

## **N.D.A.G. Letter to Schneider (Sep. 29, 1988)**

September 29, 1988

Mr. Mark Schneider  
Executive Committee Protection  
and Advocacy Project  
815 Third Avenue South  
Fargo, ND 58103

Dear Mr. Schneider:

Thank you for your letter dated April 28, 1988. I apologize for the delay in responding to your letter.

In your letter, you inquire whether the director of the Protection and Advocacy Project is properly a classified position under North Dakota law. You indicate that you believe the position should not be in the classified service because it falls within the exemption for "administrative heads of departments required by law." In your letter, you neither indicate the reason you believe the director's position constitutes an administrative head of a department required by law nor set forth any facts concerning the Protection and Advocacy Project. This opinion, therefore, is based upon the facts concerning the Protection and Advocacy Project and the director's position as I was able to determine them. If any of these facts are incorrect, it may, of course, change the determination whether the director of the Protection and Advocacy Project is a classified employee under North Dakota law.

The Developmentally Disabled Assistance and Bill of Rights Act, passed by Congress in 1975, required as a prerequisite to the receipt of certain federal funds that states have in place a system to protect and advocate the rights of persons with developmental disabilities. Pub. L. No. 94-103, 89 Stat. 486, 504 (codified as amended at 42 U.S.C.A. § 6041 (West 1982)). To comply with this requirement, the state of North Dakota established the Protection and Advocacy Project, which was maintained within the North Dakota Department of Human Services.

On March 6, 1984, Judge Van Sickle entered an order in Association for Retarded Citizens v. Olson, which, among other things, required the state to develop a plan for the advocacy program that would place the program "under the direction of the Protection and Advocacy Project (Governor's Council on Human Resources, Executive Committee), or some other organization independent of the department of human services." Association for Retarded Citizens v. Olson, Civil No. A1-80-141 (D.N.D. March 6, 1984) (implementation order). By Order dated July 11, 1984, Judge Van Sickle adopted and required the state to implement the monitor's proposal concerning the advocacy program, which placed the protection and advocacy system under the Governor's Council on Human Resources Executive Committee. Association for Retarded Citizens v. Olson

(ARC), Civil No. A1-80-141 (D.N.D. July 11, 1984) (memorandum and order adopting monitor's proposal for a state advocacy system). The court also noted that placement of the state's advocacy program under an entity independent of other state agencies that provide treatment services or habilitation to persons with developmental disabilities was required by 42 U.S.C.A. § 6012 (West 1976), but made no determination whether the previous advocacy system failed to conform with this requirement. Therefore, the court orders in ARC required the state to place the Protection and Advocacy Project under the supervision of the Governor's Council on Human Resources Executive Committee in order to assure its independence from the Department of Human Services.

The Governor's Council on Human Resources is a statutorily created entity that consists of a committee on aging, a committee on children and youth, a committee on employment of the handicapped, and other committees as may be appointed. N.D.C.C. § 50-26-01. The statute provides that the Governor's Council on Human Resources is "to be maintained within the department of human services." Id. The Executive Committee of the Governor's Council on Human Resources also is established by statute and consists of the chairman and vice chairman of the committees that constitute the council. N.D.C.C. § 50-26-04.

In response to the court's July 11, 1984, Order directing the state of North Dakota to fund and place the protection and advocacy program under the supervision of the Executive Committee of the Governor's Council on Human Resources and directing that the independence of the protection and advocacy program from the Department of Human Resources be guaranteed, Governor Allen I. Olson issued Executive Order No. 1984-9. Executive Order No. 1984-9 ordered, in part:

1. The Executive Committee of the Governor's Council on Human Resources is hereby designated as the state agency responsible for the administrative supervision and direction of the statewide protection and advocacy program as ordered by the Federal District Court in ARC, et al. v. Olson, et al. on July 11, 1984.
2. In exercising its responsibilities in supervising and directing the statewide protection and advocacy program, the Executive Committee of the Governor's Council on Human Resources shall be known as the "Executive Committee for Protectio [sic] and Advocacy."
3. The "Executive Committee for Protection and Advocacy," which is hereby created as a single state agency, separate from and independent of the North Dakota Department of Human Services, shall supervise and direct the state protection and advocacy project, which is hereby transferred under the exclusive jurisdiction and control of the Executive Committee for Protection and Advocacy.
4. The Executive Committee for Protection and Advocacy is hereby

empowered and directed to take such actions as may be necessary to implement the Court-ordered protection and advocacy plan, including authority to budget, make budget requests, hire and maintain qualified personnel as authorized by the Emergency Commission and Legislative Assembly, and to provide for adequate travel, supplies and training.

5. The staff hired by the Executive Committee for Protection and Advocacy, including those of the protection and advocacy project, shall be subject to the unified system of personnel administration and the merit system pursuant to Chapter 54-44.3 of the North Dakota Century Code.
6. Expenses incurred by the Executive Committee for Protection and Advocacy in the operation of the protection and advocacy project and program shall, within the limits of authority granted by the Emergency Commission or the Legislative Assembly, be paid upon voucher signed by the chairperson of the Executive Committee or other designated member of the Committee. Upon approval of such vouchers by the Office of Management and Budget, warrant checks shall be prepared by the Office of Management and Budget for those expenditures made in accordance with state law and applicable OMB Fiscal and Administrative Policies.

Executive Order No. 1986-4, issued by Governor George A. Sinner, reaffirmed and ratified Executive Order No. 1984-9.

Based upon the foregoing, it is my understanding that the director of the Protection and Advocacy Project is an employee of the Executive Committee of the Governor's Council on Human Resources, which is also known as the Executive Committee for Protection and Advocacy, and that the Executive Committee for Protection and Advocacy functions separately from and independently of the North Dakota Department of Human Services. It is also my understanding that the director's position is the top administrative position in the Protection and Advocacy Project. With this background in mind, I turn to the question of whether or not the director of the Protection and Advocacy Project is exempt from the classified service.

N.D.C.C. § 54-44.3-20 sets forth those positions in the state service which are not included in the classified service. N.D.C.C. § 54-44.3-20 provides as follows:

54-44.3-20. Categories of positions in the state service. All positions in the state service are included in the classified service except:

1. Each official elected by popular vote and each person appointed to fill vacancies in an elective office, one principal assistant, and one private secretary.

2. Members of boards and commissions required by law.
3. Administrative heads of departments required by law.
4. Officers and employees of the legislative branch of government.
5. Members of the judicial branch of government of the state of North Dakota and their employees and jurors.
6. Persons temporarily employed in a professional or scientific capacity as consultants or to conduct a temporary and special inquiry, investigation, or examination for the legislative branch of government or a department of the state government.
7. Officers and members of the teaching staff of universities and other institutions of higher education.
8. Positions deemed to be inappropriate to the classified service due to the special nature of the position as determined by the division and approved by the board.
9. The classified employees at the institutions of higher education under the control of the state board of higher education, until July 1, 1976.
10. Members and employees of occupational and professional boards.
11. Officers and employees of the North Dakota mill and elevator association.

N.D.C.C. § 54-44.3-20 provides that all positions in the state service are in the classified service except those specifically enumerated in subsections one through eleven.

The question presented is whether the position of director of the protection and advocacy project is exempt from the classified service as an administrative head of a department required by law. For the reasons discussed below, it is my opinion that the director of the Protection and Advocacy Project is not an administrative head of a department required by law.

First, it is not clear to me that the Executive Committee of the Governor's Council on Human Resources constitutes a "department" within the meaning of N.D.C.C. § 54-44.3-20.

The references to "agencies," "departments," "elective offices," "institutions of higher education," and "boards and commissions" within N.D.C.C. ch. 54-44.3 suggest that, in the context of that chapter, the Legislature may recognize a distinction between various types of state instrumentalities. The Legislature did not include within N.D.C.C. ch. 54-44.3 a definition of "department" or a standard for determining whether a state instrumentality constitutes a "department."

Because neither N.D.C.C. ch. 54-44.3 nor its legislative history contains any definition of "department" or any standard by which to determine whether a state instrumentality is a "department," it is unclear whether the Executive Committee for Protection and Advocacy is a "department" within the meaning of N.D.C.C. § 54-44.3-20(3).

Even if the Executive Committee for Protection and Advocacy could be construed as a "department" within the meaning of N.D.C.C. ch. 54-44.3, however, it is my opinion that it is not a department "required by law." Generally, the expression "required by law" used in a state statute refers only to the statutory law of the state, unless the context requires a different construction. See Litchfield Elem. School Dist. No. 79 v. Babbitt, 125 Ariz. 215, 608 P.2d 792, 797-98 (Ariz. Ct. App. 1980); Lewis v. Florida State Bd. of Health, 143 So. 2d 867, 869 (Fla. Dist. Ct. App. 1962), cert. denied, 149 So. 2d 41 (Fla. 1963); Howard v. Cook, 59 Idaho 391, 83 P.2d 208, 210 (1938); McLavy v. Martin, 167 So. 2d 215, 221 (La. Ct. App. 1964); Delta County v. City of Gladstone, 305 Mich. 50, 8 N.W.2d 908, 909 (1943); State v. Missouri Pub. Serv. Comm'n, 352 Mo. 29, 175 S.W.2d 857, 861 (1943); State v. State Bd. of Land Comm'rs, 131 Mont. 65, 307 P.2d 234, 236 (1957); In re Sorensen's Estate, 195 Misc. 742, 91 N.Y.S.2d 220, 224 (1949); City of Mountlake Terrace v. Stone, 6 Wash. App. 161, 492 P.2d 226, 230 (1971). But see Valley State Bank of Canton v. Farmers State Bank, 87 S.D. 614, 213 N.W.2d 459, 463 (1973); Beardon v. Boone, 693 S.W.2d 25, 27 (Tex. Civ. App. 1985). The context of N.D.C.C. § 54-44.3-20 does not require another construction; therefore, it is my opinion that "required by law" means required by state statute.

Neither the Executive Committee for Protection and Advocacy nor the Protection and Advocacy Project is established by the statutory law of North Dakota and, therefore, cannot be construed as being "required by law." Furthermore, neither the Governor's Executive Order, the court's order in ARC, nor the federal Developmentally Disabled Assistance and Bill of Rights Act renders the Protection and Advocacy Project an agency "required by law" as contemplated by N.D.C.C. § 54-44.3-20.

For the reasons discussed above, it is my opinion that the position of director of the Protection and Advocacy Project is not exempt from the classified service as an administrative head of a department required by law.

I hope that I have adequately set forth my opinion on this matter. Thank you for contacting the Office of Attorney General.

Sincerely,

Nicholas J. Spaeth

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