

Date Issued: March 26, 1981 (AGO 81-32)

Requested by: Senator Rolland W. Redlin

- QUESTIONS PRESENTED -

I.

Whether officials who are designated as ex officio members by statute are to be included as part of the total number of members of those certain boards and commissions under section 54-07-01.2 of the North Dakota Century Code of which a new governor is entitled to appoint a simple majority.

II.

Whether the Senate is required by section 54-07-01.2, N.D.C.C., to confirm the ex officio members of certain boards and commissions.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that officials who are designated as ex officio members by statute are to be included as part of the total number of members of those certain boards and commissions under section 54-07-01.2, N.D.C.C., of which a new governor is entitled to appoint a simple majority.

II.

It is my further opinion that the Senate is not required to confirm the ex officio members of certain boards and commissions set forth in section 54-07-01.2, N.D.C.C.

- ANALYSIS -

I.

Section 54-07-01.2, N.D.C.C., grants a new governor broad powers in appointing a simple majority of the membership of various boards and commissions set forth in that section. The membership of these various boards and commissions is determined by the appropriate section of law establishing the board or commission. Several of these boards and commissions have state officials designated as members by the statute creating the board or commission. These officials are members of the board or commission regardless of whether or not they are ex officio members.

An ex officio member of a board is by definition a member of a board. "Ex officio" simply means that the member serves by virtue of an office held. See, State ex rel. Hennepin County v. Brandt, 31 N.W.2d. 5, (Minn. 1948), and Black's Law Dictionary. An example is the State Historical Board. Under section 55-01-01, N.D.C.C., the board consists of sixteen persons. Nine persons are appointed by the Governor with the consent of the Senate. The other seven members are designated in the statute including the Secretary of State, the State Engineer, the State Highway Commissioner, the State Forester, the State Game and Fish Commissioner, the Director of the State Library Commission, and the State Treasurer. State officials or any other persons specifically designated by statute to serve on one of these boards and commissions, whether or not they serve as ex officio members, are in fact members of these boards and commissions.

Section 54-07-01.2(1), N.D.C.C., provides that all members of the boards and commissions listed are considered to have resigned effective the first day of January of the first year of each four-year term of the Governor. Subsection 5 indicates that this provision does not apply to those "constitutional officers" who serve on these boards and commissions. It also does not apply to other state officials or persons who are designated by law as members of these boards and commissions. Their membership on these boards and commissions is set by statute and not by appointment. In essence, the Legislature through statute has already appointed these persons as members of these boards and commissions.

Subsection 2 grants the Governor the right to appoint a simple majority of any board or commission. In the case of the State Historical Board, for example, there are sixteen members. The Governor, then, may appoint a simple majority which is one over half or nine members. If we were not to count the seven state officials designated by the Legislature and hold that the Governor could only appoint a simple majority of the nine remaining members of the board, that would defeat the clear intent of the statute which gives the Governor the right to appoint a simple majority of the entire board.

Section 54-07-01.2(2), N.D.C.C., also provides that to ensure continuity the Governor shall reappoint for the completion of their original terms no fewer than one less than the simple majority of former members of each board or commission. In the case of the State Historical Board, the simple majority to be appointed by the Governor consists of nine members. Since the other seven members of the board have been designated by statute or in essence appointed by the Legislature, all of these sixteen members of the board are accounted for. Therefore, any old member of the State Historical Board, for example, appointed by the former Governor need not be reappointed since the continuity of one less than a simple majority is preserved through the positions designated by statute.

## II.

In the various sections of law creating the boards and commissions set forth in section 54-07-01.2(1), N.D.C.C., provisions are made for the confirmation by the Senate of those persons appointed by the Governor to those several boards and commissions. The Century Code contains no requirement that any person designated by statute as a

member of a board or commission, whether ex officio or not, must be confirmed by the Senate. To do so would be a useless act since the Senate must comply with provisions of law, some of which already designate members of various boards and commissions. Therefore, statutory members of boards and commissions, whether ex officio or not, need not be submitted to the Senate for confirmation.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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