

LETTER OPINION
93-L-232

August 19, 1993

Mr. Milton W. Kane
Commissioner
Department of Veterans Affairs
P.O. Box 9003
Fargo, ND 58106-9003

Dear Mr. Kane:

Thank you for your letter regarding the jurisdiction of the Department of Veterans Affairs under North Dakota Century Code (N.D.C.C.) ? 37-01-25.1, with respect to faculty members of institutions under the control and administration of the Board of Higher Education.

N.D.C.C. ? 37-01-25.1 in general provides that public employees who have been called to military service are entitled to reinstatement to their former or a like position upon discharge from active service. The Department of Veterans Affairs is given the authority under this section to "order" the employing unit to comply with this statutory provision. The issue raised is whether the Department of Veterans Affairs' authority extends over employees under the control and administration of the Board of Higher Education.

Article VIII, Section 6 of the North Dakota Constitution establishes an independent "part of the executive branch of government" known as the Board of Higher Education. Nord v. Guy, 141 N.W.2d 395, 402 (N.D. 1966). The Board is vested with the "control and administration" of the various state institutions of higher education. The North Dakota Supreme Court has concluded that this power is essentially administrative in nature and not legislative. Id.

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Thus, the Board of Higher Education has no authority to pass on the wisdom or expediency of the policy established in N.D.C.C. ? 37-01-25.1. The issue is solely whether Article VIII, Section 6 of the North Dakota Constitution limits who may be called on to implement such policies.

In addressing the issue of the Legislature's control over the Board of Higher Education, this office previously said:

I think it is appropriate to analyze the issue of legislative control over the Board and the colleges and universities, in terms of the Board's 'inherent functions' or 'core functions' that are derived from the constitution. See e.g., Ex parte Corliss, 114 N.W. 962, 965 (N.D. 1907), and Mattson v. Kiedrowski, 391 N.W.2d (Minn. 1986), (concluding that it is unconstitutional for the Legislature to remove and transfer inherent or core functions of officers named in the constitution to appointed officials). Similarly, core functions of the Board derived from the constitution may not be infringed upon by the Legislature. The North Dakota Constitution gives the Board sole control over its core functions. Unfortunately, it is very difficult to determine what constitutes the core functions of the Board.

I interpret the Board's core functions to include control over its faculty and officers, such as in hiring and promoting. . . .

Letter from Attorney General Nicholas J. Spaeth to Labor Commissioner Craig Hagen (February 12, 1992).

Although decisions regarding the hiring and promoting of faculty and officers may be core functions, I do not believe this extends to decisions regarding whether institutions under the Board's control have complied with the dictates of a specific public employment veterans benefit statute like N.D.C.C. ? 37-01-25.1. The Department of Veterans Affairs's enforcement of the policies outlined in N.D.C.C. ? 37-

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01-25.1 does not unduly interfere with the Board of Higher Education's "control and administration" over its faculty and officers.

N.D.C.C. ? 37-01-25.1 provides no exceptions for employees under the control and administration of the Board of Higher Education, but is designed to assist veterans with any public employment. In this regard, it must be remembered that every legislative enactment is cloaked with a presumption of validity. See Menz v. Coyle, 117 N.W.2d 290, 295 (N.D. 1962).

Therefore, it is my opinion that the Department of Veterans Affairs may properly exercise jurisdiction under N.D.C.C. ? 37-01-25.1 with regard to faculty members of institutions

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otherwise under the control and supervision of the
Board of Higher Education.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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