

Date Issued: April 13, 1981 (AGO 81-39)

Requested by: Lloyd H. Nygaard
Assistant Commissioner and Executive Secretary
State Board of Higher Education

- QUESTION PRESENTED -

Whether section 15-10-17(1) of the North Dakota Century Code, allowing for executive sessions of the Board of Higher Education for appointment and removal of certain personnel, applies to appointment and removal of the Commissioner and other staff members of the Board of Higher Education.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that section 15-10-17(1), N.D.C.C., does not apply to the Commissioner of Higher Education and noninstitutional staff members of the Board of Higher Education.

- ANALYSIS -

Section 15-10-17(1), N.D.C.C., provides as follows:

15-10-17. SPECIFIC POWERS AND DUTIES OF BOARD OF HIGHER EDUCATION. 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, including the following:

1. To appoint and remove the president or other faculty head, and the professors, instructors, teachers, officers, and other employees of the several institutions under its control, and to fix their salaries within the limits of legislative appropriations therefore, and to fix the terms of office and to prescribe the duties thereof, provided that the consideration of the appointment or removal of any such personnel shall be in executive session if the board chooses unless the person or persons involved request that the meeting shall be open to other persons or the public. (Emphasis supplied).

* * *

The "any such personnel" language relates to the personnel stated in the first part of the subsection, i.e., the president, professors, instructors, teachers, officers or other employees of the several institutions. The Commissioner of Higher Education is appointed in section 15-10-10, N.D.C.C., as well as pursuant to North Dakota Constitution, Article VIII, Section 6. section 15-10-10, N.D.C.C., provides as follows:

15-10-10. STATE COMMISSIONER OF HIGHER EDUCATION - QUALIFICATION - APPOINTMENT - TERM - REMOVAL. The state board of higher education, as soon as practicable, shall appoint, for a term of not to exceed three years, a state commissioner of higher education whose principal office shall be at the state capitol. The commissioner of higher education shall be responsible to the board and shall be removable by the board for cause. He shall be a graduate of some reputable college or university who by training and experience is familiar with the problems peculiar to higher education. He shall be the chief executive officer of the board and shall perform such duties as shall be prescribed by it.

Section 15-10-17(1), N.D.C.C., allows executive sessions only for the categories of employees listed. There is no statutory authority for an executive session for the appointment or removal of the Commissioner. Such a proceeding would thus be subject to the Open Meetings Law, Article XI, Section 5 of the North Dakota Constitution and Section 44-04-19, N.D.C.C.

All of the reported North Dakota cases concerning section 15-10-17, N.D.C.C., have dealt with faculty members. Zimmerman v. Minot State College, 198 N.W.2d. 108 (N.D. 1972); Posin v. State Board of Higher Education, 86 N.W.2d. 31 (N.D. 1957); Gottschalck v. Shepperd, 65 N.D. 544, 260 N.W. 573 (N.D. 1935).

There is no indication in these cases that the court considers this section to be applicable to the Commissioner or noninstitutional personnel.

- 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 question presented is decided by the courts.

ROBERT O. WEFALD
Attorney General

Prepared by: Rick D. Johnson
Assistant Attorney General