

N.D.A.G. Letter to Nagel (April 7, 1992)

April 7, 1992

Edwin J. Nagel, Jr., CPA
Director, Division of State Audit
Office of the State Auditor
State Capitol
600 E Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Nagel:

Thank you for your May 21, 1991, letter requesting my opinion on whether the state's institutions of higher education are required to follow the Fiscal and Administrative Policies of the Office of Management and Budget ("OMB").

The State Board of Higher Education (the "Board"), which was created by the adoption of N.D. Const. art. VIII, § 6 to control and administer the state's institutions of higher education, is a part of the executive branch of government. Nord v. Guy, 141 N.W.2d 395, 402 (N.D. 1966). N.D. Const. art. VIII, § 6 provides in part as follows:

1. A board of higher education, to be officially known as the state board of higher education, is hereby created for the control and administration of the following state educational institutions . . .

. . . .
5. The legislature shall provide adequate funds for the proper carrying out of the functions and duties of the state board of higher education.
6. . . .
 - b. The said state board of higher education shall have full authority over the institutions under its control. . . . In furtherance of its powers, the state board of higher education shall have the power to delegate to its employees details of the administration of the institutions under its control. The said state board of higher education shall have full authority to organize or reorganize within constitutional and statutory limitations, the work of each institution under its control, and do each and everything necessary and proper for the efficient and economic administration of said state educational institutions.

- c. Said board shall prescribe for all of said institutions standard systems of accounts and records and shall biennially, and within six (6) months immediately preceding the regular session of the legislature, make a report to the governor, covering in detail the operations of the educational institutions under its control.
- d. It shall be the duty of the heads of the several state institutions hereinbefore mentioned, to submit the budget requests for the biennial appropriations for said institutions to said state board of higher education; and said state board of higher education shall consider said budgets and shall revise the same as in its judgment shall be for the best interests of the educational system of the state; and thereafter the state board of higher education shall prepare and present to the state budget board and to the legislature a single unified budget covering the needs of all the institutions under its control. . . .
- e. The said state board of higher education shall have the control of the expenditure of the funds belonging to, and allocated to such institutions and also those appropriated by the legislature, for the institutions of higher education in this state. . . .

. . . .

- 8. This constitutional provision shall be self-executing and shall become effective without the necessity of legislative action.

The general statement of the authority of the Board set out in N.D.C.C. § 15-10-17 is virtually identical to the constitutional authority of the Board:

The state board of higher education shall have all the powers and perform all the duties necessary to the control and management of the institutions described in this chapter. . . .

N.D.C.C. § 15-10-17.

N.D.C.C. ch. 54-44.4, which deals with purchasing practices, includes several references to the separate authority of the Board:

The office of management and budget shall purchase items as requested by agencies and institutions under the jurisdiction of the state board of higher education The agencies and institutions under the jurisdiction of the

state board of higher education shall, together with the office of management and budget, make such joint purchases of like items of high common usage as determined jointly by the agencies and institutions under the jurisdiction of the state board of higher education and the office of management and budget as will result in less cost to the state.

N.D.C.C. § 54-44.4-02.

All purchases made by the office of management and budget, institutions of higher education, or any state agency or institution to which authority to purchase has been delegated, must be made in accordance with written policies of the office of management and budget and the agencies and institutions under the jurisdiction of the state board of higher education. The office of management and budget and institutions of higher education shall develop similar specifications for purchases of items of high common usage. . . . The office of management and budget and the institutions of higher education shall implement such procedures as are necessary for the inspection, testing, and acceptance of supplies and equipment to determine that goods received are in conformity with contract specifications.

N.D.C.C. § 54-44.4-06.

The office of management and budget, the institutions of higher education, and any other state agency or institution that has authority to purchase products, are encouraged, whenever possible, when purchasing news printing services, to specify the use of soybean-based ink. By July 1, 1990, at least fifteen percent of the garbage can liners purchased by the office of management and budget, the institutions of higher education, or a state agency or institution to which authority to purchase has been delegated must be starch based.

N.D.C.C. § 54-44.4-07.

OMB, however, does have certain oversight responsibilities with respect to fiscal management which are applicable to the Board. For example, N.D.C.C. § 54-44-01 provides:

The office of management and budget is to be a central authority, vested with the control and supervision of the fiscal administration of the executive branch of the government, and is directly responsible to the governor.

In addition, N.D.C.C. § 54-44-02 provides:

There is an office of management and budget vested with the duties, powers, and responsibilities necessary to supervise and administer the fiscal transactions of the various state departments, agencies, boards, and commissions.

The Office of the Budget was established in the Office of Management and Budget for the purpose of promoting economy and efficiency in the fiscal management of state government. N.D.C.C. § 54-44.1-02. Examples of OMB's oversight authority with respect to the Board can be found in various statutes setting out the responsibilities and duties of the Office of the Budget. The Legislature directed the Office of the Budget to set policies necessary for adequate accounting, to "direct the preparation of standard forms or vouchers upon which claims against any public fund must be submitted", and to "disapprove all vouchers or expenditures it determines to be in error, unlawful or in excess of the limits of legislative appropriation." N.D.C.C. § 54-14-07. The director of the budget, who is the director of OMB, has the authority to "exercise continual control over the execution of the budget affecting the departments and agencies of state government, with the exception of the legislative and judicial branches." N.D.C.C. § 54-44.1-12. The manner in which that control is to be exercised is described in N.D.C.C. § 54-44.1-12.

The statutory responsibilities and duties of the director of OMB must be read in conjunction with the constitutional and statutory authority of the Board to manage and control the state's institutions of higher education. In Posin v. State Board of Higher Education, 86 N.W.2d 31 (N.D. 1957), a case involving the dismissal of certain faculty members by the Board, the North Dakota Supreme Court stated:

[N.D. Const. art. VIII, § 6], the pertinent parts of which have been quoted, and the statutes enacted by the Legislature with reference to the duties and powers of the Board, indicate that the board has full authority over the institutions under its control.

Posin, at 35.

Previously I concluded that the Legislature could enact statutory requirements authorizing another state agency to promulgate rules which controlled the action of the Board if the "core" functions of the Board were not substantially impaired or eliminated. 1991 Op. Att'y Gen. 66; See also 1986 Op. Att'y Gen. 16. Therefore, it is my opinion that the Board must follow OMB's fiscal and administrative policies which do not substantially impair or eliminate the Board's core functions. Consideration must also be given to those constitutional and statutory provisions which specifically authorize the Board to establish its own fiscal and administrative policies. Thus, in addition to the constitutional restraints, OMB policies which purport to direct or control the manner in which public monies are to be administered need not be followed by the Board when there is an express statutory exception.

OMB's Fiscal and Administrative Policies are divided into five parts. The first series of policies is entitled "Payroll and Miscellaneous Fiscal Policies." Relevant to these policies, N.D.C.C. § 15-10-16 provides that the Board has control of the expenditure of funds belonging and allocated to the institutions under its control and of funds appropriated by the legislature for such institutions. Further, each month an abstract of expenditures and payroll showing the name and amount due each claimant and the fund from which the payment is to be made must be prepared. N.D.C.C. § 15-10-25. The abstract must certify that all expenditures were incurred in accordance with law. The monthly abstract must be submitted to OMB, which must prepare a warrant-check for the total amount claimed in the abstract against each fund. Mileage and travel expense payments for employees of institutions under the Board's control are handled in the same manner. Further, severance pay limitations set out in N.D.C.C. § 54-14-04.3 do not apply to an early retirement program established by the Board pursuant to its authority to establish such a program. N.D.C.C. § 15-10-17(16). These statutes limit OMB's authority to require the Board to submit or report information under the Payroll and Miscellaneous Fiscal Policies to the information provided by the Board's designated officers pursuant to N.D.C.C. § 15-10-25.

The second series of OMB's policies is entitled "Expenditure and Revenue Policies." Many of the policies in this section simply restate statutory requirements and set out procedures which OMB has adopted to implement such requirements. For the most part, the reporting requirements included in these policies can be satisfied through OMB's receipt of the statutory reports and abstracts described above which the Board is required to prepare and submit to OMB. However, N.D.C.C. § 54-44-04.9 establishes a reporting requirement which is separate from the Board's other statutory duties. This section provides in part that the person in charge of any department, agency, board, commission, college, university, or institution must report all revenues and expenditures through the use of the statewide accounting system and that any department, agency, board, commission, college, university, or institution which is not presently using the statewide payroll system must provide the director of OMB with current salary information for all permanent and part-time employees in the format prescribed by the director, when required to do so. To the extent that this statutory requirement is applicable to the Board, it does not appear to be unreasonable nor does it substantially impair or eliminate the Board's core functions. Therefore, it is my opinion that a policy implementing N.D.C.C. § 54-44-04.9 could be applied to the Board. It should be noted that the Board is currently complying with N.D.C.C. § 54-44-04.9.

The third series of OMB's policies is entitled "Purchasing." As set out earlier, the Board has the power to determine purchasing policy for the institutions under its control in coordination with OMB. N.D.C.C. § 15-10-17(15). Consistent with that discussion, OMB's purchasing policies are not binding on the Board, however, the Board may coordinate its purchasing policies with those of OMB and may utilize the services provided by OMB under its policies if both the Board and OMB agree.

The fourth series of OMB's policies is entitled "Printing." These policies, to the extent they do not simply provide guidelines for the form and content of state publications, relate to central duplicating services which have been established and are operated by OMB pursuant to N.D.C.C. § 54-44-04(21). These services are available to the Board as well as to other state entities, however, there is no requirement that the Board make use of these services. Therefore, these policies would only be applicable to the Board to the extent that the Board requests the services described in the policies.

OMB's final series of policies is entitled "Travel." Payments for mileage and travel expenses for employees of institutions of higher learning must be made upon the submission of vouchers or abstracts approved by the Board or an officer designated by the Board for each institution under its control. N.D.C.C. § 15-10-25.

The payments may not exceed the amounts allowed for other state officials and employees. Further, the Board's prior written approval is required for out-of-state travel for presidents of institutions under the Board's control. The employee's supervisor and the president of the institution must also approve out-of-state travel for other employees of the institutions. These written approvals must be attached to the itemized travel vouchers submitted to OMB for payment. Because these functions are specifically provided for, the Board may establish its own policies to implement its statutory authority with respect to travel and, to the extent that OMB's policies do not merely restate state law applicable to all state employees, the Board need not comply with these policies.

I hope this discussion has been helpful to you. Please contact me again if you have additional questions or if you would like a further clarification of the matters discussed in this letter.

Sincerely,

Nicholas J. Spaeth

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