

N.D.A.G. Letter to Walsh (July 1, 1991)

July 1, 1991

Mr. Bud Walsh
Director of Accounting
Operations
Office of Management and Budget
State Capitol
600 E Boulevard Avenue
Bismarck, ND 58505-0400

Dear Mr. Walsh:

Thank you for your June 10, 1991, letter requesting my opinion concerning the interpretation of section 2 of chapter 1 of the 1989 Session Laws.

Section 2 of chapter 1 of the 1989 Session Laws provides:

APPROPRIATION - AUTHORIZATION - GOVERNOR'S OFFICE. The governor's office is hereby authorized to receive and expend any federal or private funds which are hereby appropriated that become available during the biennium beginning July 1, 1989, and ending June 30, 1991.

1989 N.D. Sess. Laws ch. 1, § 2.

A question has arisen concerning whether this section constitutes an appropriation authorizing the Protection & Advocacy Project to receive and expend federal funds not included in section 1 of chapter 1 of the 1989 Session Laws.

According to information provided by your office to my staff, the Protection & Advocacy Project has expended the total amount of federal funds appropriated to it for the 1989-1991 biennium; however, appropriated general fund monies remain. It was also disclosed that the Protection & Advocacy Project may be eligible to receive additional federal funds for this biennium.

The situation that you describe in your letter is controlled by provisions of North Dakota Century Code ch. 54-16. Section 54-16-03 Provides in Part:

No state officer . . . may expend, or agree or contract to expend in connection therewith any amount in excess of the sum appropriated therefor, or use an amount appropriated for any specific purpose or fund or for any other purpose without first having secured from the emergency commission an order duly made and entered authorizing such use of the fund.

Section 54-16-04.1 provides in part that

[t]he emergency commission . . . may authorize the state treasurer to receive, between legislative sessions, any moneys for new programs or continuation of existing programs not appropriated by the legislative assembly that are made available by the federal government, or any agency thereof, which the legislative assembly has not indicated an intent to reject. . . . No department, institution, or agency may expend funds received from the federal government which have not been specifically appropriated by the legislative assembly except as provided in this chapter.

(Emphasis supplied.)

Thus, under N.D.C.C. § 54-16-04.1, an agency may only use funds appropriated for a different purpose or to expend federal funds which have not been specifically appropriated by the Legislative Assembly, if the agency obtains permission from the Emergency Commission. Section 2 of chapter 1 of 1989 Session Laws does not except the Protection & Advocacy Project from the terms of section 54-16-04.1.

It has been suggested that section 2 of chapter 1 of the 1989 Session Laws grants the Protection & Advocacy Project the authority to receive and expend additional federal or private funds beyond those included in the original legislative appropriation. I reject that view. Section 2 lacks a sufficiently clear expression of legislative intent to grant the Protection & Advocacy Project authority to receive and expend funds that were not specifically appropriated by the Legislative Assembly. See N.D.C.C. § 54-16-04.1. Section 2 of chapter 1 of the 1989 Session Laws does not authorize the Protection & Advocacy Project to receive and expend additional federal or private funds not included in the original appropriation.

Chapter 1 of the 1989 Session Laws originated as HB 1001. As introduced, HB 1001 did not specifically provide a line item in the Governor's budget for the Protection & Advocacy Project. This line item resulted from an amendment to HB 1001 in the Senate. In testimony before the House Appropriations Committee, Charles F. Fleming, the Governor's Chief of Staff, testified that the amendments would put "operations of . . . [the] Protection & Advocacy Project . . . entirely into the Governor's Office." See Hearing on H. 1001 Before the House Appropriation Committee -- Subcommittee on Governmental Operations, 51st N.D. Leg. (January 16, 1989, Statement of Charles F. Fleming).

The Protection & Advocacy Project's executive director opposed this action. Her amendments would have removed the Protection & Advocacy Project from the Governor's Office. See, Braun Amendments dated March 22, 1989. Her amendments would have removed dollars recommended in the executive budget for Protection & Advocacy and placed them in separate line items within HB 1001. Hearing on H. 1001 Before the House Appropriation Committee -- Subcommittee on Government Operations, 51st N.D. Leg.

During the April 15, 1989, conference committee, the amendments which were eventually adopted by both Houses were described as follows: "Basically the change here is [that] the P & A program [is] removed and placed in [a] separate line item. It is still under the Governor's Office." Minutes of Conference Committee on House Bill No. 1001 - Elected Officials, (April 15, 1989).

Although both HB 1001 as enacted and the legislative history of the bill indicate that the Protection & Advocacy Project's appropriation was included as a separate line item within the Governor's Office appropriation, the Project operates independently from the Governor's Office. See, N.D.C.C. § 25-01.3-02. The Protection & Advocacy Project is under the administrative supervision and direction of a 7-member committee on protection and advocacy. Id. The committee "in its capacity of supervising and directing the project shall operate independently of the governor or any state agency that provides treatment, services, or habilitations to persons with developmental disabilities or mental illness." Id.

The Committee on Protection & Advocacy operates independently in supervising and directing the Project.

However, the Project is responsible for ensuring that its expenditures fall within the appropriations limit. N.D. Const. art. X, § 12. Section 1, subdivision 1, of chapter 1 of the 1989 Session Laws sets out the specific line item for the Protection & Advocacy Project. However, there is no explicit reference to the Protection & Advocacy Project in section 2 of chapter 1 of the 1989 Session Laws.

The only significant link between the Project and Governor's Office is that the Project's appropriation line item is listed under that of the Governor's Office. However, that link is not significant enough to construe section 2 of chapter 1 of the 1989 Session Laws do include the Protection & Advocacy Project, especially in view of the independence of the Project.

In summary, it is my opinion that the Protection & Advocacy Project does not have authority to receive and expend additional federal funds that may become available to it between July 1, 1989, and June 30, 1991, unless it secures the approval of the Emergency Commission.

I trust this answers your question.

Sincerely,

Nicholas J. Spaeth

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