

**LETTER OPINION  
2003-L-44**

October 14, 2003

Mr. David Ystebo  
Chairman of the Board  
Workforce Safety and Insurance  
200 20th St N  
Fargo, ND 58102-4136

Dear Mr. Ystebo:

Thank you for your letter requesting legal advice as board chair of Workforce Safety and Insurance. Your questions concern the Board of Directors' authority over the director and certain personnel matters.

The Board of Directors for Workforce Safety and Insurance (WSI) has the authority to appoint the director. N.D.C.C. § 65-02-01. The director is "subject to the supervision and direction of the board and serves at the pleasure of the board." *Id.* (emphasis supplied).<sup>1</sup> The Board also has authority to adopt internal management rules or bylaws. N.D.C.C. § 65-02-03.3. The Board has adopted a bylaw stating that: "[h]iring or discharging the executive director of North Dakota Workers Compensation<sup>2</sup> or amending these bylaws requires a two-thirds vote of all voting members of the board." Bylaws of the North Dakota Workers Compensation Board of Directors, Article III. In a discussion with a member of my staff, you asked whether the Board's bylaws are contrary to N.D.C.C. § 65-02-01.

The general rule in North Dakota law is that a statute "giving a joint authority to three or more public officers or other persons must be construed as giving such authority to a majority of them, unless it appears otherwise in the act giving the authority." N.D.C.C. § 1-02-14. See generally, 63 A.L.R.3d 1072, §8 (1973) (a super majority requirement

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<sup>1</sup> Section 65-02-01.2, N.D.C.C., requires WSI to establish a system of personnel administration. However, the statutory requirement that the director of WSI serves at the pleasure of the board, and is therefore an at will employee, may not be abrogated by any personnel policy which may be in place at WSI. See Bumstead v. Jasper County, 931 F.Supp. 1323, 1331 (E.D. Tex. 1996).

<sup>2</sup> North Dakota Workers Compensation Bureau has been changed in name to Workforce Safety and Insurance. N.D.C.C. § 65-02-01.1.

must be found in the governing statutes). Where the Legislature chooses to require a super majority vote, it does so specifically. When the Legislature requires only a simple majority it does so by using language requiring “approval of the board” or something similar. For example, former N.D.C.C. § 15-27.3-14 at one time required an unanimous vote of a school board to close an elementary school. It was amended in 1995 to require only a four-fifths vote. 1995 N.D. Sess. Laws, ch. 177, § 9. Later, as part of the recodification of the education statutes, the replacement for this statute, current N.D.C.C. § 15.1-12-17, was amended to require only a majority vote to close an elementary school. See 1999 N.D. Sess. Laws, ch. 196, § 12. It does so by stating that the school is closed “upon approval of the board.” The Board’s statutory authority to appoint, supervise and direct, or discharge the director is not qualified by any super majority requirement. See N.D.C.C. § 65-02-01.

The Board’s bylaws, however, call for a super majority vote. Bylaws, like administrative rules, may not exceed or supercede statutory authorization. N.D.A.G. 81-69 (personnel policies exceeded statutory authorization); Moore v. North Dakota Workmen’s Compensation Bureau, 374 N.W.2d 71, 74 (N.D. 1985) (“an administrative regulation may not exceed statutory authority or supercede a statute, and . . . a regulation which goes beyond what the Legislature has authorized is void.”). “The rationale for this principle is that allowing an administrative agency to promulgate rules which include substantive matters not included in the statute under which it is acting constitutes an improper delegation of legislative power. Id. See also Medical Properties v. N.D. Board of Pharmacy, 80 N.W.2d 87, 89-90 (N.D. 1956). The bylaws requiring a super majority contravene statutory authorization by imposing a standard contrary to N.D.C.C. § 1-02-14.

In addition, the statute authorizing the Board to adopt bylaws limits the bylaws to procedural matters. N.D.C.C. § 65-02-03.3(8). Subsection 8 requires the Board to “[a]dopt internal management rules creating bylaws for the board and relating to the election of a board chairman, formation of committees, replacement of departing members, voting procedures, and other procedural matters.” Id. (emphasis supplied). It does not allow for the adoption of substantive rules governing the Board. Super majority requirements have been held to have substantive effect rather than merely being a procedural issue in business corporations. Super majority requirements may stall or delay activities, they are contrary to democratic notions of majority rule, and may even lead to inaction or paralysis. 80 A.L.R.4th 667, § 2 (1990). It logically follows that the conclusion that a super majority requirement is substantive applies equally to government boards or committees as it does to business corporations. See generally, Northwestern Bell Telephone Co. v. Board of Comm’rs of Fargo, 211 N.W.2d 399, 404 (N.D. 1973) (discussing abstention of vote by city commissioners as creating a super majority requirement and the effects thereof). The Board’s bylaws imposing a super majority requirement is substantive and not authorized under N.D.C.C. § 65-02-03.3(8).

Therefore, it is my opinion that the bylaw requiring the WSI Board of Directors to have a super majority in order to hire or discharge the director, or to amend the bylaws, is legally invalid and not binding on the Board.

You also asked whether the Board may suspend the director or place the director on administrative leave with or without pay. As a general rule, the power to take a greater action inherently includes the power to take a lesser action. N.D.C.C. § 31-11-05(27). For example, it has been the longstanding holding of the North Dakota Supreme Court that the court has the inherent authority to discipline attorneys because the court has the constitutional authority to admit attorneys to practice. In re Simpson, 83 N.W. 541, 553 (N.D. 1900). The principle that the greater power contains the lesser has been applied to more recent regulatory issues as well. Where an administrative agency is authorized to suspend an individual's license, that agency has the inherent power to reprimand the individual. Wisdom v. State ex rel., N.D. Real Estate Com'n, 403 N.W.2d 19, 22 (N.D. 1987).

Courts of other states are also in general agreement with the principle that the greater power includes the lesser. Where a government commission had the authority to terminate the right of a broker to sell bonds under an express statutory provision, the court held that the power to suspend the broker's right to sell bonds was inherently included in the power to terminate the broker's right to sell bonds. Klatt v. Guaranteed Bond Co., 250 N.W. 825, 830 (Wis. 1933). As a matter of employment law "the greater power to dismiss necessarily includes the lesser power to demote." Pereira v. Bank of America, N.T. & S.A., 2002 W.L. 221984 (Cal. App. 6 Dist.). Another court has stated that if an officer serves at pleasure, then that officer may be "demoted or transferred without a showing of good cause." Holland v. Bank of America, 673 F.Supp. 1511, 1516 (S.D. Cal. 1987). Further, where a county engineer, may be dismissed under statute, it was held that the "greater power to dismiss includes the lesser power to suspend." Thourot v. Board of Chosen Freeholders of Hudson County, 84 A.2d 662, 663 (N.J. Super. 1951). Therefore, it is my further opinion that a majority of the WSI Board of Directors has authority to suspend or place the director on administrative leave with or without pay as a lesser consequence of its greater authority to terminate the director without cause.

You have also asked questions concerning the Board's authority to supervise and direct the WSI director. In addition to the Board's authority to appoint and set the compensation of the director, N.D.C.C. § 65-02-03.3(1), (2), the "director is subject to the supervision and direction of the board." N.D.C.C. §65-02-01. The Board has given responsibility for hiring, termination, and the annual evaluation of certain employees to the director. North Dakota Workers Compensation Board Governance Policy, C-4, ¶ 6. The director also has statutory authority to appoint the director of any division within WSI. N.D.C.C. § 65-02-01. You have specifically asked whether the Board may temporarily suspend the director's authority over hiring matters.

Statutes are construed as a whole to give each provision meaning and effect. Little v. Traynor, 565 N.W.2d 766, 776 (N.D. 1997). “Statutes must be harmonized to give meaning to related provisions and are interpreted in context to give meaning and effect to every word, phrase, and sentence.” Meljie v. North Dakota Workers Compensation Bureau, 653 N.W.2d 62, 67 (N.D. 2002). Statutes must be construed in a practical manner that will give consideration to the context of the statutes and the purposes for which they were enacted. Public Service Com’n v. Wimbledon Grain Co., 663 N.W.2d 186, 193 (N.D. 2003).

The differing provisions stating that the director appoints division directors for WSI while the director is also subject to the supervision and direction of the Board may be harmonized by noting the difference in roles of the director and the Board of Directors. The WSI Board of Directors is composed of individuals who often have other full-time employment, the Board members are appointed by the Governor for a term of years, and the Board members exercise their authority at periodic meetings rather than on a daily basis. See N.D.C.C. §§ 65-02-03.1, 65-02-03.3. The WSI director is, however, a full-time employee of WSI and is entrusted with management of the day-by-day activities performed at WSI. While the director generally acts as the chief executive officer in exercising the day-to-day control over WSI, the Board of Directors has authority to direct and supervise the director’s activities. Therefore, it is my opinion that a majority of the Board of Directors may, in their discretion, choose to take particular decisions out of the director’s hands or, if the circumstances warrant, the Board of Directors may choose to suspend the director’s authority over management decisions for a reasonable period of time if the Board has reason to question the director’s activities.<sup>3</sup> It is my further opinion that a majority of the Board of Directors may temporarily suspend the director’s authority to hire, terminate employment, or take disciplinary action against WSI employees.

Your final question is whether the Board of Directors may request an investigation into certain activities or events that may have occurred at WSI. As your legal counsel, the Office of Attorney General may perform any appropriate task concerning instituting or defending activities which may result in lawsuits. N.D.C.C. § 65-01-12. Further, the Risk Management Division of the Office of Management and Budget is authorized to investigate potential risks in consultation with affected state entities and provide those entities with advice as to the reduction of risk or the management therefore. N.D.C.C. § 32-12.2-07(3)(a). Other state agencies may also provide appropriate support at the Board’s request. As the governing body of an agency of state government, the WSI Board of Directors has authority to call upon other state agencies such as the Office of Attorney

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<sup>3</sup> Just as the Board of Directors has authority to terminate the director’s employment or to suspend that employment, the Board of Directors would logically also have authority to suspend certain aspects of the Director’s authority at WSI. If the director does not comply with the Board’s instructions, the Board may replace the director.

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General or the Risk Management Division to fulfill its duties and protect WSI against potential liabilities.

Sincerely,

Wayne Stenehjem  
Attorney General

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