

N.D.A.G. Letter to Vogel (Feb. 20, 1991)

February 20, 1991

Honorable Sarah M. Vogel
Commissioner of Agriculture
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0020

Dear Commissioner Vogel:

Thank you for your January 29, 1991, letter concerning whether a memorandum of agreement between your department and the Agricultural Products Utilization Commission violates N.D.C.C. § 54-44.1-09.

N.D.C.C. § 54-44.1-09 states:

54-44.1-09. All expenditures must be appropriated. All expenditures of the state and of its budget units of moneys drawn from the state treasury must be made under authority of biennial appropriations acts, which must be based upon a budget as provided by law, and no money may be drawn from the treasury, except by appropriation made by law as required by section 12 of article X of the Constitution of North Dakota.

N.D.C.C. § 54-44.1-10 provides that:

54-44.1-10. Payments made pursuant to law only. No payment may be made and no obligation may be incurred against any appropriation unless such payment or obligation has been authorized as provided by law. Every official authorizing payments in violation of this chapter is subject to the penalties and provisions of chapter 12.1-23.

A "budget unit" means a department, institution, board, commission, agency, or other unit of government for which separate or distinct appropriations are made. N.D.C.C. § 54-44.1-01. Under N.D.C.C. ch. 54-44.1 all of the state's budget units are required to submit budget estimates to the office of the budget. After those budgets are reviewed, submitted to the Legislative Assembly, and an appropriations act is enacted for those budget units, the office of the budget has the duty to exercise continual control over the execution of the budget affecting the departments, institutions, and agencies of the executive branch of state government involving approval of all commitments for conformity with the program provided in the budget. This duty of the office of the budget is contained in N.D.C.C. §§ 54-44.1-03(5) and 54-44.1-12. The latter section defines the term "execution" as it relates to execution of the budget, as the analysis and approval of all commitments for conformity with the program provided in the budget, frequent

comparison of actual revenues and budget estimates, and control of the rate of expenditures through a system of allotments.

The term "expenditures" contained in N.D.C.C. § 54-44.1-09 is not defined therein. Understood in its ordinary sense, it means spending or payment of money or the act of expending, disbursing, or laying out money. Black's Law Dictionary (5th ed. 1979). See N.D.C.C. § 1-02-02 (words understood in ordinary sense).

A review of the memorandum of agreement attached to your above-noted letter indicates that the consideration given by the Department was the provision of office space in the Department's office area. In turn, the Agricultural Products Utilization Commission provided certain support services. This consideration does not appear, from the face of the document, to involve the exchange of money.

However, paragraph 4 of the agreement indicates the Department of Agriculture will provide access to photocopiers, computers, telephones, and other devices at a fair and reasonable charge. The charges will doubtless be paid by the Agricultural Products Utilization Commission. There is some indication from this language that money would be expended. If the memorandum of agreement in question resulted in "expenditures" being made for which there was no appropriation, then N.D.C.C. § 54-44.1-09 was violated. Conversely, if no unappropriated "expenditures" were made as a result of the agreement, then no violation occurred. The occurrence of such expenditures is a question of fact determinable by your department and the office of the budget, and is not an appropriate subject for this opinion.

I note also that because the subject memorandum of agreement involves the provision of office space in the Capitol, the permission of the Director of Institutions under N.D.C.C. § 54-21-19 is necessary. The agreement does not indicate the involvement of that office.

Finally, I note that the Lieutenant Governor, the chairman of the Legislative Audit and Fiscal Review Committee (N.D.C.C. § 54-35-02.1), has sought the introduction of Senate Bill 2099 into the current legislative session. If passed, that bill would appear to relate directly to the subject of your inquiry and would require Emergency Commission authorization for the exchange of goods or services between state agencies, boards, and institutions.

Sincerely,

Nicholas J. Spaeth

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