

OPINION
73-48

April 24, 1973 (OPINION)

Mr. Wayne O. Solberg

City Attorney

P. O. Box 1897

Fargo, ND 58102

Dear Mr. Solberg:

This is in response to your letter of April 4, 1973, wherein you request an opinion of this office relative to voting procedures of the board of city commissioners. You submit the following in your letter of inquiry:

"The Board of City Commissioners has instructed me to seek a legal opinion from your office regarding the legality of a member of such Board 'passing' his vote without reason or cause.

Following is a quotation of the minutes requesting this opinion:

'President Lashkowitz moved that the Board request the Attorney General of North Dakota to render a legal opinion as to the legality of a person present passing his vote on a matter where there is no conflict of interest and no involvement in the matter.

Second by Stockman. On call of the roll Commissioners Schuster, Brommenschenkel, Stockman, Lashkowitz and Markey all voted aye.

No commissioner being absent and none voting nay, the motion was declared carried.'

Initially we most point out that the problem presented by your inquiry for determination is twofold, particularly as the question is phrased. It would seem the first question is directly related to the legality of a member of the city commission "passing" his vote and, secondly, whether such "passing" of vote is actually without reason or cause. We cannot minimize the difficulty that would obviously become involved in proving that there existed no reason or cause since the mere act of "passing" would tend to indicate a reason or cause for which the particular commission member refrains from casting his vote. With specific reference to the stated motion in your letter, while we find no difficulty in determining what is meant by and what constitutes "conflict of interest", we are not certain of the implied scope of matters or interest involved or contemplated by the term "involvement" in the matter. Accordingly, this response is conditioned upon "conflict of interest" situations since it would appear that a certain degree of involvement exists by mere virtue of

the fact that the question is before the commission.

We are not aware of any state statute which would make or declare such act or "passing" of vote to be illegal. Research in text materials tends to indicate that abstention from voting in instances where a quorum is present is by and large tantamount to a negative vote upon such questions as require an affirmative or negative vote. In the case of a vote requiring a selection, however, it may be that action may be brought by persons who are presented by such board member, compelling a board member to cast a vote in order to fully and properly represent such member's constituents. It does not appear, however, that such abstention or refrain from voting or casting a ballot is illegal per se.

We would note the provisions of Section 40-06-05 of the North Dakota Century Code which provides as follows:

"40-06-05. RULES OF PROCEDURE - EXPELLING MEMBERS. The governing body of a municipality shall determine its rules of procedure, punish its members or persons present for disorderly conduct by fine, and with the concurrence of two-thirds of its members may expel a member from a session but may not expel the member for neglect of duty or for unnecessary absence from its session." (emphasis supplied)

While it would not appear that the foregoing statute is directly applicable in the instance of your request, it does indicate that the governing body of a municipality shall determine its own rules of procedure. Obviously, the failure of a board member to cast a definite vote is not as serious a neglect of duty, if in fact neglect of duty in the first instance, as failure to attend the scheduled meetings of the board. Failure to attend a meeting very possibly may incapacitate the board by reason of failure to constitute a quorum. In this connection we would note the provisions of Section 40-06-03 of the North Dakota Century Code, which provides as follows:

"40-06-03. QUORUM. A majority of the members of the governing body of a municipality shall constitute a quorum to do business but a smaller number may adjourn from time to time. The governing body may compel the attendance of absentees under such penalties as may be prescribed by ordinance, and may employ the police of the municipality for that purpose." (emphasis supplied)

We also call your attention to Section 40-06-07 of the North Dakota Century Code which empowers the governing body to legislate for a full exercise of its powers when the applicable law is otherwise silent. Adoption of specific procedural rules covering the question submitted may also be employed by the governing body.

In direct response to your inquiry then, it is the opinion of this office that "passing" of vote by a member of the city commission is not illegal per se. The question of whether such "passing" or abstention of positive vote is without reason or cause is a question of fact which cannot be determined by this office and would ultimately be governed by each given instance. It is the further opinion of this office that a "pass" vote upon matters before the

commission or governing body of the municipality is tantamount to a negative vote upon all questions requiring an affirmative or negative vote.

We trust that the foregoing general observations, comments and information will adequately express the opinion of this office upon the matter submitted for determination.

Sincerely yours,

ALLEN I. OLSON

Attorney General