

LETTER OPINION
93-L-132

April 13, 1993

Senator Judy L. DeMers
18th District
Senate Chambers
State Capitol
Bismarck, ND 58505

Dear Senator DeMers:

North Dakota Century Code (N.D.C.C.) ? 44-04-09 has consistently been given a narrow interpretation by this office. In 1956, Attorney General Leslie Burgum issued an opinion stating that this section concerning nepotism did not apply to heads of subordinate departments of the public welfare board. 1954-1956 N.D. Op. Att'y Gen. 90.

A 1959 opinion issued by this office went into greater detail in construing the scope of the statute and looking at the legislative history. It was stated in that opinion: "The intent and purpose of the law was to prevent the alleged practice and custom of elected or appointed officers from appointing relatives to subordinate positions under their control. . . . The term 'head of any executive or administrative department' must refer to the person who has the authority and power to appoint a person to an office or position and to determine his salary." 1958-1960 N.D. Op. Att'y Gen. 222. The opinion further stated, "When considering the purpose for the enactment of section 44-04-09, we are certain the reference to 'the head of any-executive or administrative' refers to the head of such department who has the full authority to appoint and discharge officers or employees and does not merely refer to a person who is held responsible for the technical administrative performance and operation of a 'department.'" I have attached a copy of these two opinions for your review.

In my opinion, N.D.C.C. ? 44-04-09 does not apply to a situation such as you describe when a department head marries a permanent employee under the agency head's supervision. Although I do not believe that N.D.C.C. 44-04-09 would affect the parties or their positions, I would recommend checking the agency's internal policies in light of N.D.C.C. 34-11.1-04.1. This section, a copy of which is enclosed, prohibits an agency from discriminating against an employee because the spouse of the employee is also an employee of the state agency. However, the prohibition does not apply to employment of the spouse of someone who has the power to hire or fire or make evaluations of performance with respect to the position involved. Consequently, an agency may have policies which would affect the working relationships of employees who marry.

I hope this information is helpful.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

bab/krb
Enclosure