

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 89-14

Date issued: September 28, 1989

Requested by: Secretary of State Jim Kusler

- QUESTIONS PRESENTED -

I.

Whether a petition seeking the recall of an elected official of a political subdivision must state at least one of the statutory bases provided for recall.

II.

Whether a special election to consider the recall of a school board member must be held within 30 days after the date the petitions are determined to be valid and sufficient.

III.

Whether a separate special election on a recall petition must be held where the date of the special election is within 90 days of a statewide special election called to consider referred legislative measures.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a petition seeking the recall of an elected official of a political subdivision need not state any of the statutory bases provided for recall.

II.

It is my further opinion that a special election to consider the recall of a school board member must be held within 40 days, rather than 30 days, following the date the petitions have been determined to be valid and sufficient.

III.

It is my further opinion that a separate special election need not be called to consider a recall petition where the date of the special election is within 90 days of a statewide special election called to consider referred legislative measures.

- ANALYSES -

I.

During the 1989 legislative session, the Legislature enacted N.D.C.C. ' 44-08-21 providing for the recall of elected officials of political subdivisions who are not subject to recall pursuant to N.D. Const. art. III, ' 10. Because the constitutional recall provision is restricted to specified public officers, some political subdivision officials were not subject to recall. The purpose of N.D.C.C. ' 44-08-21 was to fill the void created by the constitutional provision and to provide for the recall of any elected political subdivision official. The recall provisions of N.D.C.C. ' 44-08-21 were patterned after the recall provisions of N.D. Const. art. III, ' 10. Hearing on H. 1276 Before the House Comm. on the Judiciary, 51st Leg. (January 17, 1989) (Statements of Rep. Haugen and Rep. Schmidt).

Unless subject to recall pursuant to N.D. Const. art. III, ' 10, an elected political subdivision official is subject to recall pursuant to N.D.C.C. ' 44-08-21 for misconduct, malfeasance, crime in office, neglect of duty in office, habitual drunkenness, or gross incompetency. The recall occurs by petition. At least 25% of the number of voters who voted in that political subdivision at the last election of the office of the official to be recalled must sign the petition. In a political subdivision with a population of not more than 100, six electors must sign.

When the petition is filed, the official receiving the petition must pass on its sufficiency in a manner similar to that required of the Secretary of State pursuant to N.D.C.C. ' 16.1-01-10. Section 16.1-01-10 provides that the Secretary of State shall conduct a representative random sampling of the signatures contained in a petition by the use of assorted methods in order to determine the validity of the signatures. If the official determines the petition is valid and sufficient, a special election is held within 30 days unless a scheduled election is to be held within 90 days.

The statutory grounds for the recall of political subdivision elected officials (misconduct, malfeasance, crime in office, neglect of duty in office, habitual drunkenness, and gross incompetency) describe the basis upon which the official may be recalled. N.D.C.C. ' 44-08-21 does not state that the recall petition must describe the statutory basis for recalling the official. The statute only states that a minimum number of valid signatures must appear on the petition.

N.D.C.C. ' 44-08-21 provides the standard of review for a recall petition. By its incorporation of N.D.C.C. ' 16.1-01-10, N.D.C.C. ' 44-08-21 restricts the scope of the petition's review to a determination of whether there are a minimum number of valid signatures. The statute states that if the petition is determined to be valid and sufficient, the special election is then held. N.D.C.C. ' 44-08-21 does not require the official who reviews the recall petition to determine whether the reason recall is being sought is a permissible reason nor whether the named official has committed any of the acts described within the statute.

A review of the legislative history surrounding the enactment of N.D.C.C.

' 44-08-21 indicates that the specific reasons for the recall of a political subdivision official were not added to House Bill No. 1276 until the bill was heard by the Senate Judiciary Committee on March 14, 1989. At that hearing, the primary sponsor, Representative Haugen, offered an amendment describing the grounds upon which a political subdivision elected official was subject to recall. In his testimony, Representative Haugen stated that his amendment provided "the reasons for recall of elected officials." Hearing on H. 1276 Before the Senate Comm. on the Judiciary, 51st Leg. (March 14, 1989) (Statement of Rep. Haugen). Nothing was said in the committee hearing as to whether these various statutory grounds had to exist in a particular circumstance or case. In the amendment offered by Representative Haugen, no changes were made to that portion of House Bill No. 1276 which restricted the petition reviewer's duties to those duties performed by the Secretary of State pursuant to N. D. C. C. ' 16.1-01-10.

The provisions of N. D. C. C. ' 44-08-21 providing for the recall of elected officials of political subdivisions was intended to provide for the recall of officials who were not subject to recall pursuant to N. D. Const. art. III, ' 10. Under section 44-08-21 and the constitution recall is accomplished by filing a valid and sufficient petition. The petition's validity and sufficiency is determined by validating a random sampling of the signatures contained on the petitions. The petition need not be examined with respect to the statutory basis for which recall is being sought. Furthermore, neither the provisions of N. D. Const. art. III, ' 10, or N. D. C. C. ' 44-08-21, require that the recall petition provide any reason justifying the recall of the named official.

For these reasons, it is my opinion that a petition seeking the recall of an elected official of a political subdivision under section 44-08-21 need not state any statutory basis provided for by statute in justification of the recall.

II.

When a recall petition has been filed and found to be valid and sufficient, section 44-08-21 provides a special election must be held "within thirty days." The name of the official who has been recalled must be placed on the ballot unless the official resigns within 10 days following the filing of the petition. Additional candidates for that office may be nominated "in the manner provided by law." N. D. C. C. ' 44-08-21.

N. D. C. C. ' 15-28-09(1) contains "the manner provided by law" for the nomination of school board candidates. This statute provides that any candidate for election as a member of a school board must file a statement with the business manager of the school district "not less than thirty-three days before the election and before four p. m. on the thirty-third day." The statement must set forth the candidate's name and the position for which that person is a candidate. Id. At least 20 days before the election N. D. C. C. ' 15-28-09(1) also requires the preparation and printing of an official ballot containing the names of all persons who have filed as candidates for the school board election.

There are two practical problems posed in the application of the statutory recall provisions to a school board member. The statutory procedures providing for the nominations of school board candidates require the filing of a statement with the school district business manager indicating one's candidacy for election 33 days before the election. However, the recall election must be held within 30 days following a finding that the recall petition is valid and sufficient.

Additionally, N. D. C. C. ' 44-08-21 requires the preparation of the ballot at least 20 days before the election. When a recall election occurs within 30 days of the filing of a valid and sufficient petition, and the named official does not resign within 10 days of the petition's filing, the preparation and printing of the ballot could not occur until at least the 11th day following the filing of the petition. On that day, there would be less than 20 days before the election and the requirements of N. D. C. C. ' 44-08-21 would not have been satisfied.

If the current statutory provisions provided by N. D. C. C. " 44-08-21 and 15-28-09(1) are strictly followed, and the named official does not resign, the named official, who is the subject of the recall, would be the only name appearing on the ballot. The applicable time frames would prevent other persons from having their names printed on the ballot.

Furthermore, if the named official did not resign by the 10th day following the filing of a petition, the printing of the ballot could not occur at least 20 days before the election as required by N. D. C. C. ' 15-28-09(1).

The North Dakota Supreme Court has stated on numerous occasions that statutes cannot be construed or implemented where the results are ludicrous and absurd. Olmstead v. Miller, 383 N. W. 2d 817 (N. D. 1986); Skoog v. City of Grand Forks, 301 N. W. 2d 404 (N. D. 1981); State v. Allesi, 216 N. W. 2d 805 (N. D. 1974).

Because strict adherence to the literal statutory provisions found within N. D. C. C. ' 44-08-21 would result in a ludicrous and absurd result (i.e., only the name of the recalled official would appear on the recall election ballot), further interpretation is needed to carry out the legislative intent as best as possible.

In interpreting a statute, the object sought to be attained by the Legislature as well as the relevant legislative history surrounding the enactment may be considered. N. D. C. C. ' 1-02-39(1), (3). The legislative history surrounding the enactment of N. D. C. C. ' 44-08-21 indicates that the original bill (House Bill No. 1276) did not include a requirement that the special election be held within any certain time period. However, the House Judiciary Committee considered and approved amendments adding the requirement that a special election be held within 30 days following the filing of a valid and sufficient petition. Hearing on H. 1276 Before the House Comm. on the Judiciary, 51st Leg. (Feb. 1, 1989). Although the written minutes and the audio tapes of that committee hearing do not disclose the intention or reasons behind these amendments, it can only be assumed that the Legislature desired to prevent long delays between the time the recall petition is filed and the time at which the actual recall election would occur.

To implement the apparent legislative intent of a quick resolution of a recall petition, and to allow sufficient time for persons to be nominated for the school board and for the printing of the ballot, it is my opinion that the special election called in response to the filing of a valid and sufficient recall petition must be held within 40 days. The use of the 40-day standard would allow school board candidates seeking to have their names appear on the special election ballot seven days within which to file the statement required by N. D. C. C. ' 15-28-09(1). Concededly, this allows very little time for persons to determine whether they wish to seek the school board office. However, the allowance of any additional time could thwart the desired legislative intent of a quickly held special election following the filing of a recall petition.

Additionally, the 40-day standard would allow the business manager to print the ballot at least 20 days prior to the election as required by N. D. C. C. ' 15-28-09(1) where the named official does not resign by the 10th day following the filing of the petition.

The provisions of N. D. C. C. ' 44-08-21 should be addressed by the Legislature during its next session. I strongly urge all concerned and interested parties to offer proposed amendments to the Legislature for its consideration in order to remove this doubt and ambiguity concerning the filing deadline for candidates for school board recall elections.

III.

N. D. C. C. ' 44-08-21 provides that the official who reviews the recall petitions filed against a political subdivision elected official and who finds those petitions to be valid and sufficient "shall call a special election to be held within thirty days." As noted in the second analysis to this opinion,

because of conflicts with other provisions of North Dakota election law, a special election for a school board must be held within 40 days. However, the statute states that no special election may be called "if the date would be within ninety days of the next scheduled election."

Recently, Governor Sinner called a special election to occur on December 5, 1989, to consider seven referred legislative measures. The Governor's action was taken pursuant to N.D. Const. art. III, ' 5. The question presented is whether the statewide special election called by the Governor constitutes a "scheduled election" as that term is used in N.D.C.C. ' 44-08-21. If the December 5, 1989, statewide special election constitutes a "scheduled election," and if a special election to consider recall petitions filed against a political subdivision elected official would occur within 90 days of the statewide special election, the provisions of N.D.C.C. ' 44-08-21 require the recall special election to occur at the same time as the statewide special election.

The primary objective in the interpretation of any statute is to ascertain the intent of the Legislature. Peterson v. Heitkamp, 442 N.W.2d 219 (N.D. 1989).

Where a statute is ambiguous or of doubtful meaning, extrinsic aids, including legislative history, may be used to ascertain that legislative intent. First Security Bank v. Enyart, 439 N.W.2d 801 (N.D. 1989); N.D.C.C. ' 1-02-39(3).

The term "scheduled election" is not defined by N.D.C.C. ' 44-08-21. A review of legislative history, however, indicates that the addition of this language to House Bill No. 1276 occurred at the suggestion of a representative of the North Dakota Association of Counties. In testifying in favor of House Bill No. 1276 before the House Judiciary Committee, Mr. Richard Bendish noted a concern as to the cost of special elections. "If [the recall special election is] close enough to an upcoming election, I would like to have some provision in here . . . to not have a special election and use that election as a special election." Hearing on H. 1276 Before the House Comm. on the Judiciary, 51st Leg. (January 17, 1989) (Statement of Richard Bendish).

Following the suggestion of Mr. Bendish made at the January 17, 1989, committee hearing, the House Judiciary Committee amended House Bill No. 1276 to include a provision prohibiting a special election if it would occur within 90 days of the next scheduled election. Hearing on H. 1276 Before the House Comm. on the Judiciary, 51st Leg. (January 31, 1989). Because of technical malfunctions with the tape recording equipment, we cannot review the recorded comments of the committee members at the time they adopted the amendment under consideration. The available legislative history, however, including Mr. Bendish's comment, suggests the Legislature intended the phrase "next scheduled election" to refer to any election scheduled to occur. The Legislature's purpose was to avoid unnecessary special election costs if an upcoming election were scheduled to occur within 90 days of the date of the recall election.

Therefore, to further legislative intent as expressed by available legislative history, it is my opinion that a recall election to consider the recall of a

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political subdivision elected official may not occur if the date of that special election would be within 90 days of a statewide special election to consider referred legislative measures.

- EFFECT -

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

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