

Date Issued: March 2, 1982 (AGO 82-13)

Requested by: Ernest Sands, Chairman,
State Personnel Board

- QUESTIONS PRESENTED -

I.

Whether the State Personnel Board is authorized to initiate policy.

II.

Whether the State Personnel Board has the authority to direct the Central Personnel Division of the Office of Management and Budget to initiate and follow particular policies.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the State Personnel Board is not authorized to initiate policy.

II.

It is my further opinion that the State Personnel Board does not have the authority to direct the Central Personnel Division of the Office of Management and Budget to initiate and follow particular policies.

- ANALYSIS -

I.

The duties of the State Personnel Board are set forth in section 54-44.3-07 of the North Dakota Century Code which states as follows:

54-44.3-07. DUTIES OF BOARD. The primary responsibility of the board shall be to foster and assure a system of personnel administration in the classified service of state government. In carrying out this function it shall:

1. Promulgate such rules and hold such hearings as are necessary to properly perform the duties, functions, and powers imposed on or vested in it by law. The promulgation of rules shall be accomplished in accordance with provisions of chapter 28-32.

2. Review and hear comments from any concerned individuals, departments, agencies, or their representatives, on any rules or modifications thereof adopted by the personnel division. Such a rule or modification will be effective upon implementation by the division; however, if the board finds that the rule constitutes poor administrative practice, is arbitrary, capricious, contrary to the spirit or intent of the personnel system, or otherwise contrary to law, it may disapprove the rule or modification on that basis, thus repealing the concerned rule or modification.
3. Review any personnel action relating to pay ranges or job classification.
4. Submit a biennial report as prescribed by section 54-06-04 of its activities and the operation of this state's personnel system.
5. Keep such minutes and maintain such records as are necessary to assure the equitable administration of this chapter.

Section 54-44.3-12, N.D.C.C., states in part as follows:

54-44.3-12. DUTIES OF DIRECTOR. The director shall direct and supervise, with the approval of the director of the department of accounts and purchases, all the administrative and technical activities of the division. In addition to the duties imposed elsewhere in this chapter, the director shall:

1. Establish general policies, rules, and regulations, subject to the approval of the board, which shall be binding on the agencies affected. . .

Sections 54-44.3-07 and 54-44.3-12, N.D.C.C., delineate wholly separate functions for the State Personnel Board and the director of the Central Personnel Division. The duties of the board, as set out in section 54-44.3-07, N.D.C.C., relate solely to the development of the system of personnel administration. That is, the board functions relate to organization, development of procedure, and review of actions taken by the Central Personnel Division. The direct and active management of the division is, however, the responsibility of the director of the Central Personnel Division. Section 54-44.3-12, N.D.C.C. The management responsibilities of the director include responsibility for "establishing general policies, rules, and regulations". Section 54-44.3-12(1), N.D.C.C.

Among the duties of the State Personnel Board is that of reviewing, approving, or disapproving the general policies, rules, and regulations established by the director of the Central Personnel Division. 54-44.3-12(1), 54-44.3-07, N.D.C.C. Nowhere among the enumerated duties of the board is the responsibility to initiate or establish such policies,

rules, regulations. The specific inclusion of the establishment of policy within the statutory duties of the director of the Central Personnel Division implies the intentional exclusion by the Legislative Assembly of that same responsibility from the duties and thus the authority of the board. See State, ex rel. Link v. Olson, 286 N.W.2d. 262 (N.D. 1979). It is therefore my opinion that the State Personnel Board has no authority to initiate policy.

II.

As noted above, the duties of the State Personnel Board as specified by section 54-44.3-07, N.D.C.C., do not authorize the board to direct or actively manage the Central Personnel Division through the initiation of policy. Management of the division is the responsibility of the director of the division. Section 54-44.3-12, N.D.C.C. What the board is precluded from doing directly, it may not do indirectly. The power to direct the Central Personnel Division to initiate and follow particular policies is the essence of management of the division.

A construction of the duties of the board to allow it to direct the Central Personnel Division to initiate and follow particular policy would allow the board to circumvent the director and to thereby interfere with performance of the director's statutory duty "to direct and supervise . . . all of the administrative and technical activities of the Division". Section 54-44.3-12(1), N.D.C.C. Furthermore, such a construction would violate the concept of the separation of functions which is embodied in chapter 54-44.3, N.D.C.C., by allowing the board both to actively manage the division by directing the division to establish and follow particular policies, and then to review the policies which the board established in order to determine their propriety. Such a result would be incongruous and obviously would not conform to the intent of the Legislative Assembly which was to establish a personnel system where the responsibility for establishment of policies is independent from the responsibility for subsequent review of the policies. It is therefore my further opinion that the State Personnel Board does not have the authority to direct the Central Personnel Division to initiate and follow particular policies. Rather, the authority of the board is limited to reviewing, approving, or disapproving, such policies as are initiated and established by the director of the Central Personnel Division.

- EFFECT -

This opinion issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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