

## IMPOSITION OF ADDITIONAL QUALIFICATIONS ON MEMBERS OF THE STATE BOARD OF HIGHER EDUCATION

This memorandum is in response to a request for information regarding whether the Legislative Assembly may impose additional qualifications by statute for appointments to the State Board of Higher Education.

### STATE BOARD OF HIGHER EDUCATION

Article VIII, Section 6, of the Constitution of North Dakota provides for the appointment of a State Board of Higher Education consisting of eight members. That section requires the Governor to appoint seven members who are qualified electors and taxpayers of the state, and who have resided in the state for not less than five years immediately preceding their appointment. Those seven appointments are subject to confirmation by the Senate. Section 6 requires the Governor to appoint an eighth member who is a full-time resident student at an institution under the jurisdiction of the board. That section further provides that "[e]xcept for the student member, no more than two persons holding a bachelor's degree from a particular institution under the jurisdiction of the state board of higher education may serve on the board at any one time." In addition, except for the student member, an individual employed by any institution under the control of the board may not serve as a member of the board and an employee of any such institution is not eligible for membership on the board for a period of two years following the termination of employment.

The Governor's nominations for the board must be made from a list of three individuals for each position selected by four of the five members of a selection committee consisting of the president of the North Dakota Education Association, the Chief Justice of the Supreme Court, the Superintendent of Public Instruction, the President Pro Tempore of the Senate, and the Speaker of the House of Representatives. A member may not be appointed to serve more than two terms.

### IMPOSITION OF ADDITIONAL QUALIFICATIONS

In general, when a constitutional provision establishes qualifications for the appointment of constitutional officers, the constitutional provisions are exclusive and a legislative body is prohibited from imposing additional qualifications. 63C Am. Jur. 2d *Public Officers and Employees* § 51.

In a 1944 decision, the North Dakota Supreme Court determined that legislation that provided that any person who was a candidate for nomination for office at any primary election in any year and who was defeated for that office is not eligible as a candidate for the same office at the ensuing general election was essentially seeking to impose additional qualifications to those imposed in the constitution for the state officers mentioned in the constitution. The court followed the reasoning of the Utah Supreme Court which addressed a similar issue and concluded that the "legislature cannot enlarge nor diminish constitutional provisions prescribing eligibility and qualifications to hold office created by Constitution." *State ex rel. Graham v. Hall*, 73 N.D. 428 (1944), quoting *State ex rel. Stain v. Christensen*, 84 Utah 185, 35 P.2d 775 (1934).

When faced with the question of whether Congress may impose additional qualifications upon its members beyond what is prescribed in the qualification clauses of the United States Constitution, the United States Supreme Court held that Congress may not do so. *Powell v. McCormack*, 395 U.S. 486 (1969).

The Attorney General recently addressed the issue of whether the Legislative Assembly may impose a statutory requirement that the Superintendent of Public Instruction hold a valid North Dakota professional teaching license. In a February 2007 opinion, the Attorney General concluded that "a court faced with the issue would determine that the Legislature may not impose statutory qualifications upon the office of Superintendent of Public Instruction over and above those established by the North Dakota Constitution."

### CONCLUSION

Although all enactments of the Legislative Assembly are presumed to be constitutional and may be held unconstitutional only upon the concurrence of four of the five members of the Supreme Court, based upon precedent established by the North Dakota Supreme Court, the United States Supreme Court, and commonly recognized constitutional principles, additional statutory qualifications for members of the State Board of Higher Education would likely be found to be impermissible.