

LETTER OPINION
95-L-92

April 17, 1995

Mr. Michael F. Daley
P.O. Box 5788
Grand Forks, ND 58206-5788

Dear Mr. Daley:

Thank you for your March 10, 1995, letter regarding the number of terms a person may serve on the state Board of Accountancy.

You first ask whether N.D.C.C. ? 43-02.2-03(1) prohibits the reappointment of board members to either a consecutive or separate term after they have served two consecutive complete terms, or if it simply prohibits the reappointment of board members to a third consecutive complete term. N.D.C.C. ? 43-02.2-03(1) provides in part:

No person who has served two consecutive complete terms [on the board] is eligible for reappointment, but appointment to fill an unexpired term may not be considered a complete term for this purpose.

The State Legislature added this restriction in 1993. See 1993 N.D. Sess. Laws ch. 417, ? 4.

The answer to this question depends on the meaning of "reappointment." Because this term is not defined in the statute, it must be given its plain and ordinary meaning. N.D.C.C. ? 1-02-02. The prefix "re" is a Latin word meaning "again," and "appoint" means "[t]o select or designate to fill an office or position." The American Heritage Dictionary 121, 1029 (2d coll. ed. 1991); see also Black v. DuQuesne Borough School Dist., 86 A. 703, 706 (Pa. 1913) (reappointment implies appointment in first instance). Thus, the term "reappointment" in N.D.C.C. ? 43-02.2-03(1) means to select a person again as a member of the board.

An argument may be made that N.D.C.C. ? 43-02.2-03(1) prohibits the reappointment of board members to either a consecutive or separate term after they have served two consecutive complete terms. Although nothing in N.D.C.C. ? 43-02.2-03 restricts its application to reappointment to a third consecutive complete term, the statute also does not limit the number of terms a board member may serve. It appears that the Legislature was concerned with limiting the number of consecutive terms board members may serve, rather than the total number of terms they may serve. Had the Legislature been concerned with the latter, it simply could have limited the total number of

terms a board member may serve. It did not do so. Furthermore, it would seem inconsistent to allow board members to be appointed to an unlimited number of separate terms, yet prohibit any reappointment to a separate term after they served two consecutive terms. Therefore, it is my opinion that N.D.C.C. ? 43-02.2-03(1) only prohibits the appointment of a board member to a third consecutive complete term.

You also ask whether past or present board members who served two consecutive complete terms before the effective date of N.D.C.C. ? 43-02.2-03(1) are immediately ineligible for reappointment to a third consecutive term. Previous board members are not expressly included in the statute, and "[s]tatutes are generally not retroactive unless expressly declared so by the legislature." Gabriel v. Minnesota Mutual Fire and Casualty Co., 506 N.W.2d 73 (N.D. 1993), citing N.D.C.C. ? 1-02-10. However, a "statute is not retroactive because it draws upon antecedent facts for its operation or because part of the requisites of its action is drawn from time antecedent from its passing." Public School Dist. No. 35 v. Cass County, 123 N.W.2d 37, 40 (N.D. 1963).

The application of N.D.C.C. ? 43-02.2-03 to past or present board members is analogous to statutes enhancing a criminal defendant's sentence based on facts that may have occurred before the effective date of the statute. The North Dakota Supreme Court has approved such a statute despite objections that its application is retroactive. State v. Haverluk, 432 N.W.2d 871 (N.D. 1990).

Like the statutes in Haverluk and Public School Dist. No. 35, the operation of N.D.C.C. ? 43-02.2-03(1) to prohibit reappointment to a third consecutive complete term is "dependent upon the existence of the required antecedent fact and is prospective only." Public School Dist. No. 35, 123 N.W.2d at 40. Therefore, it is my opinion that the statute applies equally to board members who served two consecutive complete terms before or after the effective date of the statute.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jcf/vkk