

Testimony on HB1446  
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Mr. Chairman and members of the Senate Education Committee:

First, I am testifying as a private citizen on my own behalf. So, let me introduce myself so you understand why I am testifying. I am a native North Dakotan who lived there for 52 years. I, my wife and two sons attended and/or graduated from NDUS institutions. I had a thirty-year career in North Dakota higher education and state government. I was Chancellor of the North Dakota University System (NDUS) for approximately ten years from 1994 through 2003. Prior to that I was a vice chancellor/associate commissioner for administration and student affairs, was the state Executive Budget Analyst, and Assistant Legislative Budget Analyst and Auditor. After 2003 I was employed as the president of the Midwestern Higher Education Compact until 2018 when I retired. I returned to the state at least annually and several more times to make presentations on higher education trends and governance. In 2018 I made a presentation about the history of the State Board of Higher Education (SBHE) and the NDUS to Governor Burgum's task force on higher education which is the basis for much of my testimony. I or the NDUS office can give it to you if you wish to see it.

Various legislation being considered by the 2023 legislative assembly will considerably reshape the governance and administration of the NDUS. So, today I am asking you to recommend a do not pass on HB1446. As you consider this bill and other legislation, I respectfully urge you to be keenly aware of the impact of legislation on the State Board of Higher Education's (SBHE) constitutional governance mandate, and also its impact on employees, students and citizens impacted by the institution's services. The current legislation being considered in HB1446, among others, is the most significant challenge to the Board's constitutionally mandated authority since the board was created in 1938. Specifically, I appreciate this opportunity to share with you my concerns about engrossed HB 1446 since I believe this legislation usurps the SBHE's constitutional authority and may threaten the accreditation of institutions.

1. The intent of the 1938 initiated measure that amended the state constitution creating the board of higher education was enacted to protect state colleges and universities from political interference (any political interference, whether by a governor or the legislature). The measure was enacted by a vote of the people after a governor fired the president and several employees at the state agricultural college (NDSU) over a dispute on funding for the experiment station and after the institution lost its accreditation. What is important here is that the board was created by the state's citizens in reaction to an employment issue. As a result, the legislature does not have authority to enact legislation regarding hiring, firing, evaluation and terms of employment of institutional personnel.

2. VIII, sec. 6 of the North Dakota constitution states: The SBHE is **“created for the full control and administration of (state colleges)”** and **“shall have full authority over the institutions under its control.”** In the past, it has been suggested the following sentence in subparagraph (6) of art. VIII, sec. 6 means the legislature retains ultimate authority over state colleges and universities and the SBHE: *“The said state board of higher education shall have full authority to organize or reorganize within constitutional and statutory limitations, etc.”* The words *“within constitutional and statutory limitations”* modify or restrict **only** SBHE authority to organize or reorganize the work of the institutions.

There are not similar modifiers or restrictions elsewhere in art. VIII, sec.6. Obviously, the SBHE has no authority to close institutions or change “the work” of institutions, at least insofar as such work is stated in the constitution such as state university and school of mines (engineering programs) at UND, state agricultural college and experiment station at NDSU, school of forestry at Bottineau, etc.). However, only the SBHE - not the governor or the legislature – may establish employment terms for faculty and other employees, hire or fire employees, and establish employee evaluation processes as part of the administration of the campuses, or delegate such authority to the chancellor or institutions.

The definition of administration is the process or activity of running a business, organization, etc.: “The day-to-day administration of the company”. So, what is more important in administration than establishing policies on hiring, firing, evaluation and terms of employment? Further, SBHE Policy 106.6(3) references language in the state constitution creating the SBHE and adds: “The people of North Dakota created the SBHE through the North Dakota Constitution to ensure the institutions and their employees were protected from political interference.” This a fiduciary duty explicitly recognized, not action that is discretionary.

This bill is not necessary. The issues embodied in HB1446 legally should have been brought to the SBHE. The SBHE recently approved a new mission for DSU to make it a dual mission institution, and for the BSC mission to be a polytechnic institution. Now, it is up to the SBHE to decide what tenure policies or other internal working policies should be in place to match the new missions since this is part of the board’s mandated constitutional authority: **“created for the full control and administration of (state colleges)”and “shall have full authority over the institutions under its control.”** The board’s process should include students, faculty and the broader community, and ensure that any personnel policies comply with federal and state laws. The policies for DSU and BSC decided by the board may be the same or different based on their mission.

3. The property right to employment for tenured faculty is the same right held by NDUS classified employees, other ND agency classified employees, and federal, state and local government employees appointed to classified positions in civil service systems around the country. Upon completion of a probationary period and with limited exceptions (e.g., financial exigency, elimination of position due to reorganization), all have a right to continued employment unless dismissed for good cause. Also, procedures leading to dismissal for cause must include minimum due process protections set forth in a 1985 U.S. Supreme Court opinion (including pretermination written notice and opportunity to respond and a formal evidentiary or due process hearing either before or shortly after termination). One difference between a system for tenured faculty and a civil service system is the probationary period for tenure-track faculty typically is six years compared to six months in most civil service systems. The only other real difference in ND is that the evidentiary hearing for faculty is conducted by an appointed hearing officer before a Standing Committee on Faculty Rights (SCOFR), and the SCOFR prepares recommended findings, conclusions and a recommended decision for submission to the institution president, while an appointed hearing officer conducts the hearing and submits a recommendation, with recommended findings, etc. to the president. **The president still makes the final decision.**

4. As I’ve mentioned, political interference in employment of faculty and administrators at what is now NDSU in the 1930s resulted in loss of institutional accreditation. Institution and program accrediting agencies may find HB 1446 to be unwarranted, unconstitutional interference in effective administration of NDUS institutions under the governance structure established and administered by the SBHE. It

happened before. The loss of accreditation of an institution or program will have devastating consequences to students and people of the state if an institution or program accreditation is lost.

5. Finally, I know from experience that the SBHE's action opposing this bill and other legislation will not be popular with some. The SBHE authority mandated in the constitution is also not popular with some. However, doing the right thing mandated by the state's constitution is not about being popular since protecting the campuses from elected politicians' intrusion into the administration of the institutions is perhaps the most important job the board has as required by the state's constitution.

Thank you for the opportunity to testify.