

N.D.A.G. Letter to Johnson (Nov. 15, 1989)

November 15, 1989

Ms. Deborah Johnson, Manager
North Dakota Dairy Promotion Commission
4023 North State Street
Bismarck, ND 58501

Dear Ms. Johnson:

Thank you for your letter to me dated August 9, 1989, in which you ask three related questions concerning the hiring of Commission employees:

1. Whether the hiring by the chairman of the Commission of his daughter violates N.D.C.C. § 44-04-09.
2. If the answer to No. 1 is "yes," whether the resignation by the chairman from the Commission would remedy the situation.
3. Whether the daughter of a member of the Commission may be hired by the Commission as a dairy princess in connection with the Commission's dairy princess program.

For the reasons set out below, it is my opinion that the chairman of the Commission violated N.D.C.C. § 44-04-09 by hiring his daughter. It is my further opinion that the Commission as a whole may hire the daughter of a Commission member as a dairy princess.

The North Dakota Dairy Promotion Commission is a nine-member commission created by N.D.C.C. § 4-27-04. Seven members of the Commission are voting members and two are non-voting members.

N.D.C.C. § 4-27-05 sets out the powers and duties of the Commission. A majority of the Commission members constitutes a quorum for transacting business and carrying out the Commission's duties. N.D.C.C. § 4-27-05(1). The Commission is directed to elect a chairman, vice chairman, secretary-treasurer, and other officers and must adopt rules for the exercise of its powers and the performance of its duties. N.D.C.C. § 4-27-05(2). The Commission must hire a manager and may hire additional employees. N.D.C.C. § 4-27-05(4).

You have indicated the Commission has reserved to itself the authority to hire and fire all employees. The unilateral hiring by the chairman of the Commission of his daughter violates the Commission's own hiring rule.

The hiring also violates N.D.C.C. § 44-04-09. N.D.C.C. § 44-04-09 prohibits nepotism.

This statute provides:

44-04-09. Nepotism.--No head of any executive or administrative department, either elective or appointive, of this state, shall 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 statute prohibits the chairman of the Dairy Promotion Commission from hiring his daughter.

N.D.C.C. § 44-04-10 provides the penalty for violating section 44-04-09 is to deduct the salary paid out "from the salary of the head of the department." However, no other method of correcting the situation is set forth by statute.

Actions which could be taken to correct the violation include:

1. Resignation of the chairman of the Commission as a member of the Commission;
2. Ratification by the Commission as a whole of the chairman's daughter as an employee;
3. Resignation of the daughter as an employee of the Commission; or
4. Dismissing the employee.

If the Commission chooses to remedy this situation by ratification of the hiring of the chairman's daughter and also wishes to avoid the application of this penalty, the Commission's confirmation or ratification could be made effective as of the date the chairman's daughter began working for the Commission. Otherwise, the penalty provided in N.D.C.C. § 44-04-10 would be applicable.

Finally, it would not be a violation of N.D.C.C. § 44-04-09 for the Commission to hire the daughter of one of its members as a dairy princess if the hiring decision is made by a majority of the Commission members at a meeting of the Commission when there is a quorum present. In that instance the decision would be that of the Commission as a whole, not that of the parent Commission member and N.D.C.C. § 44-04-09 would not be applicable.

I hope that this response adequately addresses your questions. If you need any further assistance in this matter please contact me.

Sincerely,

Nicholas J. Spaeth

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