

**OPINION
66-120**

December 14, 1966 (OPINION)

Mr. Kenneth Raschke

Commissioner

Higher Education

RE: Legislature - Members - Conflict of Interest

This is in response to your request for an opinion on the following facts:

In November of 1966, Dr. Warren Allen, a member of the faculty of Minot State College was elected to the North Dakota Legislature. Dr. Allen's contract year runs from July first through June thirtieth and is employed under the provisions of the tenure policy of the board, which is attached hereto. Dr. Allen has been employed at Minot State College a sufficient length of time to obtain tenure and has obtained it. You also call our attention to Article 51 of the North Dakota Constitution and an initiated measure adopted on June 29, 1954, which is now section 54-03-21 of the North Dakota Century Code. You then ask for an opinion on the following questions:

- (1) Can Minot State College and the Board of Higher Education honor Dr. Allen's contract for the current academic year?
- (2) Can Minot State College and the Board of Higher Education continue to employ Dr. Allen during 1967-68?"

There are several prohibitions and limitations affecting the members of the North Dakota Legislature. In addition to the two you mentioned, there are sections 37 and 39. Section 37 provides that no person holding certain offices shall hold any office in either branch of the legislative assembly. The term "office" has been judicially defined as a person having authority to exercise some part of the sovereign power in making, administering or executing state laws. (State ex rel. Biggs v. Corley, 172 Atl. 415.) A faculty member of the state college does not make, administer or execute state laws, nor does such member exercise part of the sovereign power. It thus appears eminently clear that section 37 has no application to the question submitted.

Section 39 prohibits the governor from appointing a legislator to an office and prohibits a legislator from accepting an appointment from the governor with or without confirmation by the Senate. Faculty members to the state colleges are appointed or elected thereto by the Board of Higher Education. (Section 15-10-17, N.D.C.C.) The governor plays no role in electing or appointing such members, or in removing the same. It is manifestly clear that section 39 of the constitution does not apply.

As to the power of the State Board of Higher Education, see also Posin v. State Board of Higher Education, 86 N.W.2d. 31.

Article 51 of the North Dakota Constitution provides as follows:

"The governor or an officer of this state, or any manager or executive head, or other person employed either directly or indirectly in any department, bureau, commission, institution, or industry of this state, or any member of any state board shall not appoint a member of the legislative assembly to any civil office or employment of any nature whatsoever, during the term for which said member of the legislative assembly shall have been elected. No member of the legislative assembly shall accept any such appointment to civil office or other employment during the term for which he was elected."

In substance this constitutional provision prohibits the appointing authority from appointing a member of the legislative assembly to any civil office or employment during the term for which said member of the legislative assembly was elected. It also prohibits a member of the legislative assembly from accepting such appointment or civil office.

We have already disposed of the question whether or not the position on the college faculty is a civil office and have concluded that it is not, therefore, no further comment thereon is necessary. The faculty member, however, is employed and his service constitutes "employment." Article 51 does not provide that a member of the faculty shall not be eligible to hold an office in either branch of the legislature. The prohibition is in making an appointment or in accepting an appointment during the term for which a person is elected as a member to the North Dakota Legislature.

The distinction between "holding" an office and "accepting" an office was pointed out by the North Dakota Supreme Court in *State ex rel v. Stray*, 68 N.D. 498, 281 N.W. 83. The Court pointed out that "accept" an appointment or to make an appointment does not include holding employment or holding an office. It compared the provisions of the California Constitution which were construed by the California Supreme Court in *Chenoweth v. Chambers*, 164 Pac. 428. The constitutional provision in the State of California provided, "No senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state; * * *." Article 51, as stated previously, does not prohibit the holding of employment. It prohibits the making of an appointment or the acceptance of same. In the *Stray* case, *supra*, the Court also pointed out that the purpose of Article 51 was to prevent the exercise of influence by appointing officer or body over the mind of a legislator through the lure of an appointment. It quoted approvingly from the statement by Justice Story in his *Constitutional* 5th Edition, section 857, that these prohibitions are designed "to take away as far as possible any improper bias in the vote of the representative and to secure to the constituents some solemn pledge of his disinterestedness."

Keeping in mind the evils attempted to be cured, or to be prevented, by the adoption of Article 51, we must take note of the fact that Dr. Allen was a member of the college faculty at the time of his election. His membership on the faculty was such that he had

acquired tenure under the policy statement of the North Dakota State Board of Higher Education. Consequently, Dr. Allen already has the position and would not be subject to influence with the lure of an appointment to the position. His election is subsequent not prior to appointment. An appointment subsequent to election would be prohibited.

While the North Dakota Supreme Court in the Posin case, *supra*, held that the State Board of Higher Education has plenary power to dismiss or remove faculty members from institutions under its control; the subsequent adoption of tenure policy somewhat modifies the result and must be given full force and effect. The Board of Higher Education is not required by law to provide for a tenure program but having full control of this matter under Article 54 of the North Dakota Constitution, it has the power to adopt and adhere to a tenure policy. Under the tenure policy a person may be removed or his services terminated only for adequate cause. The specific reason for the proposed termination of the appointment of a person having tenure must be made in writing by the president of the institution and presented to the person involved and the State Board of Higher Education. It would thus appear that neither the president nor the State Board of Higher Education could summarily remove or terminate the services of a faculty member under the tenure policy adopted.

From the foregoing it appears that the services of Dr. Allen as a member of the faculty of the Minot State College will not be adversely affected by his election to the North Dakota Legislature and serving as a member of such assembly. His contract runs on a yearly basis from July first through June thirtieth, however, under the tenure policy his employment is continuous until his services are terminated for adequate cause. We also assume that he may terminate his services by giving notice to the college or the State Board of Higher Education.

The tenure does not discuss any adjustment of salary or compensation. We must therefore assume that under the tenure provision the salary or compensation would be on the same basis as the contract entered into. The tenure policy does not provide for automatic increases in accordance with longevity. The implication is that the contract would be continued on the same basis. There would be a question if there were a renegotiation or revision of the contract providing for increases beyond the normal routine increase allowed for inflation or higher cost of living. Other than that, the employment of Dr. Allen is on a continuous basis.

Section 54-03-21 of the North Dakota Century Code (initiated measure adopted June 29, 1954) provides as follows:

"CONFLICT OF INTEREST - PROHIBITION - MISDEMEANOR. - No member of the legislative assembly of the state of North Dakota, his spouse, nor a partnership, corporation or association, in which such member or spouse, has an ownership of five percent or more of the assets, shall perform any work, labor or services, or provide any material, supplies, or merchandise, for the state of North Dakota, or any of its subdivisions for a consideration in excess of a total of ten thousand dollars during any calendar year for such work, labor, services, material,

supplies and merchandise.

"Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and shall forfeit any consideration received during, or as a result of, or in connection with the violation of this section."

The foregoing statute makes no reference to appointing a person or holding an office, but limits the amount of money that may be received by a member of the legislature during a calendar year. A calendar year means from January first to January first. The limitation is not merely upon the member of the legislative assembly but also includes his spouse, partnership or a corporation in which he has ownership of five percent or more of the assets. The North Dakota Supreme Court in Lindberg v. Benson, 70 N.W.2d. 42, held that the \$10,000 limitation applied to each political entity and was not the aggregate for all entities. By construction this would mean that the salary or remuneration received from the legislature would not be included in computing the \$10,000 limitation. The salary or salaries received from the Minot State College could reach \$10,000 but could not go beyond that figure.

If the spouse is also employed in some capacity by the Minot State College the combined salaries or remuneration could not exceed \$10,000 in any calendar year.

The penalty for violating this provision constitutes a misdemeanor and shall cause forfeiture of any consideration during, or as a result of, or in any connection with the violation of the Act.

It is thus observed that section 54-03-21 of the North Dakota Century Code is significant primarily only to the extent that it limits the remuneration that Dr. Allen may receive from the Minot State College.

In direct response to Question No. 1, it is our opinion that the Minot State College and the Board of Higher Education can honor Dr. Allen's contract for the current academic year. In direct response to Question No. 2, it is our opinion that the Minot State College and the Board of Higher Education can continue to employ Dr. Allen during the year 1967 and 1968 - if the employment is continued substantially on the same basis as the employment existed for the year beginning 1966 and ending 1967.

HELGI JOHANNESON

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