

**N.D.A.G. Letter to Hagen (Feb. 12, 1992)**

**Replaces February 12, 1991, letter to Craig Hagen.**

February 12, 1992.

Honorable Craig Hagen  
Commissioner of Labor  
State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Commissioner Hagen:

This letter opinion is issued to replace the letter opinion of February 12, 1991, which you received from my office in regard to your duties and responsibilities under House Bill No. 1559 and the constitutionality thereof in light of the State Board of Higher Education's authority over Higher education employees.

At the request of interim Chancellor Thomas Clifford, I have reconsidered the opinion of February 12, 1991, and this opinion is being issued to replace the opinion of February 12, 1991.

As introduced, House Bill No. 1559 provides for collective bargaining by Higher Education employees, negotiations, mediation and arbitration of disputes. Negotiated, agreements or arbitration orders are to be reduced to a written agreement, and if the financial terms of such agreement exceed legislative financial appropriations then the parties are to renegotiate the financial terms. The involvement of the Commissioner of Labor in the proceedings contemplated by the bill is to determine the exclusive representative, conducting elections for that determination, resolution of disputes by mediation or directing the commencement of arbitration, resolving unfair practice disputes, and seeking sufficient appropriations for the Department of Labor to carry out the duties imposed by the bill.

The Board of Higher Education (hereafter the Board) was created in the North Dakota Constitution as a response to Governor Langer's attempt, in 1937, to fire Higher Education employees and gain control of their payroll at NDSU. W. Hunter, BEACON ACROSS THE PRAIRIE 146 (1961).

Because of this political interference with its administration, NDSU lost its North Central Association accreditation. Elwyn B. Robinson, HISTORY OF NORTH DAKOTA, 497 (1966). "The alumni association started a petition for a constitutional amendment to remove control of the colleges from the Board of Administration and place it in the

hands of a nonpolitical board of higher education. The amendment passed in 1938, and the new board... took over on July 1, 1939..." Id.

The North Dakota Constitution provides for the creation of the Board "for the control and administration of" certain educational institutions. The constitution further provides that the Board shall have "full authority" over those institutions under its control. The constitution also provides that:

The said state board of higher education shall have full authority to organize or reorganize within the constitutional and statutory limitations, the work of each institution under its control and do each and everything necessary and proper for the efficient and economic administration of said state educational institutions.

N.D. Const. art. VIII, § 6(l) and (6)(b) (emphasis supplied). Thus, the Legislature may pass laws regarding the organization or reorganization of the work of the institutions under the Board's control. In addition, the constitution states, "[t]his constitutional provision (i.e., N.D. Const. art. VIII, § 6] shall be self-executing and shall become effective without the necessity of legislative action." N.D. Const. art. VIII, § 6(8) (emphasis supplied). Other than the two foregoing underlined statements, the constitution does not address the role of the North Dakota Legislature in the governance of the North Dakota colleges and universities. Thus, it is unclear to what extent the Legislature may control the Board, or the colleges and universities.

North Dakota case law has not clarified to what extent statutory limitations may be placed on the authority of the State Board of Higher Education as outlined in the North Dakota Constitution. The rule of law in this state is well established that a statute enacted by the Legislature is conclusively presumed to be constitutional unless it is shown that the statute clearly contravenes a provision of the state or federal constitution. Patch v. Sebelius, 320 N.W.2d 511, 513 (N.D. 1982); N.D.C.C. § 1-02-38. In is regard, the North Dakota Supreme Court has held that:

In considering the constitutionality of an act, every reasonable presumption in favor of its constitutionality prevails... And the courts will not declare a statute void unless its invalidity is, in the judgment of the court, beyond a reasonable doubt.

Menz v. Coyle, 117 N.W.2d 290, 295 (N.D. 1962).

I think it is appropriate to analyze the issue of legislative control over the Board and the colleges and universities, in terms of the Board's "inherent functions" or "core functions" that are derived from the constitution. See e.g., Ex parte Corliss, 114 N.W. 962, 965 (N.D. 1907), and Mattson v. Kiedrowski, 391 N.W.2d (Minn. 1986), (concluding that it is unconstitutional for the Legislature to remove and transfer inherent or core functions of officers named in the constitution to appointed officials). Similarly, core functions of the Board derived from the constitution may not be infringed upon by the Legislature. The

North Dakota Constitution gives the Board sole control over its core functions. Unfortunately, it is very difficult to determine what constitutes the core functions of the Board.

Without specific North Dakota case law on the subject, and because of the presumption of constitutionality of legislative enactments, the general language of N.D. Const. art. VIII, § 6, by itself, does not provide a sufficient basis for finding that the enactment of House Bill No. 1559 would violate the constitution or that the duties required of the Commissioner of Labor under the bill would be an unconstitutional imposition on the State Board of Higher Education.

It is my opinion, however, that the Legislature may not infringe upon the core functions of the Board derived from the constitution. I interpret the Board's core functions to include control over its faculty and officers, such as in hiring and promoting. I also interpret the Board's core functions to include its control over courses. Thus, even though the duties required by the Commissioner of Labor under the bill must be presumed to be constitutional, to the extent that such duties would interfere with the Board's core functions, they would be unconstitutional.

Sincerely,

Nicholas J. Spaeth

jfl