

Date Issued: April 24, 1986 (AGO 86-16)

Requested by: Honorable Earl R. Pomeroy
Commissioner of Insurance

- QUESTIONS PRESENTED -

I.

Whether Section 26.8 of the Staff Personnel Policy Manual of the State Board of Higher Education contravenes N.D.C.C. chapter 54-44.3.

II.

Whether the statewide appeal mechanism of N.D.C.C. chapter 54-44.3 may constitutionally be applied to classified employees at the institutions of higher education under the control of the State Board of Higher Education.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that Section 26.8 of the Staff Personnel Policy Manual of the State Board of Higher Education contravenes N.D.C.C. chapter 54-44.3.

II.

It is my further opinion that the statewide appeal mechanism of N.D.C.C. chapter 54-44.3 may constitutionally be applied to classified employees at the institutions of higher education under the control of the State Board of Higher Education.

- ANALYSES -

I.

On June 27, 1985, the North Dakota State Board of Higher Education amended its Staff Personnel Policy Manual, Sections 26.5.1 and 26.8, to provide as follows:

26.5.1. An employee may appeal a decision of the President pursuant to 26.5 to the Board of Higher Education within ten (10) working days following the decision by filing a notice of appeal with the Commissioner of Higher Education. The Commissioner may appoint a hearing officer to conduct a hearing and submit recommendations to the Board, may order that the matter will be presented to the Board solely on the evidence already submitted, or may order limited additional testimony submitted as may be appropriate. The case will be presented to the Board at its next duly scheduled meeting. The Board may allow the employee to make a statement at the meeting. The Board's decision shall be final.

26.8. Pursuant to Board Policy 606.1, appeals shall not be authorized to the Central Personnel Board except in cases of

classification and pay grade controversies.

Under these policies, classified employees at institutions of higher education under the control of the State Board of Higher Education may appeal pay grade and classification decisions to the Central Personnel Division. However, these State Board of Higher Education policies do not authorize those employees to appeal other adverse employment decisions, including dismissal, demotion, and suspension without pay, to the Central Personnel Division.

Other state classified employees may appeal such adverse actions by their employer to the State Personnel Board. N.D.C.C. section 54-44.3-12.2 provides as follows:

54-44.3-12.2. EMPLOYEE COMPLAINTS - COOPERATION IN DEVELOPMENT AND IMPLEMENTATION OF BASIC AGENCY GRIEVANCE PROCEDURES AND A STATEWIDE APPEAL MECHANISM. It is the intent of the state of North Dakota to assure fair and equitable treatment and promote harmony between and among all classified employees. To ensure this the state desires to resolve bona fide employee complaints as quickly as possible. The division shall cooperate with and assist the various departments, agencies, and institutions of the state in the development and implementation of basic agency grievance procedures and a statewide appeal mechanism.

The Central Personnel Division has developed and implemented the statewide appeal mechanism in N.D.A.C. article 59.5-03. Therefore, classified employees may appeal actions relating to their employment to the State Personnel Board as provided in that article.

N.D.C.C. section 54-44.3-20 establishes which state employees are considered to be "classified employees." That statute provides as follows:

54-44.3-20. CATEGORIES OF POSITIONS IN THE STATE SERVICE. All positions in the state service are included in the classified service except:

1. Each official elected by popular vote and each person appointed to fill vacancies in an elective office, one principal assistant, and one private secretary.
2. Members of boards and commissions required by law.
3. Administrative heads of departments required by law.
4. Officers and employees of the legislative branch of government.
5. Members of the judicial branch of government of the state of North Dakota and their employees and jurors.
6. Persons temporarily employed in a professional or scientific capacity as consultants or to conduct a temporary and special inquiry, investigation, or examination for the legislative branch of government or a department of the state government.

7. Officers and members of the teaching staff of universities and other institutions of higher education.
8. Positions deemed to be inappropriate to the classified service due to the special nature of the position as determined by the division and approved by the board.
9. The classified employees at the institutions of higher education under the control of the state board of higher education, until July 1, 1976
0. Members and employees of occupational and professional boards.
1. Officers and employees of the North Dakota mill and elevator association.

Emphasis added).

The question is whether the Legislature intended to include classified higher education employees within the scope of N.D.C.C. chapter 54-44.3. "That intent must first be sought in the language of the statute." *Quist v. Best Western International, Inc.*, 354 N.W.2d. 656, 660 (N.D. 1984). When the statutory language is unambiguous, the letter of that law must be followed. N.D.C.C. section 1-02-05. Moreover, "words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears. . . ." N.D.C.C. section 1-02-02.

The Legislature specifically excluded "classified employees at the institutions of higher education under the control of the state board of higher education" from the state's classified service only until July 1, 1976. The statute, therefore, clearly provides that, after July 1, 1976, the exclusion of such employees from the classified service would cease. If the Legislature had intended to exclude nonfaculty, nonofficer, classified employees at the higher education institutions from the statute permanently, it could have done so simply by omitting the phrase "until July 1, 1976" from N.D.C.C. section 54-44.3-20(9). Indeed, the Legislature did permanently exclude officers and faculty at institutions of higher education from the operation of the statute. See N.D.C.C. section 54-44.3-20(7). The Legislature's express exclusion of the other higher education employees only until July 1, 1976, indicates its intent not to exclude such employees after July 1, 1976. See *Rheaume v. State*, 339 N.W.2d. 90, 92 (N.D. 1983).

Thus, the unambiguous language of N.D.C.C. section 54-44.3-20 shows that nonfaculty, nonofficer, classified employees at institutions of higher education are within the classified system and are authorized by that chapter to pursue appeals of adverse employment actions to the State Personnel Board.

The argument may be made that this statute, so construed, conflicts with N.D.C.C. section 15-10-17(1). N.D.C.C. section 15-10-17(1) provides as follows:

15-10-17. SPECIFIC POWERS AND DUTIES OF BOARD OF HIGHER EDUCATION. The state board of higher education shall have all the powers and perform all the duties necessary to the control and management of the institutions described in this chapter, including the following:

1. To appoint and remove the president or other faculty head, and the professors, instructors, teachers, officers, and other employees of the several institutions under its control, and to fix their salaries within the limits of legislative appropriations therefor, and to fix the terms of office and to prescribe the duties thereof, provided that the consideration of the appointment or removal of any such personnel shall be in executive session if the board chooses unless the person or persons involved request that the meeting shall be open to other persons or the public.

These two statutes should be construed, if possible, to give effect to both statutes. N.D.C.C. section 1-02-07. Both statutes can be reconciled.

Under N.D.C.C. section 15-10-17, higher education employees may be "appointed and removed" by the State Board of Higher Education. The initial dismissal decision is made by the State Board of Higher Education rather than by any other agencies under the control of the Board or by the Legislature or any other branch of state government. However, under N.D.C.C. chapter 54-44.3, a classified employee at an institution of higher education may then appeal his or her dismissal to the State Personnel Board. There is no irreconcilable conflict in granting initial dismissal authority to the State Board of Higher Education and permitting classified higher education employees the right to appeal that decision to the State Personnel Board. This construction of these two statutes gives effect to both.

Therefore, the unambiguous language of the statute indicates the State Board of Higher Education Personnel Policy section 26.8 does contravene the provisions of N.D.C.C. chapter 54-44.3.

II.

Under the North Dakota Constitution, the North Dakota Legislature has plenary authority except as limited by the state constitution, the federal Constitution, and appropriate federal statutes. *State v. Kainz*, 321 N.W.2d. 478, 480 (N.D. 1982). "'>All governmental sovereign power is vested in the legislature, except such as is granted to the other departments of the government, or expressly withheld from the legislature by constitutional restrictions.'" *State v. Baker*, 21 N.W.2d. 355, 358 (N.D. 1945) (quoting *State, ex rel. Standish v. Boucher*, 3 N.D. 389, 56 N.W. 142, 145 (N.D. 1893)).

It 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 constitution or the federal Constitution. *Patch v. Sebelius*, 320 N.W.2d. 511, 513 (N.D. 1982); see also N.D.C.C. section 1-02-38. Indeed, in *Menz v. Coyle*, 117 N.W.2d. 290, 295 (N.D. 1962), the North Dakota Supreme Court held as follows:

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.

The question here is whether the application of N.D.C.C. chapter 54-44.3 to classified employees at institutions of higher education under the control of the State Board of Higher Education is unconstitutional under the provisions of N.D. Constitution Article VIII, section 6.

N.D. Constitution Article VIII, section 6, created the State Board of Higher Education to control and administer the state's institutions of higher education. N.D. Constitution Article VIII, section 6(6)(b), provides as follows:

The said state board of higher education shall have full authority over the institutions under its control with the right, among its other powers, to prescribe, limit, or modify the courses offered at the several institutions. In furtherance of its powers, the state board of higher education shall have the power to delegate to its employees details of the administration of the institutions under its control. The said state board of higher education shall have full authority to organize or reorganize within 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.

The State Board of Higher Education is, therefore, a separate constitutional body entitled to a degree of autonomy in its administration of the state's institutions of higher education.

The State Board of Higher Education was originally established as a constitutional body after a controversy in the 1930's. R. Crockett, Constitutional Autonomy and the North Dakota State Board of Higher Education, 54 N.D.L. Rev. 529, 532 (1978). At that time the Board of Administration (the State Board of Higher Education's predecessor) included three gubernatorial appointees among its five members. In 1937, the Board of Administration fired seven faculty and staff members at the North Dakota Agricultural College. This action was seen as an attempt by Governor Langer to assume greater control over funds and appointments at the North Dakota Agricultural College for political reasons. This action led to the removal of the college's accreditation because of "undue interference" in the college's administration. The subsequent public protests gave rise to a constitutional amendment making the State Board of Higher Education a constitutional body. *Id.* The State Board of Higher Education was then given "full authority" over the institutions under its control to ensure that politics did not play a role in the administration of those institutions.

However, the application of N.D.C.C. chapter 54-44.3 to the classified employees at issue here does not interfere to any

substantial degree with the State Board of Higher Education's control over and administration of the state's institutions of higher education. N.D.C.C. chapter 54-44.3 does not apply to the officers and teaching staffs at the schools under the Board of Higher Education's control. N.D.C.C. section 54-44.3-20(7). The term "officer" includes anyone occupying a position of authority in these institutions of higher education. See Webster's New World Dictionary 988 (Second Ed. 1974). Thus, N.D.C.C. chapter 54-44.3 does not include people in authority in the administration and management of the state's colleges and universities within its scope. It also does not apply to "members of the teaching staff" of those institutions, including faculty engaged in teaching and/or research.

Therefore, policymaking employees at the higher education institutions are not covered by that chapter. The statute applies only to other, nonofficer, nonfaculty employees at those institutions. Permitting such employees to appeal adverse employment actions to the State Personnel Board does not pose a significant danger to the State Board of Higher Education's power to administer the state's institutions of higher education free from any political interference.

The North Dakota Constitution does grant the State Board of Higher Education the authority to do "everything necessary and proper" to administer the state institutions of higher education. This authority certainly encompasses the power to dismiss and otherwise discipline employees at the state institutions of higher education. Indeed, the State Board of Higher Education was expressly given this power by the Legislature. See N.D.C.C. section 15-10-17(10). However, that authority cannot be extended so as to prohibit the State Personnel Board from reviewing such actions when nonofficer, nonfaculty, classified higher education employees are involved.

A contrary argument can be made. Specifically, an argument could be raised that under the state constitution, the Board's power over its employees should be exercisable without the review of any other state department or agency, including the State Personnel Board. On its face, this argument appears to be supported by the North Dakota Supreme Court's decision in *Posin v. State Board of Higher Education*, 86 N.W.2d. 31 (N.D. 1957).

In *Posin*, the North Dakota Supreme Court determined that the state constitution and statutes granted the State Board of Higher Education the authority to discharge four faculty members at the North Dakota Agricultural College. The professors had argued that the college constitution granted them tenure and that the Board's action in discharging them was contrary to the tenure provisions of the college constitution. The Supreme Court disagreed and held that the college constitution could not have the effect of limiting the "full authority" granted the Board by Article 54 of North Dakota's then-existing constitution and the relevant statutes. *Id.* at 35. The court concluded:

Under the explicit language of the statutes and the constitutional authority granted the Board there can be no question of its right to discharge the appellant>s! without assigning cause for their removal and without a hearing, if it

saw fit to do so. . . . The action of the Board was in accord with the power and authority vested in it by the State Constitution and the statutes under which it operates.

Id. at 36.

However, the Posin decision is not dispositive here for several reasons. First, the court's rationale there was based on both the State Board of Higher Education's constitutional powers and the Legislature's designation of the Board's specific powers and duties. The court did not clearly determine that the constitutional provision concerning the Board, by itself, gave the Board the power to remove the faculty members. The Posin decision seems to have been grounded at least in part on the then-existing legislation. However, the relevant legislation has changed since Posin was decided in 1957 (even though the specific statute concerning the State Board of Higher Education's power to remove employees, N.D.C.C. section 15-10-17, has not been altered in a manner significant to this issue). The appeals procedure at issue here was authorized by N.D.C.C. chapter 54-44.3, which was enacted in 1975, and particularly by N.D.C.C. section 54-44.3-12.2, which was added to the North Dakota Century Code in 1979. As discussed in the analysis of Question I, that chapter authorizes the State Personnel Board to hear appeals of adverse employment actions, including dismissals, from classified employees at institutions of higher education under the control of the State Board of Higher Education. Therefore, the legislation relating to procedures upon removal of those employees has changed significantly since the Posin decision was issued.

Moreover, the Posin decision concerned removal of faculty members. N.D.C.C. section 54-44.3-20(7) expressly exempts teaching staff at the universities and other institutions of higher education from the classified service and, thus, from the operation of the statewide appeal mechanism authorized by N.D.C.C. section 54-44.3-12.2.

Therefore, while the language of the Posin decision is quite broad, that case does not establish the principle that the North Dakota Constitution gives the State Board of Higher Education unlimited authority to remove its classified employees without permitting them access to the statewide appeal mechanism available to the state's other classified employees.

There are no other North Dakota opinions decisive of this issue. Without such authority and in view of the presumption of the constitutionality of N.D.C.C. chapter 54-44.3, the general language of N.D. Constitution Article VIII, section 6, by itself, is not an adequate basis for finding the statute's application to the classified employees at institutions under the State Board of Higher Education's control unconstitutional. The alleged unconstitutional application of N.D.C.C. chapter 54-44.3 to classified higher education employees is not demonstrated beyond a reasonable doubt.

Therefore, N.D.C.C. chapter 54-44.3, including the statewide appeals mechanism authorized by that chapter, may constitutionally be applied to classified employees at the institutions of higher education under the control of the State Board of Higher Education.

- EFFECT -

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

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