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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

North Dakota Department of Human Services, Appellee, vs. Thomas P. Ryan Appellant.	**Supreme Court No. 20030156** **District Court No. 02-C-02638**

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STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BURT L. RISKEDAHL

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

STATEMENT OF ISSUES

I. Whether the designated administrative law judge, acting through and on behalf of the Central Personnel Division, had jurisdiction to entertain Thomas P. Ryan's employee/applicant appeal.

II. Whether a party that invokes the jurisdiction of an administrative agency may cross-appeal the decision of that agency without complying with the requirements of N.D.C.C. § 28-32-46.

III. Whether a reasoning mind could have found that Thomas P. Ryan did not possess the minimally necessary skills, knowledge and experience needed for the positions for which he applied.

STATEMENT OF THE CASE

The Department of Human Services appealed a final decision of an administrative law judge acting on behalf of the Central Personnel Division. Although the final order upheld the actions of the Department, the Department sought to have the jurisdictional decision of the hearing officer judicially reviewed. Accordingly, the Department appealed the decision under N.D.C.C. ch. 28-32. The Department, in the alternative, also applied for a writ of certiorari should it have been determined that the Department, as a prevailing party, was unable to maintain an administrative appeal under N.D.C.C. ch. 28-32. The employee/applicant, Thomas P. Ryan, also attempted to perfect a cross-appeal.

The district court, the Honorable Burt L. Riskedahl presiding, reviewed the administrative decision under N.D.C.C. ch. 28-32, and concluded that the the hearing officer did not have jurisdiction to entertain the appeal. The district court therefore remanded the matter back to the agency with instructions to dismiss. This appeal by Ryan followed.

STATEMENT OF FACTS

On December 1, 2000, appellant Thomas P. Ryan ("Ryan") was terminated from an Addiction Counselor II position at the Northwest Human Service Center, part of the Department of Human Services, pursuant to a bona fide reduction-in-force. Ryan was subsequently notified of a vacant temporary position for a Community Home Counselor. Ryan accepted this position.

In approximately July 2001, Ryan applied for a permanent Mental Illness Case Manager position. The Department ultimately determined that Ryan did not meet the qualifications for the position. As a current employee (temporary nonclassified) of the Department, Ryan filed an internal grievance with the Executive Director for the Department asserting he should have been offered the job. The Executive Director's designee upheld the decision, agreeing that Ryan did not meet the qualifications necessary for the position. In addition, Ryan applied for a permanent Human Relations

Counselor position. The Department also determined that Ryan did not meet the minimum qualifications for this position as well. Ryan submitted appeals to the Central Personnel Division for both positions.

The assigned administrative law judge, on behalf of the Central Personnel Division, initially indicated she did not believe there was jurisdiction to hear Ryan's appeal given the clear limitations contained in the administrative rules under which she was to operate. (Supplemental Appendix ("Supp. App.") at 7.) At a subsequent prehearing conference, the designated administrative law judge orally declared the jurisdictional limitations contained in N.D. Admin. Code § 4-07-20.1-07 "void." (Supp. App. at 6.) A written order to that effect was subsequently issued.

On November 22, 2001, the Department applied to the district court for writ of prohibition seeking to annul the November 1st order and enjoin further proceedings in excess of N.D. Admin. Code chs. 4-07-20.1 & 4-07-20.2. On January 28, 2002, the district court denied the Department's application indicating that an appeal through N.D.C.C. ch. 28-32 would provide an adequate remedy. See Department of Human Services v. Central Personnel Division et al, Civil No. 08-01-C-2762. (Record ("R.") at 192-94.) An administrative hearing was thereafter held on April 23, 2002.

On August 7, 2002, the designated administrative law judge issued her decision denying Ryan's appeal. The administrative law judge found that Ryan did not possess the minimum qualifications for either position. However, given that the assigned administrative law judge, on behalf of the Central Personnel Division, acted in excess of her jurisdiction, the Department appealed the August 7, 2002 decision and alternatively sought a writ of certiorari annulling the proceedings.

LAW AND ARGUMENT

I. SCOPE OF REVIEW.

The review on appeal from an administrative agency decision is a limited one requiring affirmance unless one of the specific items listed in N.D.C.C. § 28-32-46 is

present. Myre v. N.D. Workers Compensation Bureau, 2002 N.D. 186 ¶ 8, 653 N.W.2d 705. Although the Supreme Court reviews the decision of the administrative agency and not that of the district court, the district court's analysis is entitled to respect if its reasoning is sound. See Sherman v. N.D. Workers Comp. Bureau, 1998 ND 97 ¶ 7, 578 N.W.2d 517; Paul v. N.D. Workers Comp. Bureau, 2002 ND 96, ¶ 6, 644 N.W.2d 884.

Review of an administrative agency decision under N.D.C.C. § 28-32-46 essentially involves a three-step process: "(1) Are the agency's findings of fact supported by a preponderance of the evidence? (2) Are the conclusions of law sustained by the agency's findings of fact? (3) Is the agency's decision supported by the conclusions of law?" Obrigewitch v. N.D. Dept. of Transp., 202 N.D. 177 ¶ 7, 653 N.W.2d 73. The standards the court is to use when making such a determination have been summarized as follows:

1. We do not make independent findings of fact or substitute our judgment for that of the agency, but determine only whether a reasoning mind could have reasonably determined that the factual conclusions drawn were supported by the weight of the evidence.

2. We exercise restraint when we review administrative agency findings.

3. It is not the function of the judiciary to act as a super board when reviewing administrative agency determinations.

4. We will not substitute our judgment for that of the qualified experts in the administrative agencies.

Berdahl v. North Dakota State Personnel Bd., 447 N.W.2d 300, 303 (1989); Skjefte v. Job Service of North Dakota, 392 N.W.2d 815, 817 (N.D. 1986).

A court's review of an appeal of an administrative agency decision is limited to a review of the record compiled before the agency. See N.D.C.C. § 28-32-45. A court's review does not include probing into the mental process by which an administrative decision maker reaches its decision. Schultz v. North Dakota Dep't of Human Services, 372 N.W.2d 888, 892 (N.D. 1985).

II. The Designated Hearing Officer Did Not Have Jurisdiction To Entertain Ryan's Grievance.

Under N.D. Admin. Code ch. 4-07-20.1, certain limited "employer actions" may be appealed for an evidentiary hearing. Appealable employer actions are limited to those actions that affect a then current regular classified employee through demotion, dismissal, suspension without pay, forced relocation, reduction-in-force, and reprisal. See N.D. Admin. Code § 4-07-20.1-02(1). Reduction-in-force appeals are further limited to a review of whether the four comparative criteria outlined in N.D. Admin. Code § 4-07-11-03 were followed. In addition, in order to appeal an employer action, an internal grievance must first be processed. The ability to internally grieve an action is reserved to individuals who are employees of the agency at the time of the action.

In her decision, the assigned administrative law judge asserted authority to review and "second guess" the determination made by the Department that Ryan did not possess the necessary qualifications for the job. In doing so, the administrative law judge acted in excess of the jurisdiction conferred by N.D. Admin. Code § 4-07-20.1. The assigned administrative law judge essentially declared "void" the limitations contained in N.D. Admin. Code §§ 4-07-20.1-02(1), 4-07-20.1-03, 4-07-20.1-06 and 4-07-20.1-07.

Administrative rules, once promulgated and approved as to their legality by the Attorney General, have the force and effect of law. N.D.C.C. § 28-32-06. Properly promulgated administrative rules "are as binding as if they were statutes enacted by the legislature. . . and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard in a particular case a validly adopted rule so long as such rule remains in force." Havener v. Glaser, 251 N.W.2d 753, 761 (N.D. 1977). See also First State Bank of Buffalo v. Conrad, 350 N.W.2d 580, 585 (N.D. 1984) ("To make the system of administrative agencies function the agencies must assume the law to be valid until judicial determination to the contrary has been made."). Furthermore, the

Office of Administrative Hearings and a designated administrative law judge possess no greater authority than the agency itself. See N.D.C.C. ch. 54-57.

This Court "has long recognized that the creation of the three branches of government by our constitution operates as an apportionment of the different classes of power whereby there is an implied exclusion of each branch from the exercise of the functions of the others." State ex rel. Spaeth v. Meiers, 403 N.W.2d 393, 394 (N.D. 1987). This principle has been made explicit in Article XI. § 26 of the North Dakota Constitution. State v. Hanson, 558 N.W.2d 611, 614 (N.D. 1996).

Flowing from separation of powers principles are the limitations on the legislature's ability to delegate legislative authority to administrative agencies. Trinity Medical Center v. North Dakota Bd. of Nursing, 399 N.W.2d 835 (N.D. 1987). Under the modern approach adopted by this Court, agencies may be delegated authority to promulgate rules in somewhat broader terms, so long as there are sufficient standards and safeguards in place. Id.

This Court has noted, the Administrative Agencies Practice Act sets out "comprehensive procedural safeguards" on an agency's promulgation of administrative rules. These safeguards are largely negated if an agency can simply disregard or declare an administrative rule void without going through the rule making process outlined in N.D.C.C. ch. 28-32.

In addition, although agencies certainly can be delegated quasi-adjudicative powers, the power to declare that a properly promulgated rule was not within legislatively delegated authority is judicial in nature. Like passing on the constitutionality of legislation, administrative agencies must presume that properly promulgated administrative rules are valid until declared otherwise by a court. State Bank of Buffalo v. Conrad, 350 N.W.2d at 585.

In this case, the proffered rationale for the administrative law judge's decision to ignore the jurisdictional limitations contained in the administrative rules is that N.D.C.C.

§ 54-44.3-12.2 provides for appeals "related to" a reduction-in-force. The administrative law judge therefore concludes that the administrative rules limit the broadly worded statute. However, re-employment provisions do not automatically spring from dismissals resulting from a reduction-in-force. N.D. Admin. Code § 4-07-11-07 exists solely based on the policy choice of the Central Personnel Division.[1] The Central Personnel Division has not included reemployment decisions as one of the listed appealable employer actions. Furthermore, N.D.C.C. § 54-44.3-12.2 provides quite clearly that the Central Personnel Division is to certify appeals only from nonprobationary classified employees and applicant appeals related to discrimination. Ryan was not a nonprobationary classified employee and made no claims of discrimination.

The designated administrative law judge, on behalf of the Central Personnel Division, did not have authority to declare void properly promulgated administrative rules, which limit her jurisdiction. The decision that a RIF'd former employee does not meet the qualifications for a vacant position is not an appealable employer action. Reduction-in-force appeals are specifically limited to the criteria utilized to make the initial dismissal decisions. Furthermore, Ryan was not a nonprobationary classified employee when the decision was made that he did not meet the qualifications for the job. The administrative law judge did not have authority to ignore the clear administrative and statutory limitations that only those that were nonprobationary classified employees at the time of the employer action may maintain an appeal through the Central Personnel Division.

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[1] N.D.C.C. ch. 54-44.3 makes absolutely no mention or even suggestion of the reemployment of individuals subjected to a reduction-in-force. N.D.C.C. § 54-44.3-12.2 does, however, expressly limit appeals to those that are nonprobationary classified employees. Clearly, administrative agencies lack the power to create and bestow substantive rights outside of the substantive provisions of legislation. See People ex rel. Kilquist v. Brown, 561 N.E.2d 234 (Ill. App. 1990) (merit commission lacked authority to enact rule restricting employee transfers). Thus, N.D. Admin. Code § 4-07-11-07 must be interpreted as a mere directory provision as the vast majority of Central Personnel Rules are and not as creating any substantive rights in any individual. Any contrary interpretation would render the rule void. See also N.D. Admin. Code § 4-07-06-02 (discretionary whether reemployed former employees must serve probationary period).

In his brief to this Court, Ryan makes the rather ridiculous assertion that the Department is somehow forclosed from pointing out the plain language of the statute the administrative law judge relied upon in her jurisdictional decision. The applicable administrative rules clearly limit appeals to nonprobationary employees affected by an employer action. In her decision, the administrative law judge declared void and ignored these jurisdictional limitations. The rationale for this action on the part of the administrative law judge was the state-wide appeals language contained in N.D.C.C. § 54-44.3-12.2. But as the Department has repeatedly pointed out, the statutory language itself limits appeals to nonprobationary employees in the classified service. The suggestion by Ryan that the Department somehow did not preserve the issue of the ALJ's faulty reasoning in her jurisdictional decision is absurd.

Ryan was a nonprobationary employee when he lost his employment pursuant to a reduction-in-force. Ryan was later offered and employed in a temporary nonclassified position. There has never been a dispute over these basic facts—Ryan was a regular employee when RIF'd but not when he was deemed unqualified for the two positions. Any suggestion by Ryan, deliberate or otherwise, that the administrative law judge found differently is incorrect. (See Appendix ("App.") at 68.) Jurisdiction was only an issue because Ryan was not a regular employee at the time he was deemed unqualified for the two positions. See N.D. Admin. Code ch. 4-07-24.

The assigned administrative law judge, on behalf of the Central Personnel Division, acted in excess of her authority and, accordingly, the administrative order is not in accordance with the law. N.D.C.C.§ 28-32-46. Therefore, the district court correctly remanded the matter back to the agency with instructions to dismiss.

III. Ryan's Cross-Appeal.

A. Ryan did not properly perfect his cross-appeal to the district court and therefore this Court lacks jurisdiction to entertain the cross-appeal.

On September 6, 2002, Ryan filed and served his Notice of Cross-Appeal and Specifications of Error. According to the Affidavit of Service by Facsimile, however, the agency from which the appeal was being taken was not served with a copy of the Notice. (Supp. App. at 1.) Neither the Central Personnel Division of the Office of Management and Budget nor the Administrative Law Judge acting on its behalf were apparently served.

The failure to serve the very agency from which the appeal was being taken was raised by the Department below. Ryan responded with legal arguments why such failure should not bar his cross-appeal, but no evidence of any service other than as indicated on the Affidavit of Service by Facsimile was produced. Thus, it appears clear that neither the agency nor the hearing officer on its behalf were properly served with the Notice of Cross-Appeal in this case.

N.D.C.C. § 54-44.3-12.2 provides that an appeal shall be made in the manner provided in N.D.C.C. ch. 28-32, except that the Central Personnel Division (and OAH) should not be named as a party unless the proceeding involves one of its employees. The reason for this is simply that the Division (and of course OAH) generally does not choose to participate in an appeal where the relative merits and demerits of the decision are adequately addressed by the other parties. The very agency that made the decision, however, must still be served with the notice of appeal.

N.D.C.C. § 28-32-42(4) provides:

> An appeal shall be taken by serving a notice of appeal and specifications of error specifying the grounds on which the appeal is taken, upon the administrative agency concerned, upon the attorney general or an assistant attorney general, and upon all the parties to the proceeding before the administrative agency, and by filing the notice of appeal and specifications of error together with proof of service of the notice of

appeal, and the undertaking required by this section, with the clerk of the district court to which the appeal is taken. (Emphasis added).

Thus, it would appear the issue in this case is essentially whether a cross-appeal can be made at any time and without meeting the requirements of N.D.C.C. § 28-32-42(4) simply because an initial appellant has met the statutory requirements for perfecting an appeal on wholly unrelated issues.

In North Dakota, "[a]ppeals are purely statutory and limited to those specified in the statute." In re Bjerke's Estate, 137 N.W.2d 226, 227 (N.D. 1965). "This Court has held that, since the right to appeal is statutory, the appellant must conform to the provisions of the statute." Id.

"In order for subject matter jurisdiction to attach, the particular issue to be determined must be properly brought before the court in the particular proceeding." Reliable, Inc. v. Stutsman County Com'n, 409 N.W.2d 632, 634 (N.D. 1987) (citing King v. Menz, 75 N.W.2d 516, 521 (N.D. 1956)). "For a court to have subject matter jurisdiction over an appeal, the appellant must meet the statutory requirements for perfecting the appeal." MacDonald v. North Dakota Com'n on Medical Competency, 492 N.W.2d 94, 96 (N.D. 1992).

Because Ryan failed to meet the statutory requirements of N.D.C.C. § 28-32-42, the district court lacked jurisdiction to entertain his cross-appeal and therefore no appeal on these issues may be made to this Court. See Peterson v. North Dakota Workers Compensation Bureau, 534 N.W.2d 809 (N.D. 1995).

B. Assuming there was jurisdiction for the designated administrative law judge on behalf of the Central Personnel Division to entertain the appeal, the determination that Ryan did not meet the minimum qualifications for the position is fully supported by the findings of fact and conclusions of law.

In her decision, the administrative law judge concluded that a preponderance of the evidence at the evidentiary hearing showed that Ryan did not meet the minimum qualifications for the positions in question. (App. at 74.) The appointing authority within

the Department testified to the qualifications she deemed minimally necessary to successful performance of both positions. Ryan failed to demonstrate that he possessed these attributes through the job interview he was afforded and wholly failed to meet his burden of proving at the evidentiary hearing that he in fact had these necessary attributes. (R. at 115-22.)

N.D. Admin. Code § 4-07-11-07 directs agencies to offer reemployment to employees terminated through a reduction-in-force for a one-year period after the termination if a position is being filled externally and the former employee has the qualifications necessary to successfully perform the job. N.D. Admin. Code § 4-07-11-07 requires agencies to in good faith assess whether a RIF'd employee has the skills, knowledge, and experience necessary to successfully perform in a vacant position that is going to be filled.

The appointing authority at the Department determined that Ryan did not possess the necessary attributes for these two positions. There was no evidence or even suggestion that the appointing authority for the Department did not in good faith fulfill the directives contained in N.D. Admin. Code § 4-07-11-07. (Supp. App. at 5.) Rather, Ryan's position has been that he met the initial screening criteria published in the job advertisement and therefore is entitled to the position(s) regardless of his inability to successfully perform the specific jobs in question. Distilled down, Ryan's arguments rest on an assertion that the Department should be estopped from denying him employment, all as a result of a necessarily incomplete list of required qualifications contained in a job announcement. Ryan's arguments are without merit.

The Department of Human Services fills most positions based upon the relative merit of those available for appointment. The hiring system is competitive in nature and designed to employ the most worthy applicant. City of Bismarck v. Santineau, 509 N.W.2d 56, 59 (N.D. 1993). This merit-based system of filling positions is required of the

Department as a recipient of federal funds under certain federal programs. See 5 C.F.R. § 900.601 et seq.

Although most of the cumbersome guidelines previously proscribed by federal regulation have been eliminated, the Department continues to utilize a hiring process wherein a "registry" and "certificate of eligibles" are generated. At the Department, the initial screening is based upon nothing more than a paper review of those items submitted with the application. (Supp. App. at 3.) The Department does not use a scored oral interview, written examination, or performance test at this first step. Only those items that can be quickly and easily verified by someone unfamiliar with the particular job are considered. (Id.)

Quite simply, without considerable time, effort, disruption, and expense, the individual conducting the initial screening could not possibly have the knowledge or expertise necessary to make judgments on whether an applicant possessed every qualification necessary for proper and successful job performance. Thus, certain attributes, both minimum requirements and those that are merely preferred, are not considered at all in this first step of the process. Further review, either through testing, a scored oral interview, or other appropriate job screening is necessary to both ascertain whether an applicant meets the minimum requirements and appropriately rank or grade an applicant so truly merit-based hiring decisions can be made. (Supp. App. at 2.). In this case, Ryan went through a rigorous interview process which revealed quite clearly that he could not perform the jobs in question.

In both hiring decisions, the individual conducting the initial screening determined that Ryan met the initial screening qualifications outlined in the job announcement. The qualifications outlined in the job announcement, however, did little more than restate the

base minimums for both proposed class specifications.[2] Class minimums often have little to do with the particular skills, knowledge or experience necessary to do a particular job. Classifications cut across agencies often performing widely different functions. This is particularly the case given efforts to reduce the overall number of classifications and drafting class minimums in a manner that gives each agency the maximum amount of flexibility in determining what attributes are actually needed. Ryan conceded that he was not entitled to reinstatement simply because he may have met class minimums proposed for the positions. (See e.g. R. at 19.) N.D. Admin. Code § 4-07-11-07 requires that an agency offer reemployment to an individual that meets the minimum qualifications for the particular position at issue.

Notwithstanding this fact, Ryan continues to assert that the Department must be bound by its job announcement. Ryan asserts that the Department cannot point to skills, knowledge, or experience minimally necessary to do these particular jobs that are not contained in the job announcement.[3] Ryan's assertion is essentially in the nature of an improper estoppel argument. See Knight v. North Dakota Industrial School, 540 N.W.2d 116 (N.D.1995) (estoppel against the Government is not applied freely). See also Lippert v. Grand Forks Public School Dist., 512 N.W.2d 436 (N.D. 1994).

The appointing authority within the Department explained what qualifications were necessary to successfully perform these particular positions. Among other items, the positions worked with special population groups and needed computer skills necessary to

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[2] However, as noted on both job announcements, the actual class designation for these jobs was still pending at Central Personnel. At the time the jobs were announced the classifications were simply those that the Department had recommended to the Central Personnel Division.

[3] In the announcement for the MI Case Manager II position, 2 years experience working with special population groups was indicated. Of course with what specific population group prior work experience would qualify would have to be further determined by the appointing authority. Likewise, the exact type of qualifying professional therapeutic counseling experience would have to be further determined by the appointing authority for the Human Relations Counselor position. (See App. at 69-70.)

undertake data collection and analysis. Yet, notwithstanding that these skills were necessary to properly serve the public's interest, Ryan asserts he must be employed in a job he cannot properly perform because of a job advertisement that did not itemize in detail every skill, knowledge, or experience necessary to successful performance of the job. Ryan's assertion is without merit. It would be nothing short of ridiculous to suggest that government must be ineffective, all to the detriment of the public being served, because a job announcement was not as detailed as it perhaps could have been.

N.D.C.C. § 54-44.3-01 provides, in part, that the "purpose of this chapter is to . . . establish a unified system of personnel administration for the classified service of the state based upon merit principles and scientific methods . . . [and that] appointments and promotions . . . must be made . . . on the basis of merit and fitness." The clear purpose is to secure for the benefit of the public a well qualified workforce. Ryan's position would clearly frustrate this statutorily expressed policy.

Ryan asserts that allowing an appointing authority to point to qualifications not contained on the job announcement allows appointing authorities to hire whoever they want by simply calling preferred qualifications minimal qualifications "after-the-fact." Perhaps, but Ryan did not even make any such suggestion that had occurred in this case at the evidentiary hearing and there certainly is no evidence in the record calling into question the appointing authority's veracity.

The appointing authority within the Department explained the qualifications she deemed minimally necessary to successful performance of both positions. The administrative law judge deemed this testimony credible and found them to be minimum (not merely preferred) qualifications necessary for the vacant positions. Ryan simply failed to demonstrate that he possessed these attributes through his interview and wholly failed to meet his burden of proving at the evidentiary hearing that he in fact had these necessary attributes.

To the extent the hearing officer had jurisdiction to entertain Ryan's appeal, her decision is fully supported by the findings of fact and conclusions of law and therefore should be affirmed.

C. Ryan's request for attorneys fees under N.D.C.C. § 28-32-50 is frivolous.

The agency order Ryan challenges is an order of the Central Personnel Division, not the Department of Human Services. The Department did not issue an order within the meaning of N.D.C.C. ch 28-32. The Department made a simple routine personnel decision. Furthermore, it was Ryan that purported to invoke the jurisdiction of the Central Personnel Division but failed to prove that he possessed the minimum qualifications necessary for positions at issue.

The Department determined that Ryan does not possess the skills, knowledge and experience minimally necessary for the two positions for which he applied. After an evidentiary hearing, the designated administrative law judge agreed. Ryan was not qualified for either position. (App. at 74.) More fundamentally, the Department took the rather obvious position that the designated administrative law judge must follow the administrative rules under which she is to operate. An agency and its hearing officer are not free to ignore the plain language of administrative rules and ignore the unambiguous language of a statute proffered as the basis for declaring administrative limitations void.

Ryan's request for attorneys fees is frivolous.

CONCLUSION

For the above reasons, the North Dakota Department of Human Services respectfully requests that the decision of the district court be affirmed. Alternatively, the

Department requests that the decision of the administrative law judge be affirmed.

Dated this 11 day of August, 2003.

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