

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-26

Date Issued: October 6, 1998

Requested by: Robert R. Peterson, State Auditor

- QUESTIONS PRESENTED -

I.

Whether the phrase "head of any executive or administrative department" in N.D.C.C. § 44-04-09 relates only to an agency administrator or also to department or division heads within a large state agency or university.

II.

What constitutes "control or direction" by a department head pursuant to N.D.C.C. § 44-04-09?

III.

Whether a department head may appoint an immediate family member to a position within the department that is not under the control or direction of the department head without violating N.D.C.C. § 44-04-09.

IV.

Whether hiring activities at the University of North Dakota by anyone other than a member of the state board of higher education could constitute "nepotism" in violation of N.D.C.C. § 44-04-09.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that the phrase "head of any executive or administrative department" means that person or group of persons who has ultimate and plenary control over the hiring, dismissal, and salaries of the employees of any given department or agency, and can only apply to the highest agency administrator or department head and not to subordinate department or division heads.

II.

It is my opinion that one is under the "control or direction" of a department head when the department head has the complete authority or ability to supervise and influence the actions of the subordinate.

III.

It is my opinion that a department head may appoint an immediate family member to a position within the department that is not under the control or direction of the department head without violating N.D.C.C. § 44-04-09.

IV.

It is my opinion that hiring decisions at the University of North Dakota cannot constitute "nepotism" in violation of N.D.C.C. § 44-04-09 unless they are made by one of the members of the state board of higher education.

- ANALYSES -

I.

N.D.C.C. § 44-04-09 provides that "[n]o head of any executive or administrative department, either elective or appointive, of this state, may appoint his wife or her husband, as the case may be, son, daughter, brother, or sister, to any position under the control or direction of said head of such department." This office has consistently given N.D.C.C. § 44-04-09 a narrow interpretation. See 1993 N.D. Op. Att'y Gen. L-132 (letter to DeMers, April 13).

In 1959, this office issued a rather extensive opinion on N.D.C.C. § 44-04-09. 1958-1960 N.D. Op. Att'y Gen. 222. That opinion thoroughly discussed the legislative history of N.D.C.C. § 44-04-09, including the various drafts presented to the Legislature. N.D.C.C. § 44-04-09 has not been amended since its adoption in 1933.

The question raised in the 1959 opinion was whether the superintendents of the individual institutions under the control of the Board of Administration came under the provisions of N.D.C.C. § 44-04-09. Then Attorney General Leslie Burgum determined that the superintendents of the institutions governed by the Board of Administration did not come within the provisions of N.D.C.C. § 44-04-09. One of the conclusions reached in the 1959 opinion was

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that "[t]he term 'head of any executive or administrative department' must refer to the person who has the authority and power to appoint a person to an office or position and to determine his salary." 1958-1960 N.D. Op. Att'y Gen. 222, 223. The opinion went on to state that this phrase "refers to the head of such department who has the full authority to appoint and discharge officers or employees and does not merely refer to a person who is held responsible for the technical and ministerial performance and operation of a 'department.'" Id. at 224. Heads of subordinate departments are not subject to N.D.C.C. § 44-04-09. 1954-1956 N.D. Op. Att'y Gen. 90.

Thus, since 1959, the phrase has applied to those persons in an executive or administrative department who have the ultimate authority to appoint and discharge employees and determine salaries. If an individual is not the highest authority in that department with influence on hiring, firing, and salaries, the phrase, and, therefore, the statute, has been determined to not apply to that person.¹ Based on this long-standing interpretation by this office, it is my opinion that the phrase "head of any executive or administrative department" means that person or group of persons who has ultimate and plenary control over the hiring, dismissal, and salaries of the employees of any given department or agency, and can only apply to the highest agency administrator or department head and not to subordinate department or division heads.

Where I might be inclined to reverse the prior opinions of this office, I am reluctant to do so in this case because of the long-standing reliance on past opinions by agencies. I encourage the next Legislative Assembly to review N.D.C.C. § 44-04-09 to consider whether, as a matter of policy, this statute currently provides the level of protection against nepotism the Legislature desires for the state.

II.

By its terms, N.D.C.C. § 44-04-09 only applies if a department head appoints a related person "to any position under the control or direction of said head of such department." Neither "control" nor "direction" is defined in N.D.C.C. chapter 44-04. Words that are not defined by statute are to be given their plain and ordinary meanings. N.D.C.C. § 1-02-02. Having "control" means having the authority or

¹ However, an agency may adopt reasonable instructions to its employees. 1995 N.D. Op. Att'y Gen. L-285 (Letter to Nalewaja, Dec. 5). These instructions may include a policy against nepotism in the agency's hiring practices. N.D.C.C. § 34-11.1-04.1.

ability to regulate, direct, or dominate another. The American Heritage Dictionary 319 (2nd coll. ed. 1991). Being under the "direction" of another means being subject to that person's management, supervision or guidance. Id. at 400. Accordingly, it is my opinion that one is under the "control or direction" of a department head when the department head has the complete authority or ability to supervise and influence the actions of the subordinate.

III.

N.D.C.C. § 44-04-09 only applies if a department head appoints a related person "to any position under the control or direction of said head of such department." Assuming that the department head in question is the head of that department as defined in section I of this opinion, the department head must also have control or direction of the person appointed for N.D.C.C. § 44-04-09 to apply. Accordingly, it is my opinion that a department head may appoint an immediate family member to a position within the department that is not under the control or direction of the department head without violating N.D.C.C. § 44-04-09.

Generally, however, one who has plenary authority over the hiring, dismissal, and salary of an employee also has the ability to control or direct that employee.

IV.

As concluded above in sections I and II, N.D.C.C. § 44-04-09 does not apply unless the person making the questionable hiring decision has plenary authority over the hiring, dismissal, and salary of the employee, as well as the authority to supervise and influence the employee's actions. To determine whether a hiring decision at the University of North Dakota would be subject to N.D.C.C. § 44-04-09 under these criteria, we must determine who has that authority.

N.D.C.C. § 15-10-01 states, in relevant part, that the "state board of higher education shall have the control and administration of" the University of North Dakota. N.D.C.C. § 15-10-17 lists the specific powers of the state board of higher education. Included in those powers is the power to control and direct almost every imaginable function at the university, including the power to "appoint and remove the president or other faculty head, and the professors, instructors, teachers, officers, and other employees of the several institutions under its control, and to fix their salaries" N.D.C.C. § 15-10-17(1).

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In contrast, the president of the university only has the authority to control or direct activities "subject to the power of the state board of higher education" N.D.C.C. § 15-11-03. Similarly, the university's president, instructors, teachers, and assistants may adopt rules and regulations for the government of the school "subject to such rules and regulations as the state board of higher education may establish" N.D.C.C. § 15-10-13.

These statutes clearly show that the state board of higher education is the only body with plenary control over the hiring, dismissal, and salary of the employees of the University of North Dakota.² As such, N.D.C.C. § 44-04-09 only applies to the state board of higher education and its members. Accord Letter from Attorney General Nicholas J. Spaeth to Deborah Johnson (Nov. 15, 1989) (member of board to which N.D.C.C. § 44-04-09 applies can violate that statute by making an individual, rather than board, hiring decision). Therefore, it is my opinion that hiring decisions at the University of North Dakota cannot constitute "nepotism" in violation of N.D.C.C. § 44-04-09 unless they are made by one of the members of the state board of higher education.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: Scott A. Miller
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² The question presented only concerns the operation of N.D.C.C. § 44-04-09. Therefore, I do not address the existence or scope of any possible rule concerning nepotism adopted by the state board of higher education or the president or faculty of the University of North Dakota.

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