

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-26

Date issued: October 23, 1990

Requested by: Sarah M. Vogel  
Commissioner of Agriculture

- QUESTIONS PRESENTED -

I.

Whether the Commissioner of Agriculture has supervisory authority over the dairy commissioner.

II.

Whether the Commissioner of Agriculture may remove the dairy commissioner and, if so, whether cause is required.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the Commissioner of Agriculture has supervisory authority over the dairy commissioner.

II.

It is my opinion that the Commissioner of Agriculture may remove the dairy commissioner for cause.

- ANALYSES -

I.

The position of dairy commissioner is created by statute (N.D.C.C. ' 4-29-02) and the powers and duties granted to the dairy commissioner are delineated in N.D.C.C. ch. 4-29 and ch. 4-30. The North Dakota Supreme Court touched upon the scope of the dairy commissioner's authority in Cofman v. Ousterhous, 168 N.W. 826 (N.D. 1918). In dicta, the court stated that ". . . the Dairy Commissioner . . . as we view the statute, is an independent officer and not subordinate in such cases to the Secretary of Agriculture . . . ." 168 N.W. 826, 829 (1918). However, that finding was limited to those cases where the production and marketing of highly perishable foodstuffs, such as dairy products, was thought to require close and careful regulation. In those situations a mechanism was needed which would ensure prompt and certain determinations.

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By statute, the dairy commissioner has broad authority and discretion. N. D. C. C. chs. 4-29 and 4-30 indicate that it is the dairy commissioner, not the Commissioner of Agriculture who enforces the laws, promulgates and enforces rules and regulations, makes licensing determinations, assesses financial conditions of licensees and prospective licensees, serves as trustee in cases of default, conducts hearings, subpoenas witnesses, orders seizure of products and assesses civil penalties.

Although some statutes grant independent decision-making authority to the dairy commissioner, other statutes indicate that the dairy commissioner is not independent. When the position was created in 1913, the Dairy Department was referred to as a "bureau" within the Department of Agriculture. N. D. Compiled Laws 1913, ' 2835. Later, it became a "division" within the Department of Agriculture. N. D. Sess. Laws 1963, ch. 85 ' 1. As such, the Dairy Division/Department comes under the umbrella of the Commissioner of Agriculture. The Agriculture Commissioner appoints a dairy commissioner and his assistants. N. D. C. C. ' 4-29-02. Subject only to legislative appropriations, the Agriculture Commissioner sets their salaries. N. D. C. C. ' 4-29-07. The dairy commissioner must report to the Commissioner of Agriculture when so directed. N. D. C. C. ' 4-29-05. Additionally, the Commissioner of Agriculture's annual report must contain details of the "work and proceedings, together with an account of expenses and disbursements of the dairy commissioner and the assistant dairy commissioners, in relation to production, manufacture, and sale of dairy products, and such suggestions as

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the commissioner of agriculture may regard of public importance." Id.

The Commissioner of Agriculture is elected by and is accountable to the people of North Dakota. To be responsive to that public, the Commissioner of Agriculture must be able to supervise the actions and efforts of all the divisions and division heads within the Department of Agriculture, regardless of job title.

The totality of the statutory scheme creating and empowering the dairy commissioner provides the Agriculture Commissioner with the accountability for the dairy commissioner's actions. Therefore, it is my opinion that the Commissioner of Agriculture has supervisory authority over the dairy commissioner.

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II.

The Commissioner of Agriculture appoints the dairy commissioner. N. D. C. C. ' 4-29-02. It is a long-standing principle that with the power to appoint comes the power to revoke.

"[T]he rule is, and on principle must be, that the power of arbitrary removal is vested in the person or board vested with the appointing power, as incidental to the power of appointment, unless the law places a limitation on such power." North Dakota ex rel. Moore v. Archibald, 66 N. W. 234, 241 (N. D. 1896). "[I]n the absence of any statutory or constitutional provision to the contrary, [a person not holding office for a fixed term is] subject to removal without cause and without notice, by order of the appointing power." North Dakota ex rel. Johnson v. Myers, 19 N. W. 2d 745, 751 (N. D. 1945).

No provisions within N. D. C. C. ch. 4-29 or ch. 4-30 contravene these holdings.

However, the position of dairy commissioner was classified pursuant to N. D. C. C. ' 54-44.3-12(1). See Memorandum from Ken Purdy, Acting Director, Central Personnel Division (July 3, 1990) ("It appears that the dairy commissioner classification existed from the first day of the classification system in 1974. The class specification was written (or re-written) in February, 1978, when the grade was changed from 25 to 29."). Dismissal of a classified employee must be for cause, N. D. Admin. Code ' 59.5-03-03-05. Thus, this classification is a limit upon the power of the Commissioner of

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Agriculture to remove the dairy commissioner. It is therefore my opinion that the dairy commissioner may be removed for cause.

- 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.

Nicholas J. Spaeth

Attorney General

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