**OPINION**
**71-159**

March 4, 1971 (OPINION)

The Honorable Earl H. Redlin
State Senator, Twenty-eighth District
State Capitol

RE: Higher Education - Ellendale - Closing by Legislature

This is in reply to your letter of March 3, 1971, relative to House Bill 1001 as amended by the House on pages 545 through 547 of the House Journal. You note the several pieces of legislation, both bills and resolutions, which have been introduced into the Forty-second Legislative Assembly affecting the status of the institution of higher education at Ellendale. You note the effect of the legislation presently contained in House Bill 1001, as amended by the House, would require that UND-Ellendale Branch cease operation as an educational facility and that expenditures at the institution, for the period of July 1, 1971, to June 30, 1973, be limited to $102,500 - consisting of an estimated income of $70,000 and general fund moneys of $32,500 - with the funds to be used only for routine maintenance and custodial care. You then state the following question:

> "Can the Forty-second Legislative Assembly, or for that matter, any legislative assembly, disregard the mandate of the North Dakota Constitution, in this case, section 216, by refusing to appropriate moneys for the operation of a constitutionally established institution? Or, to put it another way, does not the existence of the institution in compliance with section 216 imply that the Legislative Assembly must appropriate funds for its operation in the manner and for the purpose for which it was established, specifically, higher education?"

Section 216 of the North Dakota Constitution provides in part:

> "The following named public institutions are hereby permanently located as hereinafter provided, each to have so much of the remaining grant of one hundred seventy thousand acres of land made by the United States for 'other educational and charitable institutions' as is allocated by law, namely:
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> * * *
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> Third: An industrial school and school for manual training or such other educational or charitable institution as the legislative assembly may provide at the town of Ellendale, in the county of Dickey, with a grant of forty thousand acres.
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> Seventh: (a) a state normal school at the city of Dickinson, in the county of Stark. (b) a state hospital for the insane at such place within this state as shall be selected

> by the legislative assembly, provided, that no other institution of a character similar to any one of those located by this article shall be established or maintained without a revision of this constitution. (As amended by Articles 21 and 22 of the amendments to the constitution, both approved and ratified on November 7, 1916 S.L. 1913, cc. 96 and 99; S.L. 1915, cc. 84 and 85; S.L. 1917, pp. 407 and 408.)"

We note, in the first instance, that the institution at Ellendale need not under the Constitution necessarily be an institution of higher education. The above-quoted constitutional provision specifies that it will be an industrial school and school for manual training or such other educational or charitable institution as the Legislative Assembly may provide. Thus the Legislature has permitted the institution to be made a branch of the University of North Dakota. See Section 15-11-02 of the North Dakota Century Code which permits the State Board of Higher Education to unite with the University of North Dakota, any college in the state and make such college a branch thereof. The Legislature could, if it so desired, prescribe that some other educational or charitable institution be situated at Ellendale. In reply to that portion of your question which indicates that the Legislature must appropriate money for the operation of an institution of higher education at Ellendale, it is our opinion that the Legislature could prescribe some other educational or charitable institution for that location without violating the provisions of the Constitution.

However, the Legislature has not, to our knowledge, prescribed any institution other than an institution of higher education for Ellendale. Therefore, we must consider that portion of your question which refers to the obligation of the Legislature to appropriate moneys for the institution established at Ellendale, i.e., a branch of the University of North Dakota.

With respect to this question, we have no judicial precedents in this state which are directly in point and to which we can look for guidance. To our knowledge this is, insofar as the legal question is concerned, a question of first impression.

As to the proposition whether or not there is a mandate by the Constitution, Section 21 states that the provisions of this Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise. This taken in itself indicates that the Constitution probably did contain a mandate of the Legislature to carry out the provisions of Section 216 of the North Dakota Constitution. Even though this is a mandate or can be considered as a mandate, Section 216 is not a self-executing provision of the Constitution and requires implementation by the Legislature. We must recognize a distinction between a self-executing provision of the Constitution and a provision which requires implementation by the Legislature. As an example, the North Dakota Supreme Court with reference to a provision contained in Section 25 of the North Dakota Constitution, relating to the publishing of the publicity pamphlet said that this provision was self-executing and needed no implementation by the Legislature. In State ex rel. Byrne v. Baker, 65 N.D. 190, 262 N.W. 183, it was

specifically recognized that Section 25 contained the following provision: "This section shall be self-executing and all of its provisions treated as mandatory." We do not have a similar provision in Section 216 of the North Dakota Constitution.

It might be argued with some success that the legislators are bound to follow the Constitution and have taken an oath to support the Constitution, but the ultimate question is what body in our three branches of government can compel the Legislature to act in a certain manner? We are satisfied that the courts may not issue a mandate to the Legislature because both are separate coequal, coordinated branches of government. Therefore, even if the argument could be validly made that the Legislature should follow the dictates of the Constitution, there are no means available of enforcing the taking of certain action as distinguished from declaring action taken by the Legislature as being invalid or unconstitutional. It would appear in the final analysis that there is no way of compelling the Legislature to act.

We note that the constitutional provision above-quoted does not refer to appropriations made by the Legislature. It provides that certain institutions, among them the one at Ellendale, are permanently located at the places named and grants to such institution a specified amount of grant lands for their support. Thus, it could be argued that the Constitution only requires the location of a specific institution at the sites named and does not necessarily require that such institutions be operated or that moneys be appropriated for the actual operation of such institutions. While such a conclusion may be derived from literal reading of the constitutional provision, we believe that such result would be impractical and therefore favor the position that the constitutional provision indicated that an operating institution would be situated at the sites named. One such institution had actually become operative.

Whether such a conclusion can be sustained legally may be subject to question. While we believe it is the most practical construction to give the constitutional provision, we must note there is authority for a contrary view. The Supreme Court of North Dakota in construing this provision (but with respect to a different question) stated: "There is still another principle bearing directly upon this question. It may be thus stated: When the legislative assembly repeatedly construes or interprets a constitutional provision, such construction or interpretation should be followed by the courts, when it can be followed without doing violence to the fair meaning of the words, used, in order to support the legislative action and give effect thereto, if the language construed admits of such construction." See State v. Taylor 133 N.W. 1046, 1051 (N.D. 1911).

In this respect we find there is precedent for this kind of action. The 1895 and 1897 sessions of the Legislative Assembly appropriated funds for the institutions of higher learning prescribed in the Constitution. The 1895 Session Laws indicate the only moneys appropriated were for janitor salary and maintenance of buildings. See e.g., Chapter 18 of the 1895 Session Laws with respect to the appropriation for the University of North Dakota. In fact, however, the Legislature had appropriated more funds including funds for salaries, etc., but such funds were vetoed by the Governor. In 1897

the funds for the operation of the institutions of higher learning were also vetoed, but the Legislature overrode the Governor's veto. See e.g., Chapter 8 of the 1897 Session Laws. Therefore, the institutions received no state support for actual operating costs in the biennium of 1895 to 1897. The institutions, such as the University of North Dakota, did operate through donations, etc. See Geiger, University of Northern Plains University of North Dakota Press, 1958.

In 1923 the Governor vetoed the operating appropriation for the Forestry State Normal School at Bottineau leaving only the appropriations for maintenance of grounds, general repairs and dormitory maintenance, in the total amount of $950 for the biennium in effect. See Chapter 58, 1923 Session Laws.

To our knowledge, these votes, which had the effect of denying the institutions the means with which to operate, were never challenged in the courts of this state. Whether such veto would have been sustained in the courts may be open to question in view of the decision of the North Dakota Supreme Court in State ex rel. Dahl v. Dewing 131 N.W.2d. 434 (N.D. 1964) in which the court held the Governor had no power to veto a line item appropriation for the salary of the director of the State Laboratories Commission, as the veto would have the effect of making an initiated measure ineffective in violation of Section 25 of the North Dakota Constitution providing that an initiated or referred measure may be amended or repealed only by a vote of two-thirds of the Legislative Assembly. If we are to construe the provisions of the Constitution concerning the institutions of higher learning as requiring their actual operation rather than merely the location of same, the decision in the Dahl case, supra, would appear to be applicable with regard to the exercise of a veto of an operating appropriation by the Governor. If, on the other hand, the constitutional provision is merely considered to be a statement requiring the location of a specific institution at a specific site, then the decision would not appear to be applicable. As noted above, the exercise of the Governor's veto in 1895 and 1923 removing all operating funds from some of the institutions of higher learning was not challenged in the courts. The Governor's veto is a part of the legislative process. It may, therefore, be argued the construction of this constitutional provision by the Legislature in effect requires the location of a specific institution at a given location only and does not require the actual operation of such institution. This argument would apparently bring the question within the ruling of the North Dakota Supreme Court in State v. Taylor supra, and the Court, if this question were presented to them, could conceivably hold that Section 216 of the Constitution requires the location of the institutions at a specific site only and not the actual operation of such institutions, that being a matter for legislative determination.

The issue in the Taylor case concerned an amendment to the Constitution establishing a state normal school at Minot and involved the question of whether the provision in the Constitution that no other institution of a character similar to any one of those located by Article XIX could be established or maintained without a revision of the Constitution (see Subdivision Seven of Section 216 of the North Dakota Constitution quoted above) meant the Constitution must

be revised by Constitutional Convention or whether it could be done by amendment presented to the electorate by the Legislature. The Court also considered whether an appropriation for the school was valid insofar as it was based on a provision that it should become available only if the citizens of Minot should donate a suitable location of not less than sixty acres for the institution. The Court in this regard stated, page 1052 of the reported case:

> "The state contends that this is not a valid appropriation because not effective except upon the action of the citizens of Minot. It appears to us that this point is not well taken. The Legislature, in effect, said: 'It will require $200,000 to put this school into operation during the next two years, and in addition to that, sufficient to procure a suitable site. The school is located by the Constitution at Minot, but it is discretionary with the legislative assembly when to provide an appropriation and to determine the amount necessary to set the school in operation. We have not sufficient money available for the purpose at this time. If the citizens of Minot are enough interested in the subject to furnish the site, and thereby relieve the state from that burden, we will make an appropriation of so much money as is available; the amount named to be subject to use if and when the site is furnished.'
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> "We see no reason why this is not a valid exercise of legislative power, under circumstances like these.* * *" (Emphasis ours)

Such statement does lend weight to the argument that the Constitutional provision only specifies the location of a given institution and does not necessarily require the actual operation of such institution. The provision does prohibit the operation of a similar institution at any other location without an amendment to the Constitution. In addition we have no doubt that the income from the forty thousand acres of grant land for the institution at Ellendale can be used for no other purpose. We assume the seventy thousand dollars appropriated for the maintenance of the institution at Ellendale is derived from that income although we have no specific evidence of that fact.

We further note that the 1889 Constitutional Debates also contain some statements indicating that the location of the institutions was directory and the Legislature would have the discretion as to when and how to operate same. See e.g., page 483 of the 1889 Constitutional Debates. While these statements are not conclusive, they are indicative of the intent of the Constitutional Convention in adopting this provision of the Constitution.

Whatever the theoretical decision might be with regard to this entire question, i.e., whether the Constitution requires the location and actual operation of an institution at a given location, or whether the Constitution does not require the actual operation but only prescribes the location of a given institution and prohibits a similar institution to be situated anywhere else without a constitutional amendment, there is another aspect of the question which cannot be overlooked. Even if it is determined that the Constitution requires the actual operation of an institution, thus

requiring the Legislature to appropriate funds for such operation, this does not answer the question of how the Legislature can be forced to appropriate funds, as a matter of law, for any given institution or the amount which is to be appropriated. Thus, if we were to hold the Constitution required the Legislature to maintain an operating institution at Ellendale and to appropriate the necessary funds therefore, we would be able to provide no answer to the question of how the Legislature could be forced to do so. We deem this observation appropriate in this discussion since the question presented involves an appropriation measure.

In summary, we favor a view that once the Legislature has, in accordance with the Constitution, established an operating institution they have an obligation to continue that institution until such time as the Constitution might be amended. This view is based on the practical consideration which has been given the constitutional provisions in the past. However, as noted above, we realize the matter is by no means free from doubt and that there is considerable collateral precedent which supports a contrary view. In this respect should the Legislature enact the appropriation bill in its present form, we assume the Court, if the matter is presented to them, would, in view of the rules of constitutional construction, resolve every possible doubt in favor of the constitutionality of the bill. We must therefore candidly admit there is a good possibility the courts would construe the bill in its present form as constitutional.

HELGI JOHANNESON

Attorney General