

**LETTER OPINION
2003-L-46**

October 22, 2003

The Honorable Lois Delmore
House of Representatives
714 S 22nd St
Grand Forks, ND 58201

Dear Representative Delmore:

Thank you for your request for my opinion on whether the Governor appropriately followed the guidelines of N.D.C.C. § 20.1-02-23 when appointing a new member of the Game and Fish Advisory Board ("Board").

Section 20.1-02-23, N.D.C.C., states that four members of the Board must be "sportsmen." N.D.C.C. § 20.1-02-23. "[E]ach sportsman appointment must be made from a list of three names submitted by outdoor, sportsmen, wildlife, and conservation organizations requested by the governor to submit the list." *Id.* You question whether the Governor followed that procedure in appointing Daniel Mikkelson to the Board.

A letter from one of your constituents accompanied your request letter, and set out what that individual believed occurred during the appointment process. That letter alleges that the Governor essentially ignored the two names that were submitted to him by different organizations, and instead called Mr. Mikkelson and advised him that the Governor would like to appoint Mr. Mikkelson, but that Mr. Mikkelson would need to find an organization to submit Mr. Mikkelson's name for the Governor's consideration. The letter goes on to state that Mr. Mikkelson did so, and was then appointed by the Governor.

Although I see nothing in statute that would prohibit the Governor from calling a potential appointee as reflected in your constituent's letter, the law regarding the validity of appointments not made in compliance with statutory requirements is clear. "It is essential to the validity of an appointment that there shall have been a compliance with such valid conditions and limitations as may have been imposed upon the appointing power, such, for example, as a requirement that the appointee shall have received specific recommendations." *Rosoff v. Haussamen*, 228 N.W. 830, 833 (N.D. 1930). In *Rosoff*, the statute provided that the governor was to appoint members to the state board of pharmacy who had been recommended by the North Dakota Pharmaceutical

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Association. Id. at 831. The court found that the governor had no authority to appoint a member not recommended by the pharmacy board. In so concluding, the Court said “[i]t is a well-settled principle of construction that when a statute or a constitutional provision directs that a thing be done by certain persons and in a certain manner, this affirmative contains a negative that it shall not be done by other persons or in another manner.” Id. See also State ex rel Standish v. Boucher, 56 N.W. 142 (N.D. 1893) (no valid appointment made where senate failed to confirm an appointment made by the governor as required by statute). Thus, the failure to comply with the conditions and requirements in N.D.C.C. § 20.1-02-23 certainly could affect the validity of appointments to the Board.

While the law is clear, determining what actually happened in the appointment process involves the resolution of a number of factual issues. This office has historically declined to resolve factual issues when issuing a legal opinion. N.D.A.G. 2002-F-07 (“This office will not attempt to deliver an opinion that a minor factual variation might render incorrect.”). Thus, I am limited to simply clarifying the statute, and will not render an opinion on whether, factually, the Governor followed the process outlined in the statute.

Sincerely,

Wayne Stenehjem
Attorney General

sam/vkk