



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

April 13, 2007

Representative Jerry Krummel
900 Court Street NE H281
Salem OR 97301

Re: Foster Parents and Concealed Weapons

Dear Representative Krummel:

You have asked this office whether the Department of Human Services (DHS) may adopt a proposed administrative rule, OAR 413-200-0335, as finally issued March 20, 2007. We conclude that it may not.

The proposed rule would provide certification standards for foster parents, relative caregivers and preadoptive parents regarding the home environment. The standards relate to many aspects of health and safety, but the particular provisions at issue prescribe conditions for the storage and carrying of firearms and ammunition and for the carrying of concealed weapons. You ask whether these DHS proposed rules—or any others relating to firearms—would be valid in light of ORS 166.170. That statute generally vests authority to regulate matters relating to firearms solely in the Legislative Assembly, except as expressly authorized by state statute.

Clearly, the proposed rule falls within the broad grant of rulemaking authority found in ORS 418.640. That statute requires the department to “adopt such rules, not inconsistent with ORS 418.625 to 418.645, as it deems necessary or advisable to protect the best interests of children in foster homes[.]” Because the best interests of children include their physical safety and because the storage and handling of firearms reasonably relates to issues of child safety, the courts would conclude that the proposed rules are within the scope of the rulemaking power delegated to the department in ORS 418.640.

We turn to consider, then, whether ORS 166.170 limits the rulemaking power of DHS. It states, in relevant part:

(1) Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Assembly.¹

By its terms, the statute limits all authority to regulate firearms, unless otherwise expressly authorized by state statute. No statute expressly authorizes DHS to regulate firearms. The

¹ Subsection (2) of ORS 166.170 is not relevant to this discussion because it preempts only the power of local governments to regulate firearms.

proposed rule clearly addresses how firearms and ammunition are to be possessed, stored and transported. Therefore, the only issue is whether the proposed rule would regulate firearms.

There is no law defining "regulate" for purposes of ORS 166.170 or more generally for state statutes.² Nor does "regulate" have a specific meaning settled in the common law of court decisions. Instead, it is a word of common usage. As such, to "regulate" means "to govern or direct according to rule[;] . . . to bring under the control of law or constituted authority[.]" *Webster's Third New Int'l Dictionary*, 1913 (unabridged 2002).

The proposed rule would "regulate" because it would govern and direct according to rule and bring under the control of the constituted authority of DHS certain conduct of operators of foster homes. It is immaterial that it would prescribe standards for certification of foster homes, rather than directly regulating firearms, because it would still govern and direct firearm use according to rule. Therefore, the proposed rules would conflict with ORS 166.170.

One issue remains and that is to reconcile the broad grant of rulemaking authority in ORS 418.640 with the limitation of authority in ORS 166.170. Where one law directly conflicts with another, the law later enacted governs. In this instance, ORS 166.170 was enacted in 1995 as section 1, chapter 1, Oregon Laws 1995 (special session). The rulemaking provisions of ORS 418.640 were enacted prior to 1995. See, e.g., ORS 418.640 (1993 Edition).³ Therefore, the provisions of ORS 166.170 limit the power of the department to enact any rules regulating firearms, unless otherwise expressly authorized by state statute. To the extent that our previous opinions are inconsistent with these conclusions, they are reversed and void.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Sincerely,



Ann Boss

Legislative Counsel

² For purposes of the Administrative Procedures Act, ORS chapter 183, ORS 183.310 (9) broadly defines "rule," in part, as "any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency." In the context of the Act, then, "regulation" appears to have a narrower meaning than "rule." But because the Act does not apply to ORS 166.170, it is of no value in construing "regulate."

³ Although ORS 418.640 was amended in 2005, those amendments did not reenact or otherwise reaffirm the rulemaking mandate of the statute. See section 291, chapter 22, Oregon Laws 2005.