

**OPINION
73-437**

April 4, 1973 (OPINION)

The Honorable Arthur A. Link
Governor
State Capitol
Bismarck, ND 58501

Dear Governor Link:

This is in reply to your letter of March 28, 1973, with regard to the interpretation of section 54-06-10 of the North Dakota Century Code, which you letter quoted in full.

You state that the North Dakota State Electrical Board has informed you that since all expenditures for cost of administration of the board, including out-of-state travel expenses, are derived from fees rather than appropriated tax funds, the board will no longer submit out-of-state travel applications for approval by the Governor prior to such travel.

You state that you would appreciate it if we could advise you as to whether state boards and commissions need advance approval from the Governor for out-of-state travel before they can be reimbursed for their expenses, whether or not that board of commission is funded by legislative appropriation or through the collections of fees.

We would readily agree that the North Dakota State Electrical Board's expenditures are derived from fees and that same are not required to be legislatively appropriated by section 186 of the North Dakota Constitution. Section 186 of the North Dakota constitution does except such fees from its requirement that "all public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau, or institution of the State receiving the same, to the State Treasurer, and deposited by him to the credit of the State, and shall be paid out and disbursed only pursuant to appropriation first made by the Legislature; * * *".

While these funds raised by this license fee may, under the quoted provisions of Section 186 of the North Dakota constitution, not be subject to the requirement of said Section 186 as to legislative appropriations, it does not necessarily follow that they are completely beyond legislative control, inspection, etc. Thus, we note the amount of the license fee is set by legislative enactment (Section 43-09-13 of the North Dakota Century Code as amended to date which is probably essential to the validity thereof under the reasoning of the Court in *Ralson Purina Company v. Hagemester*, 188 N.W.2d. 405). We note further the provision of subsection 2 of section 54-10-01 of the 1971 Supplement to the North Dakota Century Code (and see also section 1 of chapter 493 of the 1971 Session Laws) providing for examination of books, records, accounting methods, and internal controls of any and all state agencies, "including the occupational and professional boards provided for in Title 43 of the North Dakota Century Code". We would also note in

this respect that section 54-44-12 of the 1971 Supplement to the North Dakota Century Code does indicate that the Legislative Assembly has appropriated these tax funds to the use of the State Electrical Board.

The fact that the funds of this board are raised entirely within this licensed profession, rather than directly from the public at large, the fact that they are exempted from the usual appropriation process required by the quoted provision of section 186 of the North Dakota Century Code and the fact that the board's funds are held in the bank selected by the majority vote of the governing body of the board (SEE: Section 54-44-12 of the 1971 Supplement to the North Dakota Century Code) might be arguments sufficient to convince a legislative body that their out-of-state travel should not be subject to gubernatorial control. However, we find no evidence of any presentation of such argument to the Legislature of the state, or that the Legislature acceded to such argument.

The statute to which you call our attention in specific terms applies to: "any member, officer, or employee of any department of the state, except the judicial and legislative department". We find no further definition of the term "department" in this section. In at least one sense of the term, there are only three departments in government, i. e., the Executive, the Judicial and the Legislative departments (U.S. v. MacEvoy D.C N.J. 58 F. Supp. 83, Yont v. Secretary of Commonwealth, 176 N.E. |1, 2, 275 Mass. 365, Rainey v. Malone, Tec. Civ. App. 141 S.W.2d. 713). The fact that two of these branches of the government are specifically named in the statute, as departments may indicate that this was the definition of the term the legislative assembly had in mind. We think it quite obvious that in this sense of the term the State Electrical Board is a part of the executive department, from the fact that its members are appointed by the Governor (section 43-09-02 of the 1971 Supplement to the North Dakota Century Code) and under the terms of chapter 43-09 of the North Dakota Century Code they carry out a specifically executive function.

Even if we were to assume that the Legislature intended to use the term in a broader sense, indicating the various executive departments of the state government we would see no reason to exclude the state government's electrical department from the "protections" afforded by this statute. While, on the practical level, though not specified or required by any statutory provision, the membership of the profession may have some voice in the selection of its members and special interests in their activities, the electorate and taxpayers of the state at large have an actual, constitutionally and statutorily specified voice in the selection of other executives of the state government. We note that even in the creation of this department, the Legislative Assembly saw fit to provide that the mileage and travel expenses allowance shall not exceed the amount provided for in section 54-06-09 (SEE section 43-09-04 of the 1971 Supplement to the North Dakota Century Code).

In conclusion, while we recognize that the statute may be somewhat ambiguous in referring to "any department of the state", rather than to the "executive department of the state government" we feel that the phrase as used in the statute was intended to include such units

of the state government as the State Electrical Board, and that on such basis, authority for out-of-state travel by its members, officers and employees must first be granted in writing by the Governor. The fact that same is funded by the collection of license fees, rather than by legislative appropriations from the general fund, would not change this result.

We hope the within and foregoing is sufficient for your purposes.

Sincerely yours,

Allen I. Olson

Attorney General