LETTER OPINION
2001-L-25

July 13, 2001

Honorable Bob Stenehjem
State Senator
7475 41st Street SE
Bismarck, ND 58504-3200

Honorable Wesley R. Belter
State Representative
15287 47th Street SE
Leonard, ND 58052-9763

Dear Senator Stenehjem and Representative Belter:

Thank you for your letter requesting my opinion regarding the constitutionality of reducing a term of office of a member of the Legislative Assembly as part of an otherwise valid legislative redistricting plan. The Legislative Council has appointed a Legislative Redistricting Committee to develop a redistricting plan for the 2002 primary election. You cite article IV, section 3 of the North Dakota Constitution which provides that the "legislative assembly shall establish by law a procedure whereby one-half of the members of the senate and one-half of the members of the house of representatives, as nearly as is practicable, are elected biennially."

You point out that historically, in legislative redistricting plans in North Dakota, the terms of senators have been reduced in some instances to effectuate the staggering of senate terms. You also point out that because of a recent change in article IV, section 4 of the North Dakota Constitution, representatives are now elected for terms of four years and it is likely that any redistricting plan will result in the reduction of terms for some House members and some senators.

In a letter from Attorney General Nicholas Spaeth to Representative William Kretschmar dated March 4, 1992, Attorney General Spaeth concluded that a portion of the 1991 redistricting bill relating to the terms of senators was unconstitutional because the terms of certain senators were reduced from four years to two years in violation of article IV, section 4 of the North Dakota Constitution which then provided that "[s]enators must be elected for terms of four years and representatives for terms of two years." You asked that the matter

be revisited due to an apparent contradictory holding issued by the North Dakota Supreme Court in a 1910 case which was not discussed in the 1992 opinion, State ex rel. Williams v. Meyer, 127 N.W. 834 (N.D. 1910). Also not discussed in the 1992 opinion was the interplay between article IV, section 4 and article IV, section 3 (requiring the staggering of terms of members of the Legislative Assembly). Such a discussion is necessary for a full analysis of the issue.

Although the Legislative Assembly has not yet enacted a redistricting bill for the 2002 primary election, I believe it is necessary to reexamine the validity of the 1992 Attorney General letter opinion in order to resolve the issue of the constitutionality of the Legislative Assembly shortening terms of certain senators and representatives. Consequently, I assume for purposes of this letter that the Legislative Assembly will pass a bill with an otherwise valid redistricting plan and that the terms of one or more senators or representatives will be reduced from four years to two years as part of the redistricting plan.

At the outset, I would note that this office, like the North Dakota Supreme Court, construes statutes to avoid conflicts with constitutional provisions, whenever possible. Walker v. Schneider, 477 N.W.2d 167, 172 (N.D. 1991).[1] "This is due, in part, to the fact that in North Dakota the usual role of the Attorney General is to defend statutory enactments from constitutional attack and because '[a] statute is presumptively correct and valid, enjoying a conclusive presumption of constitutionality unless clearly shown to contravene the state or federal constitution.' Traynor v. Leclerc, 561 N.W.2d 644, 647 (N.D. 1997) (quoting State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996)). Further, Article VI, Section 4 of the North Dakota Constitution provides that 'the supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide.'" Note 1 supra. Furthermore, as the North Dakota Supreme Court noted in McCabe v. North Dakota Workers Compensation Bureau, 567 N.W.2d 201, 204 (N.D. 1997), "if a statute is capable of two constructions, one that would render it of doubtful constitutionality and one that would not, the constitutional interpretation must be selected"; accord Hovland v. City of Grand Forks, 563 N.W.2d 384, 388 (N.D. 1997).

Thus it is clear that any statutory enactment, including the 1991 redistricting bill or the anticipated 2001 redistricting bill, is entitled to a strong presumption of constitutionality and must be construed, if at all possible, to avoid any conflict with constitutional provisions.

---

[1] See also 1998 N.D. Op. Att'y Gen. L-197 ("Traditionally, this office has been very reluctant to question the constitutionality of a statutory enactment. E.g., 1980 N.D. Op. Att'y Gen. 1.").

As noted above, article IV, section 3 of the North Dakota Constitution requires the Legislative Assembly to establish a procedure whereby one-half of the members of the Senate and one-half of the members of the House as nearly as is practicable are elected biennially, i.e., the staggering of terms. In order to carry out this constitutional mandate, it is sometimes necessary to truncate four-year terms to two-years. However, article IV, section 4 of the Constitution requires four-year terms for senators and, since 1997, also for representatives. The 1992 letter opinion focused on the fact that the 1991 redistricting bill reduced some terms from four years to two years contrary to the express terms of article IV, section 4 of the North Dakota Constitution.

However, as the North Dakota Supreme Court noted in Sanstead v. Freed, 251 N.W.2d 898, 908 (N.D. 1977), "[i]n construing and interpreting the Constitution we must give effect and meaning to every provision and reconcile, if possible, apparently inconsistent provisions." To the extent sections 3 and 4 of article IV of the North Dakota Constitution are apparently inconsistent, they must be construed and reconciled, if possible, to give effect and meaning to both. See also Lein v. Sathre, 113 N.W.2d 679, 683 (N.D. 1962) (if possible, constitutional provisions must be harmonized).

The North Dakota Supreme Court was faced with a similar situation in the Meyer case. A reapportionment of the Senate districts was made in the 1907 legislative session. A dispute arose as to the length of the term of a state senator elected in 1908. The senator received a certificate reciting that he was elected to a term of four years, but a challenger questioned the four-year term of office asserting that the term was only two years pursuant to the provisions of the 1907 reapportionments statutes. 127 N.W. at 835. At the time, section 27 of the North Dakota Constitution provided that "[s]enators shall be elected for the term of four years, except as hereinafter provided." Id. (emphasis supplied).[2] The elected senator contended the constitutional provision requiring four-year terms controlled, while the challenger asserted that the provisions of then section 30 of the North Dakota Constitution applied. That provision established a division of the senate into two classes, with one class being elected in 1890 for a term of two years, and the other class elected for a term of four years, so that "one-half of the senators, as nearly as practicable, may be elected biennially." Id. Current article IV, section 3 of the North Dakota Constitution is similarly worded. The court in Meyer held that the challenger was correct, noting that "[i]t was the clear intent of the constitutional convention to provide a Senate which should at all times, as nearly as practicable, be composed of members one-half of whom were experienced in the duties of their offices. . . . the purpose of the constitutional provisions on this subject ... was to maintain a Senate which should at all times have one-half its

[2] The language "except as hereinafter provided" did not appear in the version of article IV, section 4 of the Constitution which was effective in 1992, nor does it appear in the current version of article IV, section 4.

members, as nearly as practicable, experienced men." 127 N.W. at 836. The court reconciled the apparently inconsistent provision requiring a four-year term for senators with the other constitutional provision requiring the staggering of terms such that the literal requirement of four-year terms had to yield, in certain circumstances, to the requirement of staggering of terms in order to ensure that the Senate maintains at all times one-half of its number as experienced members.

A number of courts from other jurisdictions have found that states may truncate the terms of state senators, although in some instances the outcome of the cases was dependent on specific constitutional powers permitting truncating or terminating of state Senate terms.[3] Some courts have refused to truncate terms when senators were elected pursuant to valid redistricting plans.[4]

One notable issue in applying the Meyer case to the present circumstance arises from the fact that the present-day constitutional provision mandating four-year terms, N.D. Const. art. IV, §4, no longer has the language "except as hereinafter provided." In Meyer, the court used that exception language to aid it in determining that the staggering of terms provision controlled over the four-year term of office requirement. The "except as hereinafter provided" language was also in the state Constitution when the federal district court truncated the terms of four senators to two years after the 1970 census (see Chapman v. Meier, 372 F.Supp. 363 (D.N.D. 1972)) and when the Legislative Assembly adopted its 1981 redistricting plan which required certain senators elected to four-year terms in 1980 to run for two-year terms in 1982. See 1981 N.D. Sess. Laws ch. 804; N.D. Const. art. IV, § 3 (1981). The phrase was deleted as part of a new legislative article to the Constitution that was approved by the electorate June 12, 1984, and effective December 1, 1986.[5]

---

[3] Cases which have found that the states may truncate senators' terms include: In re Apportionment Law, 414 So.2d 1040 (Fla. 1982); Groh v. Egan, 526 P.2d 863 (Alaska 1974); Egan v. Hammond, 502 P.2d 856 (Alaska 1972); Ferrell v. State ex rel. Hall, 339 F.Supp. 73 (W.D. Okla. 1972); State ex rel. Herr v. Laxalt, 441 P.2d 687 (Nev. 1968); Butcher v. Bloom, 216 A.2d 457 (Penn. 1966); Mann v. Davis, 238 F.Supp. 458 (E.D. Va. 1964); Moss v. Burkhart, 220 F.Supp. 149 (W.D. Okla. 1963).

[4] People ex rel. Pierce v. Lavelle, 307 N.E.2d 115 (Ill. 1974); State ex rel. Lehman v. Disalle, 182 N.E.2d 564 (Ohio 1962).

[5] At the legislative hearing on HCR 3028, the resolution that became the current article IV, section 4, the sole witness before the Joint Constitutional Revision Committee was the measure's prime sponsor, Representative William Kretschmar. He did not mention in his testimony any intent by the deletion of the phrase "except as hereinafter provided" to alter the longstanding practice of truncating senate terms following reapportionment. Instead, the minutes reflect his testimony on the measure to the effect that "It goes along and

Nevertheless, even without the "except as hereinafter provided" language, in construing apparently contradictory constitutional provisions, courts are required to give effect and meaning to every provision and reconcile, if possible, apparently inconsistent provisions. State ex rel. Sanstead v. Freed, 251 N.W.2d at 908. Therefore, even in the absence of the exception language in article IV, section 4 of the North Dakota Constitution, that provision still must be reconciled and harmonized with article IV, section 3, if at all possible. I believe that even though the relevant constitutional provisions differ somewhat from 1910, the result would be the same if the North Dakota Supreme Court were to reexamine the interplay between the constitutional provisions requiring a four-year term and staggered terms. The court would undoubtedly apply the aforementioned rules of construction that a statute is entitled to a conclusive presumption of constitutionality unless it is shown to clearly contravene the federal or state constitution; that it construe a statute (including a redistricting bill) to preserve its constitutionality whenever possible; that if a statute is capable of two constructions, the court should adopt the one that would not render it of doubtful constitutionality; and that it attempt to harmonize and reconcile apparently inconsistent constitutional provisions. Further, in applying these rules, I am confident the court would reconcile the constitutional requirements of four-year legislative terms and the staggering of those terms in the same basic way as was done in State ex rel. Williams v. Meyer in 1910, especially since the Meyer court determined that the purpose of these constitutional provisions was to ensure that the Senate have one-half of its number, as nearly as practicable, be experienced members. Consequently, it is my opinion that the Legislative Assembly has, as part of its constitutional authority to maintain the staggering of terms for senators and representatives, the authority to reduce the terms of one or more senators or representatives from four years to two years if necessary to effectuate an otherwise valid redistricting plan.

To the extent that the letter from Attorney General Nicholas Spaeth to Representative William Kretschmar dated March 4, 1992, is inconsistent with this opinion, it is overruled.

Sincerely,

Wayne Stenehjem
Attorney General

---

establishes the reapportionment guideline much like we have contained in the present statute." (Minutes of the Joint Constitutional Revision Committee, March 7, 1983.)

jjf/vkk