

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 92-20

Date issued: December 29, 1992

Requested by: Sarah Vogel, Commissioner of Agriculture

- QUESTION PRESENTED -

Whether independently elected constitutional state officers are subject to Executive Order 92-10.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that independently elected constitutional state officers are not subject to Executive Order 92-10.

- ANALYSIS -

Executive Order 92-10 creates the "Emergency Hiring Council."

This council is to consider various actions related to personnel matters for "agencies and commissions of the State of North Dakota" including hiring, firing and promoting.

The Order cites Article V, section 1 of the North Dakota Constitution and N.D.C.C. ' 54-07-01 as supporting authority. The issues presented are whether the Governor has inherent executive authority, derived from Article V, section 1 of the North Dakota Constitution, to control the actions of independently elected constitutional state officers through an executive order and whether N.D.C.C. ' 54-07-01(1) grants the Governor statutory control over those officers.

North Dakota's Constitution decentralizes governmental power by distributing it to three different branches. See City of Carrington v. Foster County, 166 N.W.2d 377 (N.D. 1969) (although our constitution contains no general distributing clause, there is an "implied general exclusion of each branch from the exercise of the functions of the others." Id. at 382.) The Legislature legislates (makes, amends or repeals

laws); the Executive Branch executes the laws (carries out the legislature's directives); and the Judicial Branch interprets and applies the laws when controversies arise. Each branch must exercise its power within its own sphere of authority. Id. This distribution of powers is called the "Separation of Powers Doctrine."

In North Dakota, executive power is further dispersed to the several constitutionally elected executive state officers.

The North Dakota Supreme Court has not addressed the ability of the Legislature to modify the executive authority of the Governor. However, in a case addressing the constitutionality of a legislative act authorizing the Governor to appoint an enforcement commissioner to exercise the common-law and statutory powers of the state's attorneys, the court affirmed the principle that the inherent duties of independently elected constitutional county officials can only be discharged by persons elected to those offices. See Ex Parte Corliss, 16 N.D. 470, 114 N.W. 962, 964 (1907). The court held the legislative act of transferring the state's attorneys' powers was unconstitutional, stating that the duties of an independently elected constitutional county officer could only be discharged by that constitutional officer and "none other." Id. at 963, 970.

The North Dakota Supreme Court has also addressed the ability of the Legislature to modify the duties of a constitutionally elected state officer. In State ex rel. Link v. Olson, 286 N.W.2d 262 (N.D. 1979), the court held a legislative enactment prescribing new duties to the Lieutenant Governor unconstitutional. Other states which have addressed the issue of a legislative modification or transfer of a constitutional officer's authority to another have also held the delegation or transfer to be improper. See Minnesota ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777 (Minn. 1986) (legislative act transferring treasurer's duties to statutory officer invalid); Allen v. Rampton, 463 P.2d 7 (Ut. 1969) (legislative act creating a board to oversee the treasurer's office invalid).

N.D.C.C. ' 54-07-01 provides that the Governor has powers and duties in addition to those "prescribed by the constitution" including the duty to "supervise the official conduct of all executive and ministerial officers." N.D.C.C. ' 54-07-01(1).

On its face, this statute is a broad grant of additional authority to the Governor.

Given its broadest meaning, the phrase "supervise the official conduct of all executive and ministerial officers" may be interpreted as applying to other elected state officials as well as to those entities which the Governor and his appointees head. On its face the statute gives the Governor authority in addition to the authority given him by the constitution. The statute imposes no express limits upon the authority granted to the Governor; thus the Governor could ultimately strip other independently elected constitutional officers of their authority by issuing various executive orders. Such a broad construction of N.D.C.C. ' 54-07-01 could not be upheld because it would ultimately vest all executive authority in the Governor. See Corliss, at 964 (discussing the limitation on the Legislature's ability to remove the powers of constitutional officers). Therefore a broad construction of this statute which gives the Governor authority over other independently elected constitutional officers must be rejected in favor of another, narrower, and constitutionally permissible, construction. Paluck v. Bd. of County Comm'rs, 307 N.W.2d 852, 856 (N.D. 1981).

Such a construction can be found if the phrase "executive and ministerial officers" is construed to mean appointed heads of statutorily-created agencies and statutory boards and commissions. In addition N.D.C.C. ' 54-07-01(1) can be construed to permit the Governor to use statutory mechanisms prescribed by the Legislature to assure that independently elected constitutional state officers perform their duties. 1990 Op. Att'y Gen. 6. Under either of these constructions, the Governor may exercise supervisory control over statutorily-created executive and ministerial officers and, where the Legislature has provided a mechanism which comports with the constitution, may exercise supervision over other elected officials using that mechanism.

The North Dakota Supreme Court has also not addressed the Constitutional authority of the Governor to issue executive orders. Other courts which have addressed the Governor's

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ability to exercise executive authority over independently elected officers have limited the reach of that power to the Governor's own appointees and have prohibited the Governor from creating new substantive boards. See State ex rel. Stephan v. Finney, 836 P.2d 1169 (Kan. 1992) (creation of a state agency is a legislative function); Brown v. Barkley, 628 S.W.2d 616 (Ky. 1982) (when Legislature has assigned power to a constitutional officer, Governor may not transfer that power elsewhere); Buettell v. Walker, 319 N.E.2d 502 (Ill. 1974) (governor's executive order formulating a new legal requirement held invalid); and West Virginia Bd. of Educ. v. Miller, 168 S.E.2d 820 (W.Va. 1969) (governor's order prohibiting employment of new personnel and transfer of personnel violated separation of powers doctrine and was invalid).

It is therefore my opinion that neither Article V, section 1 of the North Dakota Constitution nor section 54-07-01 of the North Dakota Century Code authorize the Governor to exercise executive authority over independently elected constitutional state officers through an executive order. It is my further opinion that independently elected constitutional state officers are not subject to Executive Order 92-10.

- EFFECT -

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

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