

LETTER OPINION
97-L-135

August 8, 1997

Representative Ben Tollefson
500 24th Street NW
Minot, ND 58703

Dear Representative Tollefson:

Thank you for your letter asking whether the President of the Senate and Speaker of the House of Representatives may replace members of the Regulatory Reform Review Commission (RRRC) with new members.

The RRRC is created under N.D.C.C. § 49-21-22.1, which provides in relevant part:

The regulatory reform review commission consists of one member of the public service commission who has responsibility for telecommunications regulation, two members of the senate, appointed by the president of the senate, and two members of the house of representatives, appointed by the speaker. The chairman of the legislative council shall designate the chairman and vice chairman of the regulatory reform review commission from the legislative members of the commission.

(Effective through December 31, 1998). This section does not specify a term of office for RRRC members.

This office has previously summarized the power to appoint and revoke appointments of public officials:

It is a long-standing principle that with the power to appoint comes the power to revoke.

"[T]he rule is, and on principle must be, that the power of arbitrary removal is vested in the person or board vested with the appointing power, as incidental to the power of appointment, unless the law places a limitation on such power." North Dakota ex rel. Moore v. Archibald,

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66 N.W. 234, 241 (N.D. 1896). "[I]n the absence of any statutory or constitutional provision to the contrary, [a person not holding office for a fixed term is] subject to removal without cause and without notice, by order of the appointing power." North Dakota ex rel. Johnson v. Myers, 19 N.W.2d 745, 751 (N.D. 1945).

1990 N.D. Op. Atty. Gen. 102. See also Carlucci v. Doe, 488 U.S. 93, 99 (1988) (power of removal from office is incident to power of appointment, absent specific provision to the contrary); 1982 N.D. Op. Att'y Gen. 108 (sheriff generally has authority to appoint and terminate appointment of deputies); Letter from Attorney General Robert Wefald to Tom Slorby (January 13, 1983).

As the quotation above indicates, the general rule that the power to appoint includes the power to revoke the appointment may be restricted by statute or constitutional provision. I have not found any authority to categorically exclude legislative appointments from this general rule, nor have I found any statute restricting the power of the president of the senate and speaker of the house of representatives to replace current members of the RRRC at any time. However, depending on the circumstances, the replacement of current members of the RRRC may raise constitutional due process considerations.

A person holding a public office may have a property or liberty interest in that position entitled to due process protection. See 1990 N.D. Op. Att'y Gen. 63, 64. However, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. [The person] must have more than a unilateral expectation of it. [The person] must, instead, have a legitimate claim of entitlement to it.'" Id., quoting Board of Regents v. Roth, 408 U.S. 568, 577 (1972). Property interests are "'created and . . . defined by existing rules or understandings that stem from an independent source such as state law'" Id., quoting Board of Regents at 577. Generally, a liberty interest to only implicated if a person's reputation, honor, or integrity is cited in connection with a dismissal (which may necessitate a name-clearing opportunity). Board of Regents at 573.

Whether a current member of a public body like the RRRC has a protected property or liberty interest in continued appointment to the public body is ultimately a question of fact on which I cannot issue a legal opinion. As noted earlier in this opinion, N.D.C.C. § 49-21-22.1 does not specify a term of office for RRRC members nor does it offer any sort of term protection to an appointee. I

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understand the practice has been to appoint the members of the RRRC at the close of each legislative session or shortly thereafter. This periodic practice might create an expectancy of a two-year appointment to the RRRC, but weighs against the existence of any "entitlement" to continued appointment to the RRRC beyond that period. In addition, the authority of the president of the senate and speaker of the house to appoint members to the RRRC for terms extending beyond the biennium in which the president and speaker hold their offices is an open question. Finally, although the June 18, 1997, letter appointing new members to the RRRC provides a specific term of office, I have not found a similar provision in earlier appointments.

The United States Supreme Court, the North Dakota Supreme Court, and this office have all previously concluded that a person holding an appointive office for a specific term generally has no property interest in having the appointment continued for an additional term, and therefore is not entitled to due process before being replaced. Board of Regents, 408 U.S. at 577; Stensrud v. Mayville State College, 368 N.W.2d 519, 521 (N.D. 1985); 1990 N.D. Op. Att'y Gen. 63 at 64. Similarly, it is my opinion that the members of the RRRC (other than the representative from the Public Service Commission), unless appointed for a specific term or provided some assurance of a continued appointment, serve at the will of the president of the senate and speaker of the house of representatives and may be replaced without cause or notice.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jcf/vkk