

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 91-14

Date issued: October 9, 1991

Requested by: Honorable Earl R. Pomeroy  
Insurance Commissioner

- QUESTION PRESENTED -

Whether the Insurance Commissioner and the State Treasurer can deputize assistants to represent them on the State Investment Board.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the Insurance Commissioner and the State Treasurer may deputize a person who may act on their behalf.

- ANALYSIS -

The question presented is the authority of the Insurance Commissioner and the State Treasurer to deputize individuals to represent them on the State Investment Board.

Membership of the "state investment board consists of the governor, the state treasurer, the commissioner of university and school lands, the director of the workers compensation bureau, the commissioner of insurance, the executive secretary of the teachers' fund for retirement, and three members who are experienced in, and have considerable knowledge of the field of investments, and who are not otherwise employed by the state of North Dakota." N.D.C.C. ' 21-10-01. The board is charged with the investment of the state bonding fund, teachers' fund for retirement, state fire and tornado fund, workers compensation fund, veterans' home improvement fund, national guard training area and facility development trust fund, and the national guard tuition trust fund. N.D.C.C. ' 21-10-06. The board must "approve general types of securities for investment by these funds and set policies and procedures regulating securities transactions on behalf of the various funds." N.D.C.C. ' 21-10-02.

Statutory authority for the State Treasurer or Insurance Commissioner to appoint deputies is found in N.D.C.C. " 44-03-01 and 26.1-01-02. N.D.C.C. ' 44-03-01 provides:

The secretary of state, state auditor, state treasurer, superintendent of public instruction, commissioner of insurance,

commissioner of agriculture, commissioner of labor, district assessor, and city assessor each may appoint a deputy for whose acts as such he shall be responsible. Each officer required to give a bond may require a bond from any deputy appointed by him. Any such bond shall be in the penal sum of not more than half the penal sum of the appointing officer's own bond and may be retained by the officer for his own protection. Such appointment shall be in writing and shall be revocable in writing at the pleasure of the principal, and such appointment and revocation shall be filed as the bond and oath of the principal are filed.

Every appointed deputy must "take and subscribe the same oath as his principal, naming his deputyship, which shall be endorsed upon and filed with his certificate of appointment." N. D. C. C. ' 44-03-03.

Additional statutory authority mandates the Insurance Commissioner to employ a deputy. N. D. C. C. ' 26.1-01-02. " The commissioner shall employ a deputy and other competent officials and clerks to discharge the duties assigned by the commissioner. When the commissioner is absent temporarily from the office, the deputy commissioner may sign the commissioner's name and perform any other statutory duties pertaining to the office." Id.

These sections authorize the appointment of only one deputy by each named agency head. When more than one deputy may be appointed the Legislature has specifically so authorized. See N. D. C. C. " 20.1-02-10, 54-24.1-05. Further, deputizing assistants or clerks to perform specific tasks including judgment and discretion blurs the distinction between the two classifications. Generally, courts have recognized the distinction between deputies and assistants. One commentary explains this difference as follows:

Among the principal aids to public officers are deputies and assistants. The two are by no means the same or equivalent, and the two words are not legally synonymous. An assistant is one who aids, helps, or assists, while a deputy is a person appointed to act for another, a substitute or delegate who acts officially for his principal. Another distinction sometimes pointed out is that an assistant may or may not be sworn, while "deputy" implies only the sworn class. The former is the more comprehensive of the two words and includes the latter within its reach, but the person described thereby is usually more clerical than otherwise, while the latter may do anything that his principal may do. And while ministerial acts may be delegated by an officer or board to "assistants" whose employment is authorized, they do not have the status of deputies to whom quasi-judicial functions may be delegated. A deputy, it has been said, is a person appointed as the substitute of another and empowered to act for him in his name and behalf in all matters in which the principal may act. His principal is responsible for his acts, he is removable at the pleasure of his principal, and his authority ceases at the

latter's death or disqualification. The name "deputy" in an official's name is not conclusive that he is in fact a deputy. Thus, a person whose duties indicate that he is in fact an independent officer and not a servant of the officer who appointed him is not a deputy, notwithstanding that the word "deputy" is used in his title.

63A Am. Jur.2d Public Officers and Employees ' 567 (1991). See also United States v. Adams, 24 F. 348, 351 (D. Ore. 1885) ("An internal 'assistant' is one who stands by and helps or aids another. He is not a deputy, and cannot, therefore, act in the name and for the person he assists, but only with him and under his direction, unless otherwise expressly provided by law."); State v. Mangni, 43 N.W.2d 775, 779 (Minn. 1950) (Since the deputy possesses, generally speaking, all the powers of the principal, the deputy is not equivalent to a mere assistant.)

Because a deputy has power to do every act which the principal might do except those prohibited by statute, it is therefore my opinion that absent express statutory authority, the Insurance Commissioner and the State Treasurer may not deputize an assistant to perform an act required by statute involving judgment and discretion. Only the single deputy appointed pursuant to N. D. C. C. ' 44-03-01 may perform those acts.

- EFFECT -

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.

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