

LETTER OPINION
2007-L-16

The Honorable Tim Mathern
State Senator
429 16th Avenue South
Fargo, ND 58103-4329

Dear Senator Mathern:

Thank you for your letter requesting my opinion on the authority of the Governor to remove members of the Workforce Safety and Insurance board of directors. For the reasons indicated below, it is my opinion that the Governor does not have the authority to remove members of the Workforce Safety and Insurance board of directors.

ANALYSIS

State law provides for the appointment and powers of the board of directors for the Workforce Safety and Insurance (“WSI”) organization.¹ The WSI board consists of 11 members appointed by the Governor to four-year terms.² Six members represent employers; three members represent employees; one member must be a member of the North Dakota Medical Association; and one member is a member at large.³ The employer board representatives are appointed from a list of three candidates submitted by a coordinating committee appointed by the Governor from a group of outside organizations.⁴ The organized labor employee representative is appointed from a list of three candidates submitted by a statewide labor organization.⁵ The remaining two labor employee representatives and member at large are selected by the Governor.⁶ The board member representing the North Dakota Medical Association is appointed from a list of three candidates submitted by the Medical Association.⁷

¹ See generally N.D.C.C. ch. 65-02.

² N.D.C.C. § 65-02-03.1.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id.

While the various members of the WSI board of directors are appointed by the Governor, the statute is silent on removal of any of the board members.⁸

The Governor has statutory authority to remove various public officials for “misconduct, malfeasance, crime in office, neglect of duty in office, or of habitual drunkenness or gross incompetency.”⁹ While most of the officers subject to gubernatorial removal are officials of political subdivisions, the statute further provides for removal of “any custodian of public moneys, except the state treasurer.”¹⁰ However, in the case of WSI, the State Treasurer, and not the board of directors, is the custodian of the WSI fund.¹¹ Consequently, the Governor lacks authority under N.D.C.C. ch. 44-11 to remove members of the WSI board on any of the enumerated grounds because board members are not specifically mentioned in the removal statutes and are not custodians of public moneys.

Even though the Governor lacks the statutory authority to remove WSI board members, most courts have recognized that the power to appoint a public official includes the power to remove that official.¹² However, the courts have also articulated several exceptions to

⁸ An early version of the statute providing for appointment of workers’ compensation commissioners by the Governor did contain a removal for cause provision. See State ex rel. Wenzel v. Langer, 256 N.W. 194 (N.D. 1934).

⁹ N.D.C.C. § 44-11-01.

¹⁰ Id.

¹¹ N.D.C.C. § 65-04-30.

¹² See, e.g., Richman v. Straley, 48 F.3d 1139, 1143 (10th Cir. 1995) (generally power of removal is implicit in power of appointment unless the appointment is for a definite term of office or constitutional or statutory provision limits removal power); Harnett v. Ulett, 466 F.2d 113, 117 (8th Cir. 1972) (absent contractual, legislative, or constitutional provision to the contrary, the power of removal is incident to the power of appointment); State ex rel. Pearson v. Hansen, 401 P.2d 954, 956 (Wyo. 1965) (where power of appointment is vested in governor, such power carries with it right of removal unless limited by provisions of the constitution or statutes); Gowey v. Siggelkow, 382 P.2d 764, 773 (Idaho 1963) (general rule almost universally accepted that power to remove is incident to the power to appoint in the absence of any constitutional or statutory restriction); State v. Bergeron, 106 So.2d 295, 301 (La. 1958) (it is a rule of universal application that where an office is filled by appointment and a definite term is not fixed by constitutional or statutory provision, the office is held at the pleasure of the appointing authority and the incumbent may be removed at any time); State ex rel. Wehe v. Frazier, 182 N.W. 545, 559 (N.D. 1921) (Grace, J., dissenting) (the appointment of officers, as agents to carry out will of governor and duties of the department, is a political act and the power to appoint includes the power to remove). See also N.D.A.G. 97-L-32 (“It has long been the position of this office that

that general rule. The most commonly stated exception is where the appointment is to an office for a fixed term.¹³ In the case of the WSI board of directors, the individual appointees have four-year terms of office set out in the statute.¹⁴

Another exception to the common law rule involves gubernatorial appointments based upon recommendations or lists submitted by others, where the law requires the appointments to be made on that basis.¹⁵ As noted above, state law provides that candidates for the WSI board representing employers, organized labor, and the North Dakota Medical Association are selected by the Governor from lists submitted by outside groups or representatives.¹⁶

Thus, while as a general matter the Governor's power to appoint certain public officials would include the power to remove those officials, this rule would not apply to members of the WSI board of directors because the terms of the board members are fixed for a term of years by statute, and because the majority of the board members are required to be selected from a list of candidates provided by outside entities or representatives.

implicit in a county officer's power to appoint or hire an employee . . . is the power to fire that employee.").

¹³ See, e.g., State ex rel. Todd v. Essling, 128 N.W.2d 307, 311 (Minn. 1964) (where a statute creates an office to be filled by appointment for a fixed term, the right to remove at will is not incident to the power to appoint); Bruce v. Matlock, 111 S.W. 990 (Ark. 1908) (where members of a board of trustees of state charitable institutions are appointed in office for a fixed term, governor may not remove them); Barrett v. Duff, 217 P. 918, 926 (Kan. 1923) (governor may not revoke appointment for appointee to an office if the tenure of the office is declared by law). See also Schluraff v. Rzymek, 208 A.2d 239 (Pa. 1965) (if legislature creates a public office and provides that the officers must be appointed for fixed terms with staggered expiration dates, "the presence of staggered terms indicates a legislative intent that the holders of the office are not removable by the appointor at his pleasure"); 67 C.J.S. Officers § 149 (2002) ("In the absence of any constitutional or statutory limitation, the power of appointment generally carries with it, as an incident, the power to remove, where no definite term of office is fixed by law."); 63C Am. Jur. 2d Public Officers and Employees § 171 (1997) ("When the term or tenure of a public officer is not fixed by law, and the removal is not governed by a constitutional or statutory provision, as a rule, the power of removal is incident to the power to appoint.").

¹⁴ N.D.C.C. § 65-02-03.1(2).

¹⁵ See Tabor v. Siracusa, 135 So.2d 121, 123 (La. Ct. App. 1961).

¹⁶ N.D.C.C. § 65-02-03.1(2).

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Consequently, it is my opinion that the Governor does not have the authority to remove members of the Workforce Safety and Insurance board of directors.¹⁷

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹⁸

¹⁷ There are other procedures for impeaching or removing public officials in this state that do not involve the Governor. See N.D. Const. art. XI, §§ 8-11 and N.D.C.C. ch. 44-09 (impeachment) and N.D.C.C. ch. 44-10 (removal by judicial proceedings).

¹⁸ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).