

N.D.A.G. Letter to Treadway (Nov. 6, 1991)

November 6, 1991

Mr. Doug Treadway
Chancellor
North Dakota University System
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0230

Dear Chancellor Treadway:

Thank you for your October 24, 1991, letter in which you ask whether the Budget Section of the Legislative Council has the power to authorize the Board of Higher Education to issue bonds for the purpose of constructing an Energy and Environmental Research Center (the "Center") to be located at the University of North Dakota. You state that no state funds will be pledged or used to pay the debt service on these bonds, but that they will be paid solely with revenues to be received in connection with the use of the Center and that the bonds will be guaranteed by the UND Foundation.

The motion adopted by the Budget Section at its October 8, 1991, meeting authorizes

THE BOARD OF HIGHER EDUCATION TO ISSUE BONDS IN THE AMOUNT OF \$2,500,000 FOR THE PURPOSE OF PROVIDING THE BOARD'S COST SHARE OF THE CONSTRUCTION PROJECT LOCATED ON THE CAMPUS OF THE UNIVERSITY OF NORTH DAKOTA, SPECIFICALLY THE ENERGY AND ENVIRONMENTAL RESEARCH CENTER, THAT THE CENTER'S REVENUES ARE APPROPRIATED FOR THE PAYMENT OF THE BONDS, THAT ANY CENTER SHORTFALLS ARE TO BE PAID BY THE UNIVERSITY OF NORTH DAKOTA FOUNDATION, AND THAT THE BOND ISSUE IS NOT AN OBLIGATION OF THE STATE OF NORTH DAKOTA.

N.D.C.C. S 15-10-12.1, pursuant to which the Budget Section authorized the Board of Higher Education to locate the Center at the University of North Dakota, does not grant the Budget Section the power to authorize the issuance of bonds to finance the construction of buildings or other improvements. Furthermore, the Budget Section has no authority to authorize the issuance of bonds to finance the construction of such buildings and improvements even if the bonds are to be paid with revenues received from the use of the buildings or improvements and are not obligations of the state or of the Board.

The Legislative Assembly, through N.D.C.C. ch. 15-55, has provided a statutory scheme pursuant to which the Board of Higher Education may issue bonds for the construction "of such revenue-producing buildings or other revenue producing campus improvements as,

from time to time, may be authorized by the Legislative Assembly of the State of North Dakota..." N.D.C.C. § 15-55-01.

It appears from your letter and the motion adopted by the Budget Section that the issuance of bonds for the construction of the Center is governed by N.D.C.C. ch. 15-55 and, therefore, it is my opinion that the Board of Higher Education may not issue such bonds unless the Board is authorized to do so by the Legislative Assembly in accordance with the provisions of that chapter.

In addition to the lack of statutory authority to approve the Board of Higher Education's issuance of bonds, the Budget Section's action is inappropriate because it violates the separation of powers doctrine. In recent years the State has been confronted by many difficult issues when the Legislature has not been in session and has been unable to address the issues as a legislative body. Understandably, the Legislature, through the Budget Section, has attempted to fill that void. The Budget Section's attempt to respond to this particular issue is a case in point. In the past I have expressed concern with the Legislature's reliance upon the Budget Section to act when the Legislature itself cannot.

My concerns have arisen because of the applicability of the separation of powers doctrine to Legislative actions. In this regard, Metropolitan Washington Airport Authority v. Citizens for the Abatement of Aircraft Noise, U.S. ____, 111 S.Ct. 2298 (1991), is instructive.

Metropolitan involved a Congressionally created Board of Review (Board) whose membership was "limited to federal officials, specifically members of congressional committees..." Id. at 13. The Metropolitan Court expressed the issue as "whether the Legislature has followed a constitutionally acceptable procedure in delegating decision-making authority." Id. at 18. That procedure places two constraints on the Legislature:

1. When exercising legislative power the Legislature "must follow the 'single, finely wrought and exhaustively considered, procedures' specified" in the Constitution; and
2. The legislative body "may not 'invest itself or its Members with either executive power or judicial power.'"

Id. at 20 (citations omitted). These two constraints are applicable to actions of the North Dakota Legislature as well. See State ex rel Wattam v. Poindexter, 183 N.W. 852 (ND 1921) (legislative action effective only if both houses of Legislature act independently and concurrently); City of Carrington v. Foster County, 166 N.W.2d 377 (ND 1969) (although constitution contains no general distributing clause, there is an "implied exclusion of each branch from the exercise of the functions of the others").

The North Dakota Legislature, like Congress, is given broad authority to enact legislation. N.D. Const. art. IV, § 12. To properly exercise that authority however, the constitutional procedures must be followed. This requires the presence of a majority of the members of

each house. Wattam. Furthermore, N.D. Const. art. V, § 9, like the federal Constitution provides that legislative acts must be presented to the Chief Executive Officer.

In addition to complying with procedural requirements, the Legislature may only operate within its sphere of authority. In Metropolitan the Board was granted veto power over the actions of a state-created airport authority. The Court reviewed the membership and membership selection process of the Board and concluded that the Board was merely an agent of the Congress. The process of determining membership and appointment of members to the Board in Metropolitan is similar to the process for determining and appointing members to the Budget Section. I conclude that a court would find that the Budget Section is merely an agent of the Legislature, not a body to which the Legislature has properly delegated decision making authority.

The Court next reviewed the authority of the Board. The Court held that the Board's veto power was an executive power. As an agent of Congress, the Board could not constitutionally exercise that executive power. Thus Congress had violated the separation of powers doctrine because it established a mechanism which allowed it to move out of its sphere of authority and exercise powers which were executive in nature.

The authority exercised by the Budget Section is comparable to that given to the Board. It is my opinion that much of that authority is executive in nature. It is therefore my opinion that when the Budget Section, which is an agent of the Legislature, acts in an executive capacity, as it did by approving the issuance of bonds for UND's project, it violates the Separation of Powers Doctrine.

I am aware that legislation has been introduced to authorize the sale of bonds for this project. Because of my concern with the constitutionality of executive actions taken by the Budget Section, I advise that in the future approval is sought from the entire Legislature for this project. Furthermore, legislation authorizing issuance of bonds should not include a requirement for Budget Section approval or allow a Budget Section authorization or veto of the issuance. The Legislature must act as a legislative body and observe the constitutional procedures required for a valid legislative act.

I trust that this discussion is responsive to your question. If not, or if you would like to discuss this matter in further detail, please get in touch with me.

Sincerely,

Nicholas J. Spaeth

jfl

cc: Budget Section Legislative Leadership