

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

LEGISLATIVE MANAGEMENT

TELECONFERENCE CALL

Friday, February 24, 2012

Prairie Room, State Capitol

Bismarck, North Dakota

Representative Al Carlson, Chairman, called the meeting to order at 2:00 p.m.

Members present: Representatives Al Carlson, Chuck Damschen, David Drovdal, Jerry Kelsh, Shirley Meyer, Kenton Onstad, Dan Ruby, Don Vigasaa, Robin Weisz; Senators Robert Erbele, Joan Heckaman, David Hogue, Ray Holmberg, Gary A. Lee, Larry Robinson, Ryan M. Taylor, Rich Wardner

Others present: Jay E. Buringrud, Allen H. Knudson; Legislative Council, Bismarck

See attached [appendix](#) for additional persons present.

It was moved by Senator Robinson, seconded by Senator Holmberg, and carried on a voice vote that the minutes of the November 3, 2011, meeting of the committee be approved as distributed.

Chairman Carlson said the purpose of this meeting is to consider retention of legal counsel for the legislative branch in a lawsuit initiated by the State Board of Higher Education which is challenging the constitutionality of North Dakota Century Code Section 15-10-46. He said in 2011 the Legislative Assembly passed legislation requiring the University of North Dakota to use the Fighting Sioux nickname and logo and the Legislative Assembly repealed that provision during the November 2011 special session. He said petitions to refer the repeal of the measure were submitted to the Secretary of State and the repeal has been suspended according to the Constitution of North Dakota. He said the board has initiated a lawsuit to prevent the Secretary of State from placing the referred measure on the primary election ballot. Although it appears that the issue may be insignificant, he said, the lawsuit is much more far reaching than the Fighting Sioux nickname. He said the legislative branch of government needs legal representation to address the issues relating to separation of powers and to determine if the Legislative Assembly has the authority to pass laws addressing higher education other than providing appropriations. He said the Attorney General chose to represent the board, and the Secretary of State has to retain counsel as the defendant in the case. He said he had conversations with the Secretary of State to attempt to select one attorney to represent the Secretary of State and the legislative branch but was unable to reach an agreement with the Secretary of State. He said the Attorney General had indicated

that he would consider recommendations for the appointment of an attorney who would represent the legislative interests as well as the Secretary of State, but the Attorney General declined to accept a recommendation submitted to him. He said the outcome of the lawsuit could affect bills that were introduced by members from both parties during the last legislative session and enacted. This meeting was called on short notice, he said, because of the limited amount of time available to respond to the action filed by the board. He said the president of the board called the last meeting of the board to order by welcoming everyone to the meeting of the fourth branch of government.

In response to a question from Representative Carlson, Senator Hogue said the brief filed by the State Board of Higher Education acknowledges that the Legislative Assembly holds the power of the purse, but argues that the board has exclusive control of the higher education system beyond the power to appropriate funds. He said the constitution states that the authority of the board is subject to constitutional and statutory limitations. Because the Secretary of State has indicated that he does not care about the outcome of the lawsuit and only wants to know whether to put the measure on the ballot, he said, the Legislative Assembly must exercise its authority under Section 54-35-17 to retain counsel to represent the legislative branch.

In response to a question from Representative Carlson, Mr. John Bjornson, Legislative Council, said Section 54-35-17 was enacted in 1995 to allow the legislative branch of government, through the Legislative Management when the Legislative Assembly is not in session, to intervene in any action deemed necessary to protect the official interests of the legislative branch. He said the bill that granted this authority was sponsored by Attorney General Wayne Stenehjem who was a senator at that time.

In response to a question from Senator Holmberg, Chairman Carlson said he would like the Legislative Management to authorize the retention of outside counsel rather than have a member of the Legislative Assembly serve as counsel for the Legislative Assembly.

Senator Holmberg said the Senate majority leader and the Senate Pro Tempore served as counsel for

the Senate in a case during the 1977 legislative session.

Representative Kelsh said he would like to see more information regarding the 1938 amendment to the Constitution of North Dakota which established the State Board of Higher Education. He said he is bothered that the Attorney General was not as vocal during the legislative session as he is now when he argues on behalf of the board that the law is unconstitutional.

Representative Carlson said the constitutional amendment establishing the State Board of Higher Education goes back to when the Board of Administration, under the control of the Governor, fired seven faculty and staff members at the North Dakota Agricultural College. He said the State Board of Higher Education was created to keep the Governor from interfering in higher education matters such as hiring and firing of staff, not to interfere with the authority of the Legislative Assembly. He said there are numerous provisions in Title 15 which illustrate that through the years the State Board of Higher Education has been subject to the power of the Legislative Assembly. He said the lawsuit attempts to deny the people of the state the ability to vote on an issue after getting signatures to refer an action of the Legislative Assembly. However, he said, the lawsuit also may determine what is the role of the Legislative Assembly in dealing with the State Board of Higher Education.

In response to a question from Representative Kelsh, Senator Hogue said if referral election occurs and the voters successfully refer the repeal of the nickname law, the nickname law will remain in effect. He said the Supreme Court has the option to rule that the court does not have jurisdiction to address the case at this time or the court can take on the case and address the constitutionality of the nickname law. However, he said, the court has indicated that it does not provide advisory opinions. He said the action of the State Board of Higher Education is similar to the Legislative Assembly asking the court if a proposed bill is constitutional.

Representative Damschen said the referred measure should be voted on before there is any challenge to the constitutionality of the law.

Representative Carlson said if the Legislative Assembly sits on the sidelines and allows the court to rule the law unconstitutional, there likely will be bigger issues to address. He said if the State Board of Higher Education were so concerned with the constitutionality of the law, the board should have challenged its constitutionality after the law was passed in April.

In response to a question from Representative Kelsh, Mr. Allen H. Knudson, Legislative Budget Analyst and Auditor, Legislative Council, said there are funds in the Legislative Council budget that are generally reserved for consultants, but are available for all professional services. Of the \$300,000 in the

budget, he said, \$50,000 has been committed for one interim study.

In response to a question from Senator Robinson, Representative Carlson said it is not feasible to place an exact number on the amount of fees that will be paid to attorneys. However, he said, the attorney's fees should be limited due to the short timeframe in which the case must be addressed.

Senator Holmberg said he believes the law that was passed during the regular session was wrong and is unconstitutional. He said he hopes the Supreme Court rules that it is unconstitutional, but there is a bigger issue at stake. Therefore, he said, the Legislative Assembly should be at the table in the case and should seek legal representation.

In response to a question from Senator Taylor, Mr. Bjornson said Mr. Patrick Durick of the Pearce & Durick Law Firm has indicated that he would be interested in representing the legislative branch. He said the amount of attorney's fees has not been determined, but Mr. Durick indicated that the hourly rate for attorneys is in the neighborhood of \$200 an hour.

It was moved by Senator Holmberg and seconded by Representative Drovdal that the Legislative Council be directed to retain counsel for the legislative branch in the lawsuit initiated by the State Board of Higher Education.

Senator Hogue requested that the motion authorize the four legislative leaders to designate representatives to work with the Legislative Council staff in monitoring the progress of the case.

Senator Holmberg and Representative Drovdal had no objection to the revision of the motion.

Representative Meyer requested the Legislative Council staff to prepare a fiscal analysis of the costs incurred as a result of the passage of the nickname bill, including the cost of the trip to Indianapolis, Indiana, and the projected costs that may be incurred in the future.

Representative Carlson said the most significant cost could be the cost for the University of North Dakota to change the nickname. He said the cost of enacting the bill is no greater than the cost of the bill designating the ladybug as the state insect. He said determining future costs is not feasible, but the costs may be determinable at the end of the process.

In response to a question from Senator Taylor, Representative Carlson said because the Legislative Council attorneys will provide information and assistance to any attorney retained by the legislative branch, the attorney's fees may be reduced.

In response to a question from Representative Onstad, Representative Carlson said he has requested a memorandum regarding the history of the State Board of Higher Education which will be presented at an interim Higher Education Committee meeting in the near future. He said copies of that memorandum can be forwarded to the members of the Legislative Management as well as copies of the documents filed in the lawsuit.

In response to a question from Representative Kelsh, Representative Carlson said if the Supreme Court were to determine that the Legislative Assembly has no authority over the State Board of Higher Education other than to write checks, it will become necessary to look at a constitutional amendment to reexamine the authority of the board and the Legislative Assembly.

Representative Ruby said it is important to clarify the role of the Legislative Assembly with respect to enacting policy relating to the State Board of Higher Education. He said it does not really matter what brought this issue to the forefront, because there is a bigger concern. He said if the Legislative Assembly had not acted in response to the board and the University of North Dakota dropping the Fighting Sioux nickname, there likely would have been an initiated measure to restore the name.

In response to a question from Representative Kelsh, Representative Carlson said he would prefer that the Legislative Management not set a specific amount of funds to be paid to the attorney retained by the legislative branch.

In response to a question from Representative Carlson, Mr. Bjornson said the Legislative Council staff will contact the attorney who had expressed

interest in representing the legislative branch and will negotiate rates and fees with the attorney.

In response to a question from Representative Onstad, Mr. Bjornson said the legislative branch was not named as a party in the lawsuit. He said the legislative branch will need to submit a motion to the Supreme Court requesting permission to intervene in the action.

After this discussion, **the motion carried on a roll call vote.** Representatives Carlson, Damschen, Drovdal, Kelsh, Ruby, Vigasaa, and Weisz and Senators Erbele, Hogue, Holmberg, Lee, and Wardner voted "aye." Representatives Meyer and Onstad and Senators Heckaman, Robinson, and Taylor voted "nay."

No further business appearing, Chairman Carlson adjourned the meeting at 2:40 p.m.

John Bjornson
Counsel

Jay E. Buringrud
Director, Legal Services