

**OPINION
78-174**

March 15, 1978 (OPINION)

The Honorable Evan E. Lips
State Senator, 47th District
P. O. Box 775
Bismarck, ND 58501

Dear Senator Lips:

This is in reply to your letter of March 3, 1978, relative to the nonrenewal of a teacher's contract under Section 15-47-38(5) of the N.D.C.C. You state the following facts and questions:

A matter has arisen which is of the utmost concern to North Dakota school boards and which they have requested I communicate with you about. The issue is of considerable importance and I feel an Opinion needs to be issued to direct our school boards concerning the proper procedure to take. What I am talking about concerns the matter of nonrenewal of a teacher's contract under Section 15-47-38(5), N.D.C.C.

The precise question is whether the final decision to nonrenew a teacher's contract must be made at the time of the executive session hearing or whether it may be made at a later public meeting. In the past school boards have been guided by Grand Forks School District v. Hennessy, 206 N.W.2d. 876, which in the process of declaring that executive sessions held without statutory authority are invalid, seems to say that the nonrenewal decision should be made at an open, public meeting. Since this case they have followed that mandate. However, in 1975 the nonrenewal statute was amended and language was placed in it to codify the result reached in Wildrose School district v. Dathe, 217 N.W.2d. 781, to say that a meeting is to be held for the purposes of 'discussing and acting upon' the contemplated nonrenewal. ***

The position that school districts are placed in is a difficult one. Depending on when the decision is made it may be argued with considerable vigor that the decision must be made at an open public meeting on the basis of the Hennessy case or that the statute has overruled the Hennessy case and the decision must be made at the executive session hearing. I do not believe that North Dakota school boards have any preference as to when the decision should be made, but unless they are confident that a decision will not be reversed from having been made at the wrong time, they are placed in an untenable position.

In connection with this question, I would appreciate it if you would address two other areas of concern that are closely related to this problem. First, is it permissible for a school board to recess and/or adjourn from day-to-day a hearing held for the purposes of nonrenewing a teacher? The statute, Section 15-47-38(5), N.D.C.C., clearly gives the teacher the

right to ask for a continuance, but may the board continue the hearing on its own motion even though the specific statutory authority is not contained within this section?

Finally, if a school board member is not present at the special hearing itself, can that member vote on the question of whether the teacher should be nonrenewed at either a continued session of the hearing itself or at a later public board meeting? Of course, if you feel that the nonrenewal decision may be made only during the time of the hearing itself, that would answer the question insofar as the latter instance is concerned, but a question would still remain concerning continued session. This matter has arisen on several instances and if the board member should not be voting unless he has been present at the hearing, this fact should be made known to school boards.

Section 15-47-38(5) of the N.D.C.C., as amended, provides in part:

The school board of any school district contemplating nonrenewing a teacher's contract . . . shall notify such teacher in writing of such contemplated nonrenewal no later than April first. Such teacher shall be informed in writing of the time, which shall not be later than April seventh, and place of a special school board meeting for the purpose of discussing and acting upon such contemplated nonrenewal. *** The meeting shall be an executive session of the board unless both the school board and the teacher shall agree that it shall be open to other persons or the public. *** Upon such hearing, if the teacher so requests, he shall be granted a continuance of not to exceed seven days. ***

As you have noted in your letter, the North Dakota supreme Court in *Hennessy, supra*, held in 1973 that a statute requiring a school board to notify a teacher that it is contemplating a nonrenewal of the teacher's contract and allowing the teacher, upon request, to meet with the school board in executive session calls only for an informational meeting and does not intend a decisionmaking meeting of the school board and that a determination by a school board not to renew a teacher's contract must be made at a meeting which is open to the public after the statute affording a teacher the opportunity to meet with the school board in executive session has been complied with. The Court based its decision on the fact that the open meeting statute, Section 44-04-19 of the N.D.C.C., required open meetings of school boards, except as specifically authorized by statute, and on the fact that the meeting between the school board and the teacher required at that time under Section 15-47-38 did not anticipate that the school board would make a formal decision at the executive session. The Court noted that the statute at that time provided that the teacher must be informed in writing that he may request and appear at a meeting to be held by the school board "prior to the final decision of such teachers discharge or failure to renew such teacher's contract."

It is apparent that the statute which the Court construed in *Hennessy* and the statute now in existence are substantially different. Without considering, in detail, all of the amendments to the statute since the decision in *Hennessy*, we believe the effect of the addition

of the wording that the teacher be notified of the time and place of a meeting of the school board "for the purpose of discussing and acting upon" a contemplated nonrenewal substantially changes the state from that construed in *Hennessy* and requires that the decision to renew or not renew a teacher's contract must be made in an executive session of the board unless both the school board and the teacher have agreed that it be open to the public.

With respect to your second question, we believe a school board has the right to continue the executive session from day-to-day. As an example, if the meeting with the teacher was involved and might take several hours or days to complete, it is only common sense that the statute does not require the board, witnesses or teachers to continue in a marathon session from the time the meeting is commenced until it is concluded even if it might take many hours or days to complete. Note the provisions of Section 15-47-38(5) which provides that at the meeting with the board the teacher may produce such evidence as may be necessary to evaluate the reasons for nonrenewal, and either party may produce witnesses to confirm or refute the reasons for the contemplated nonrenewal of the contract. Such procedure could, conceivable, take more than a few hours. We believe, however, that if the school board does declare a recess, it must be a time and date certain and upon resumption of the meeting it is again an executive session unless the parties have agreed that it be open. We do not view the provisions that the teacher is entitled, upon request, to a continuance of not to exceed seven days to be a restriction upon the board to recess the proceeding. Rather, we view that provision as granting the teacher an absolute right to such continuance without relying upon the discretion of the school board to continue the matter, i.e., the provision operates as a right granted to the teacher and not a limitation upon the school board to recess. Such recess could not, however, be beyond the fifteenth of April since if a decision to not renew the contract is made, final notice must be given to the teacher by April 15th. Furthermore, we believe such recess must be in good faith, such as a meeting that is lasting several hours, and not for the purpose of making it difficult for the teacher to have his witnesses or representatives present.

With respect to your last question, we assume the situation to which you refer might, as an example, occur when a meeting is scheduled for one evening and, because of the length, is recessed later that evening the next evening and a member of the school board who was not present the first evening is present the second evening. This question does give us some concern since the board member who was not present the first evening but is present the second evening when a decision is made has not had the opportunity to hear all the statements, view the witnesses, etc. However, there is nothing in our statutes which limits the right of a school board member to vote in such instance and this office cannot limit the right of such school board member to vote. In *Northwestern Bell T. Co. v. Board of Commissioners of Fargo*, 211 N.W.2d. 399 (N.D. 1973), the North Dakota Supreme Court held, at point number 6 of the Syllabus by the Court, that a member of a governmental body who is present has a duty to vote unless excused by law and if he does not do so he is to be counted as voting with the majority. As noted above, we find no provision in the statutes which excuses a school

board member from voting under the circumstances outlined in your question.

I trust this will adequately set forth our position on the questions presented.

Sincerely,

ALLEN I. OLSON

Attorney General