

LETTER OPINION
93-L-301

October 21, 1993

Mr. Bob Hanson
State Tax Commissioner
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Commissioner Hanson:

Thank you for your October 14, 1993, letter asking about the conduct of the election for State Employees Compensation Commission (SECC) members under N.D.C.C. ? 54-06-25.

The relevant portion of that statute provides:

. . . Four state employees, elected at large by a ballot of all state employees, are members of the commission, three of whom must be members of the classified service of the state and one of whom must be a member of the nonclassified service of the state. The commissioner of labor shall conduct the election for the employee representatives. . . . The state employee members' terms begin on July first of the year they are elected. . . . Of the initial state employees who are elected to the commission, one of the members of the classified service and the member of the nonclassified service must be elected for a one-year term and the other two elected state employees must be elected for a two-year term, and before the conclusion of each subsequent term, an election must be held to replace the two members whose terms will end in that year.

N.D.C.C. ? 54-06-25(2). Procedures established by the Commissioner of Labor for the State Employees Compensation Commission election, as contained in an

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October 6, 1993, letter to me, indicate a request for help from agencies in the election process and that ballots are to be returned no later than October 22, 1993. The letter with attached ballot and candidate biographies contains a request for distribution of the ballot to state employees within agencies and return of the ballot either directly to the Department of Labor or to the agency head and then a collective return of the ballots to the Department of Labor. The procedures set forth limit voting by nonclassified employees to voting only for the one position that will be held by a nonclassified employee, and the voting by classified employees to only the three positions that will be held by classified employees.

Your first question is whether the Commissioner of Labor is authorized to prohibit nonclassified employees from voting for classified candidates and classified employees from voting for nonclassified candidates. As noted, the statute provides that "[f]our state employees, elected at large by a ballot of all state employees, are members of the commission." To be elected "at large" means the public official is selected from a major election district rather than a minor subdivision within the larger unit. Black's Law Dictionary 518 (6th ed. 1990). Election at large means not limited to any particular place, district, person, matter, or question. State ex rel. Brown v. Welsh, 87 N.W. 529, 531 (Neb. 1901).

N.D.C.C. ? 54-06-25 does not state that only certain groups are eligible to vote for certain members of the SECC. In some cases, such as N.D.C.C. ? 54-52-03(4) and (5), concerning the State Retirement Board, the Legislature has determined that members of a board are to be elected by a vote of different groups. However, in the instant case, the statute requires the election to be at large by a ballot of all state employees. It is, therefore, my opinion that all state employees, whether classified or nonclassified, are entitled to vote for all state employee members to be elected to the SECC. The candidates themselves may be required by law to be drawn from different groups and serve

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different terms, but all state employees, at large, are entitled to vote for them. Similar circumstances exist for other elections. See N.D.C.C. ? 15-28-02.

Your second question is divided into three parts concerning transferring election responsibilities to other agency heads, ensuring candidates are state employees and either classified or nonclassified, and whether uncorrected ballot errors on the nonclassified ballot invalidate it. Your third question asks generally concerning the duty to ensure the integrity of the election. These two questions ask essentially what degree of integrity of election procedures is imposed on the Commissioner of Labor by N.D.C.C. ? 54-06-25.

The statute states only that the Commissioner of Labor shall conduct the election for the state employee members to the SECC. Other than the fact the four state employees on the SECC are to be elected at large, no procedures for the conduct of the election are specified.

A public officer has no power to contract with and employ another to perform the duties which have by law been placed upon public officers, in the absence of expressed legislative authority. Burchard v. State, 227 N.W. 564, 565 (N.D. 1929). This rule of law prohibits the transfer of responsibility for the conduct of statutory duties. However, it does not prohibit mere voluntary assistance in the performance of ministerial acts. Therefore, for example, use of inside office mail for the distribution of ballots for membership on the SECC would not be prohibited. The expense of using U.S. mail for ballot distribution and return does not appear to be required by the statute.

Because the candidates are required to be state employees, the Commissioner of Labor must make that determination before preparing and distributing the ballot. Because one employee elected must be nonclassified and the other three classified, the Commissioner of Labor must make the determination of which candidates are classified and which are unclassified before preparation and distribution of the ballot. Only the Commissioner of Labor is responsible for the accuracy of the ballot. If a classified employee appeared on the nonclassified ballot and won election, the election results would be

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invalid because the elected employee would not be eligible for membership pursuant to the statute. Ballot accuracy is crucial to any election to give candidates and voters equal opportunities for participation.

Because N.D.C.C. ? 54-06-25 does not describe the specific election process to be followed by the Commissioner of Labor, reasonableness is the only guideline. Therefore, what constitutes appropriate integrity of the voting process is a question of fact for the Commissioner of Labor to determine. The interests of state employees, the Legislature, and the Governor in a truly representative membership on the SECC should guide the Commissioner of Labor in establishing proper election integrity. Considerations could include the fact that N.D.C.C. ? 54-06-25 does not require a secret ballot such as others do. See N.D.C.C. ? 54-44.3-05. However, to provide a reasonable election process that produces accurate and reliable results, some system of ballot accuracy and control of preparation, distribution, return, and counting of the ballots would seem advisable.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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cc: Craig Hagen, Commissioner of Labor