N.D.A.G. Letter to Solberg (Oct. 1, 1986)

October 1, 1986

Mr. Wayne O. Solberg
Office of City Attorney
P.O. Box 1897
Fargo, ND 58109

Dear Mr. Solberg:

Thank you for your letter of September 17, 1986, requesting an opinion concerning the removal of appointive officers in cities operating under the commission system of government.

Your first question pertains to the method by which charges are to be filed against any officer of a commission city. Although your question does not specifically inquire as to who may file such charges, the conversation between you and a member of my staff, as well as a review of this entire matter, indicates that this is the essential question.

The crucial statutory language is as follows:

> 40-15-07. APPOINTIVE OFFICERS -- REMOVAL UPON HEARING -- SUSPENSION -- APPOINTMENT AND REMOVAL OF TEMPORARY OFFICER. . . .Within ten days after charges are filed against any such person in the office of the city auditor, the board shall proceed to hear and determine the case upon its merits.

As written, this particular statute does not provide any guidance as to who may file charges. Can any person simply walk into the city auditor's office and charge a city officer, in a commission city, with something or another resulting in a mandatory hearing before the board of city commissioners within ten days following the filing of those charges, to hear and determine the case upon its merits? Or, can such charges be filed only by the board following its initial determination that sufficient probable cause exists to cause the matter to be heard and determined by the board upon its merits after giving the accused sufficient opportunity to be heard in his own defense? The statute is silent in answer to this question. Furthermore, the age of the statute prohibits a review of legislative history.

This particular statute has been reviewed by the North Dakota Supreme Court although this specific issue has not been addressed by the court. In State v. Board of city Com'rs of City of Fargo, 245 N.W. 887 (N.D. 1932), our supreme court made a passing reference as to the manner in which the removal hearing provided for by this statute is to be held:

> First, there must be some cause which authorizes the commission to act. Second, there must be charges filed which must relate to the official conduct

> of the officer. Third, he must be given an opportunity to be heard in his defense.

Id. at 889. In describing this sequence of events, the court mentioned action by the commission prior to the filing of charges. Furthermore the court did not mention other persons or entities which may institute the removal process. This would suggest that it is the board of city commissioners which causes the filing of charges relating to the official conduct of a city officer.

In Dames v. City of Grand Forks, 243 N.W. 802 (N.D. 1931), a police officer had asked for a writ of mandates compelling his reinstatement following his suspension from the police force. The trial court denied the writ and remanded the matter to the board of city commissioners for action pursuant to this particular removal statute. In describing the events which occurred leading up to the appeal to the North Dakota Supreme Court, that Court stated as follows:

> At the conclusion of the hearing, the trial court made an order to the effect 'that this Court cannot at this time, and under the present conditions determine the rights of the plaintiff; therefore, the cause is remitted to the City Commission of the City of Grand Forks, directing said City Commission, under statute of this State, to make and file and serve upon the said complainant Dawes, its charges against said Dawes and set a time for hearing of the same;

Id. at 803. The trial court directed the city commission to file the charges as opposed to any other individual or entity.

Finally, a commonly stated rule of statutory construction is that one cannot adhere to the strict letter of a statute where to do so would cause injustice or absurdity. In Interest of B. L., 301 N.W.2d 387 (N.D. 1981); State v. Mees, 272 N.W.2d 61 (N.D. 1978).

Obviously, legislative clarification is needed with respect to N.D.C.C. § 40-15-07. I would urge appropriate parties to approach the Legislature to determine who may bring such charges and the scope and subject matter of such charges. However, this does not help us at this time and clarification is needed to allow the removal process to be instituted in appropriate matters.

I am reluctant to close off avenues of redress by citizens who have legitimate complaints concerning the official conduct of a city officer in a commission city. However, the two prior supreme court cases, although not on point, do suggest that it is the board of city commissioners which files charges pursuant to N.D.C.C. § 40-15-07 thus instituting the hearing process and allowing the accused to be heard in his own defense. More importantly, a strong argument can be made that to read N.D.C.C. §40-15-07 to allow any and every person the opportunity to file any charge against any city officer in a commission city, resulting in a mandatory hearing on the merits, would be absurd and unjust to all city officers in commission cities as well as to citizens who are looking to the

city commission for the efficient operation of city government. I am concerned that the city government may come to a standstill where important city business is pushed aside in deference to required hearings whenever any disgruntled or frustrated citizen who decides to visit the city auditor's office and to charge a city officer with wrongdoing. I cannot believe that the Legislature intended such a result to occur and cannot in good conscience suggest that result at this time.

Thus, it is my opinion that it is the board of city commissioners which determines whether to file charges against a city officer in a city commission form of government. Where such charges are filed by the board of city commissioners, the board must proceed to hear and determine the case upon its merits within ten days of the filing.

Your second question is whether a decision made by a city prosecutor as to whether to prosecute any particular case may be the subject of a hearing pursuant to N.D.C.C. § 40-15-07. As I indicated in my earlier discussion, this statute is silent as to the scope of charges which may be brought against a city officer in a commission city resulting in a hearing by the board. I do not believe it is appropriate to state what may and what may not be the subject of such charges. Thus, this statute does not prohibit a review of a prosecutor's decision to prosecute or to not prosecute a particular case.

However, the North Dakota Supreme Court has addressed the issue of the duty of a prosecutor when reviewing the possible occurrence of a criminal offense. In Hennebry v. Hoy, 343 N.W.2d 87 (N.D. 1983), the court recognized the need and necessity for the exercise of sound judgment and discretion in the charging process by prosecutors. Furthermore, the court indicated that it would not interfere with a prosecutor's determination whether or not to institute a criminal charge where it was shown that the prosecutor made inquiries as to the substance of the allegations and had inquired into the facts and circumstances of the situation.

Therefore, should a hearing occur as to the decision of a city prosecutor to prosecute or to not prosecute any particular case, I would suggest that the standard provided by the North Dakota Supreme Court be used in determining whether the prosecutor acted properly.

Sincerely,

Nicholas J. Spaeth

ja