97, 99 (Ohio 1990) ("'[P]urpose of administrative rule making is to facilitate the administrative agency's placing into effect the policy declared by the [legislature] in the statutes to be administered by the agency'; 'rules issued by administrative agencies pursuant to statutory authority have the force and effect of law.'"); Boot Heel Nursing Center, Inc. v. Missouri Dep't of Soc. Serv., 826 S.W.2d 14, 16 (Mo.App. 1992) ("Like statutes, rules or regulations of a state administrative agency which have been duly promulgated pursuant to properly delegated authority have the force and effect of law."); Freeman v. Florida Dept. of Corrections, 1999 WL 1457480 (N.D.Fla.) ("[W]hen the legislature delegates to governmental agencies in the executive branch the authority to enact administrative rules and regulations, those agencies have quasi-legislative power and any rules and regulations enacted pursuant to that power are 'laws'").

As long as an agency has the statutory authority to promulgate a rule, this rationale applies regardless of whether a rule is adopted pursuant to the AAPA. Therefore, it is my opinion the rules adopted by the Bank to create and administer a college savings plan have the force and effect of law, even if the rules were not adopted pursuant to the AAPA.

In originally enacting the college savings plan rules, the Bank followed the AAPA procedures and submitted the rules to this office for approval. See N.D.C.C. § 28-32-02(7). In approving the rules, I noted there was a question whether it was necessary to comply with the AAPA before the rules would have the force and effect of law. Letter from Attorney General Heidi Heitkamp to John Hoeven (Aug. 19, 1999).

For reasons identified in this opinion, the college savings plan rules adopted by the Bank have the force and effect of law regardless of whether it followed the AAPA. As such, the AAPA procedures are voluntary as applied to the Bank and the adoption of rules regarding the college savings plan. Although the Bank chose to follow those procedures in promulgating the original rules, I do not believe the Bank's choice to follow the AAPA is irrevocable. Rather, in making

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any future amendments to the rules, it is my opinion the Bank can choose whether to follow the procedures in the AAPA or to adopt the amendments in another fashion.

Sincerely,

Heidi Heitkamp
Attorney General

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