

LETTER OPINION
93-L-352

December 17, 1993

Honorable Craig Hagen
Commissioner of Labor
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0340

Dear Commissioner Hagen:

Thank you for your November 15, 1993, letter asking a series of questions concerning the conduct of the election for state employee members to the State Employees Compensation Commission under North Dakota Century Code (N.D.C.C.) ? 54-06-25.

N.D.C.C. ? 54-06-25(2) only specifies some of the requirements for the election of state employee members to the State Employees Compensation Commission. The remainder of the "conduct" of the election is left to the Commissioner of Labor. The statute is specific that four state employees are elected at large by a ballot of all state employees, three of those members are from the classified service and one of them from the non-classified service. The terms begin on July 1 of the year they are elected, of the initial state employees one of the classified and the non-classified service employees are elected for one year and the two other classified employees are elected for two years. Before the conclusion of each subsequent term an election must be held to replace the two members whose terms will end that year. Aside from those items specifically provided by the statute in question, the standards for the conduct of the election are unstated. This leaves the question of reasonableness of the integrity and validity of the balloting process and the election results to the reasoned judgment of the Commissioner of Labor, recognizing that the duties of a public officer may not be contracted away to others without authority.

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Burchard v. State, 227 N.W. 564, 565 (N.D. 1929).

Your first question is whether the first election of employee members to the SECC must be held by a certain date. N.D.C.C. ? 54-06-25(2) states that the state employee members' terms begin on July 1 of the year they are elected. However, the statute itself did not become effective until August 1, 1993, after its passage as 1993 N.D. Sess. Laws ch. 513. Obviously, the Legislature was aware that some time would be needed following the effective date of the act during which to conduct the election, and it would appear that the Legislature must have been aware that the terms of state employee members elected during the first election would be shorter than the two-year terms (or one year for certain candidates) provided for by the statute. Therefore, those employee candidates running for the one-year terms under the statute, upon their election will have a term of office beginning July 1, 1993, and ending June 30, 1994. However, their actual time of service will be less than the statutorily provided one year "term." Similarly shortened terms will apply to those elected to two-year terms. Succeeding elections, however, should be conducted and the results declared before July 1 of the year of the election.

Your second question asks whether the Department of Labor is violating any state law by asking agency administrators for assistance in carrying out the election of members to the SECC. The Commissioner of Labor has the responsibility for the integrity and validity of the election and that responsibility may not be delegated outside the office of the Commissioner. However, the Commissioner may request assistance for ministerial acts from agency administrators to facilitate the election process. Assistance in distributing material within agencies using inside mail facilities, as well as intraoffice distribution and/or collection of materials would not be prohibited.

Your third question is whether it is necessary to conduct another nominating process. Your office distributed an announcement in August of 1993

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concerning the impending election of members to the SECC. The announcement stated nominations should be received no later than September 15, 1993. After receiving these nominations, you distributed letters to nominees requesting biographical information, whether they were in the classified service, and whether they wished to run for the one or the two-year term if they were a classified employee. These nominees were requested to respond to your office by September 29, 1993. Thereafter, the ballots weredistributed and my previous opinion was issued on October 21, 1993, concerning the need for an at-large election. Thereafter, you informed the candidates for state employee positions on the SECC that the election was being put on hold.

Your process thus far has provided notice to all eligible candidates of the mechanism by which they could obtain positions on the ballot. The statute is silent on the nominating process and there is no specific requirement for repeating the nomination process if the balloting function is required to be repeated. Based on available information, it does not appear that prospective candidates were misinformed as to the election process or that repeating the nomination process would serve a useful purpose. Nor does it appear that a potential candidate's due process right would be violated if a new nominating process was not undertaken for the continuation of this election.

Your fourth question asks whether ballots must be individually printed and distributed to each state employee by the Department of Labor. Again, this process is not specifically required by the statute, so reasonable discretion is provided in your office. However, it must be remembered that persons elected to the Commission will be exercising responsibility of importance to state employees. Ballot preparation and control of tabulation is the responsibility of the one conducting the election who must be able to ensure that only those eligible to vote are voting. Furthermore, even though one may believe in the integrity of the electorate, the person in control and responsible for the election should have a reliable

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process whereby eligibility to vote as a state employee can be verified. Some form of identifiable ballot preparation, numbering, distribution, collection, receipt, and counting should be implemented so the integrity of the process can be shown. Bulk mailings through the U.S. Postal Service are not required.

Your fifth question is whether ballots must be secret. The statute in question does not state specifically that ballots must be secret. For elections other than those elections to an actual public office (N.D. Const. art. II, ? 1), when the Legislature has intended that a secret ballot be used it has so stated. See, for example, N.D.C.C. ?? 4-18.1-23, 10-15-33, 34-09-01, 34-12-07, and 54-44.3-05. Consequently, it is my opinion that the balloting does not need to be secret.

Your sixth question is whether the Department of Labor may hold a one-day election with designated polling locations. The statute in question does not require that the balloting process be by mail. If all state employees were given approximately equal access to convenient polling locations throughout the state, then there appears to be no due process violation on balloting at convenient polling locations on a well publicized and identified day.

Your seventh question asks whether it is legal for you in the nominating process to ask potential members whether they wish to serve a two-year or a one-year term on the SECC. Because the statute provides that the classified employee candidates will serve either a one-year or a two-year term after the first election of members to the SECC, it is advisable that you ask candidates which ballot they wish to be on for you to properly prepare a ballot in compliance with the candidacy of the individuals. From available information, this is the manner in which you have conducted the election thus far. For the non-classified employee, there is no question that for the first election for membership on the SECC, the non-classified employee serves only a one-year term.

Your eighth question asks whether state employees voting get just one vote or whether they get four votes, one for each position on the SECC occupied by an elected state employee. The at-large election procedure requires that all employees vote for all

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positions to be filled on the SECC by state employees. That is, there are four positions to be filled, and each state employee is entitled to vote for one person to fill each of those positions.

Your ninth question asks if you are allowed to make a distinction on the ballot between non-classified employees and the one and two-year terms for classified employees and whether state employees may vote for four candidates in one category or must separate their votes. As noted above, each state employee may vote for a candidate for each of the four positions to be filled. As a practical matter, there need be only three sections to the ballot, one for the non-classified employee, one for the one-year term for a classified employee, and one for the two two-year terms for classified employees. In the first two sections, for the one-year terms, state employees may vote for only one person in each section. In the last section, for two two-year terms for classified employees, the state employees may vote for two candidates. State employees may not vote all four votes within one section of the ballot.

Your tenth question asks what categories of state employees are eligible to vote, that is, full-time, permanent, part-time, and temporary. N.D.C.C. ? 54-06-25(2) requires that four state employees "elected at large by a ballot of all state employees" are members of the SECC. The Legislature has provided no definition or limitation as to who are "all state employees." Because the Legislature has not been specific and limited the category of state employees eligible to vote, there are no criteria for you to limit voter eligibility. It therefore appears that all persons employed by the government of the state of North Dakota, whether full-time, part-time, permanent, or temporary, or on probation, are eligible to vote in the election. Therefore, if a person is on the payroll of the government of the state of North Dakota as an employee, as opposed to an independent contractor, that employee is eligible to vote in the election for members to the SECC.

I trust this answers your questions sufficiently to allow the election to proceed.

Sincerely,

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