

Date Issued: March 8, 1985 (AGO 85-9)

Requested by: Dr. Wayne G. Sanstead, Superintendent
Department of Public Instruction

- QUESTIONS PRESENTED -

I.

Whether the governor may remove a school board member from office pursuant to N.D.C.C. section 44-11-01.

II.

Whether a school board member shall be subject to recall by petition of electors in the school district pursuant to N.D. Constitution, Article III, Section 10.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the governor may not remove a school board member from office pursuant to N.D.C.C. section 44-11-01.

II.

It is my further opinion that a school board member is not subject to recall by a petition of electors in the school district pursuant to N.D. Constitution, Article III, Section 10.

- ANALYSES -

I.

The governor has been granted the power to remove from office certain governmental officials. This authority is found in N.D.C.C. section 44-11-01, which states as follows:

44-11-01. WHAT OFFICERS REMOVABLE BY GOVERNOR - GROUNDS. The governor may remove from office any county commissioner, clerk of the district court, sheriff, coroner, county auditor, register of deeds, state's attorney, county treasurer, superintendent of schools, county commissioner, surveyor, public administrator, city auditor, city commissioner, mayor, chief of police, deputy sheriff, or other police officer, or any custodian of public moneys, except the state treasurer, whenever it appears to him by competent evidence and after a hearing as provided in this chapter, that such officer has been guilty of misconduct, malfeasance, crime in office, neglect of duty in office, or of habitual drunkenness or gross incompetency.

It is clear from a reading of the above statute that school board members were not included in the list of officers which could be removed by the governor. The governor does have the power to remove a "custodian of public moneys." However, this term cannot be

construed so as to include school board members. The handling of funds in a school district is specifically delegated to the clerk of the school board pursuant to N.D.C.C. section 15-29-09. Therefore, a school board member cannot be considered a custodian of public moneys and may not be removed pursuant to N.D.C.C. section 44-11-01.

II.

Certain governmental officials may be subject to recall by a petition of electors pursuant to N.D. Constitution, Article III, Section 10, which states as follows:

Section 10. Any elected official of the state, of any county or of any legislative or county commissioner district shall be subject to recall by petition of electors equal in number to twenty-five percent of those who voted at the preceding general election for the office of governor in the state, county, or district in which the official is to be recalled. * * *

It is clear from a reading of the statute that school board members are not specifically mentioned as officers which are subject to recall.

Nevertheless, it must be determined whether the framers of this section of the Constitution intended that it be applied to school board members. The sole object sought in construing a constitutional provision is to ascertain and give effect to the intention and purpose of the framers and of the people who adopted it. All rules of construction are subservient to and intended to effectuate such object. The questions must be answered, if possible, from the language of the constitutional provision itself. If the language is ambiguous or the answer doubtful, however, then the field of inquiry is widened and rules applicable to the construction of statutes must be considered. *Newman v. Hjelle* 133 N.W.2d. 549, 555-556 (N.D. 1965).

The original provision for a recall procedure of public officers in North Dakota was found in Article 33 of the Amendments to the Constitution of the State of North Dakota, as approved on March 16, 1920. This article as originally adopted read:

The qualified electors of the state or of any county, or of any congressional, judicial, or legislative district may petition for the recall any elective congressional, state, county, judicial, or legislative officer by filing a petition with the officer with whom the petition for nomination to such office in the primary election is filed, demanding a recall of such officer. Such petition shall be signed by at least thirty percent of the qualified voters who voted at the preceding election for the governor in the state, county, or district from which such officer is to be recalled. The officer with whom such petition is filed shall call a special election not to be held less than forty or more than forty-five days from the filing of such petition.

It is clear from reading the original article that school board members were not expressly included in the list of officers which

could be removed. School board members are municipal or city officials, and there is no reference to municipal or city officials in this section of the Constitution.

The intent of the framers pertaining to this particular article cannot be determined due to the fact that there is no written constitutional history regarding this provision nor any court decisions construing it. There is some subsequent constitutional history, however, which sheds some light on this issue. In 1977, the Joint Committee on Constitutional Revision met to consider proposed amendments to the Constitution which would be submitted to the qualified electors of the State of North Dakota at a primary election to be held in 1978. One of the proposed amendments related to the recall of elected officials in the State of North Dakota. This proposal, entitled Senate Concurrent Resolution No. 4059, would have amended Article 33 to allow electors to petition for the recall of any elective congressional, state, political subdivision, judicial, or legislative officer. During the discussion of this resolution, the question was raised whether this new section would apply to park boards, school boards, city councils, and commissions. Discussion centered on the problems which would be presented with a recall procedure in small local situations where it could become so personal and acrimonious thus opening the door to constant turmoil. The resolution was indefinitely postponed because it was the general feeling of the committee members that the recall of elected officials as provided for in this proposed amendment to the Constitution could be abused. It was subsequently defeated.

The Joint Committee on Constitutional Revision also considered House Concurrent Resolution No. 3088, which would repeal Article 33 dealing with recall of public officials and create a new article of the Constitution of the State of North Dakota relating to the power of initiative, referendum, and recall. Thus, as part of this proposed article to the Constitution, a provision was included allowing for the recall of any elected official of the state, of any county, or of any legislative or county commissioner district. There was no mention in the proposed amendment nor in the corresponding debate relating to the inclusion of school board members in this particular section. This proposed amendment was passed by the North Dakota Legislature and presented to the qualified electors of the State of North Dakota at the November 1978, general election. The proposed amendment was approved by the voters of North Dakota and became the present N.D. Constitution, Article III, Section 10.

This subsequent constitutional history plainly indicates a deliberate intent to exclude city or municipal officials, including school board members, from the recall provisions of Article III, Section 10, of the North Dakota Constitution. In conclusion, it is clear from a reading of N.D. Constitution, Article III, Section 10, that school board members are not specifically mentioned as an official subject to recall. An examination of the intent of the framers reveals that they did not intend to include school board members in the list of officials which could be recalled pursuant to N.D. Constitution, Article III, Section 10. Therefore, it is my opinion that school board members are not subject to recall pursuant to N.D. Constitution, Article III, Section 10.

Although it is my opinion that school board members cannot be recalled pursuant to the North Dakota Constitution, there are other provisions which do provide an avenue of possible relief. Under N.D.C.C. section 15-29-06 and chapter 44-10, a school board member may be removed by jury trial pursuant to an accusation presented by a grand jury (N.D.C.C. section 44-10-02) or an accusation in writing and verified by the oath of any person (N.D.C.C. section 44-10-16).

- EFFECT -

This opinion is issued pursuant to N.D.C.C. section 54-12-01. It governs the actions of public officials until such time as the question is decided by the courts.

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