

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-03

Date issued: January 19, 1990

Requested by: Governor George A. Sinner

- QUESTIONS PRESENTED -

I.

Whether the Governor is authorized to remove elected state officials.

II.

Whether the Legislature has otherwise authorized the removal of elected state officials.

- ATTORNEY GENERAL'S OPINION -

I.

The legislature has not authorized the Governor to remove elected state officials.

II.

Elected state officials not subject to the impeachment process, including the State Labor Commissioner, may be removed by the judicial process set out in N. D. C. C. ch. 44-10.

- ANALYSES -

I.

The Governor may remove a public official only if the Legislature has enacted a specific statutory provision authorizing removal by the Governor. State ex rel. Wehe v. Frazier, 182 N.W. 545, 548 (N.D. 1921). Constitutional state officers may only be removed by impeachment. State ex rel. Pollack v. Miller, 57 N.W. 193 (N.D. 1893). The Legislature may provide the necessary statutory mechanism, not inconsistent with the constitutional provisions, to implement the impeachment procedures. N.D. Const. art. IV, ' 13. The impeachment process does not contemplate actual removal by the Governor; thus, the Governor may not actually remove a constitutional state officer. N.D. Const. art. XI " 8-15. In North Dakota all elected state officials except the Labor Commissioner are constitutional officers, subject only to impeachment. See

discussion infra. An officer holding a public office created by statute may be removed as "provided by law" without reference to constitutional limitations. N.D. Const. art. XI ' 11; State ex rel. Joos v. Guy, 125 N.W.2d 468 (N.D. 1963); State ex rel. Kositzky v. Prater, 189 N.W. 334 (N.D. 1922).

N. D. C. C. ' 54-07-01 provides in part:

54-07-01. Powers and duties of governor. In addition to the powers and duties prescribed by the constitution, the governor:

1. Shall supervise the official conduct of all executive and ministerial officers.
2. Shall see that all offices are filled, and the duties thereof performed, or in default thereof, shall apply such remedies as the law allows. If the remedy is imperfect, he shall acquaint the legislative assembly therewith at its next session.

N. D. C. C. ' 54-07-01(1) & (2).

Although the Governor is authorized to supervise the conduct of all executive officers and see that their respective duties are performed, N.D.C.C. ' 54-07-01 by itself does not authorize the Governor to remove any official. Thus, to assure elected state officials perform their duties as required, the Governor must look to "such remedies as the law allows." Id. at (2); see State ex rel. Joos v. Guy, 125 N.W.2d 468 (N.D. 1963) (upholding removal where express statutory authority existed to remove official).

N. D. C. C. ' 54-11-07 authorizes the Governor to suspend, but not remove, the State Treasurer if both the State Auditor and the Commissioner of Banking and Financial Institutions certify that the State Treasurer has embezzled or converted state funds to his own use. N.D.C.C. ' 54-11-07. This statute authorizes suspension of the Treasurer until he is "reinstated or his successor is elected and qualified." Id. The statute contemplates removal of the State Treasurer through the impeachment process because it requires the Governor to report to the Legislature concerning the State Treasurer's suspension and the surrounding circumstances. Thus, the statute only provides for a suspension of the State Treasurer during the time period when the Legislature is not in session and the period when the impeachment process is being conducted. The procedure for suspension of the State Treasurer is not inconsistent with the constitutional procedure for impeachment. See N.D. Const. art XI; N.D.C.C. ' 44-09-08. Given the significant amounts of money over which the Treasurer has control and the importance of assuring that money is available to state agencies to accomplish the business of the state, suspension of the State Treasurer during the pendency of the impeachment trial is necessary and justified. Additionally, this procedure allows for immediate correction of the situation without the added expense of calling the

Legislature in to specially attend to the State Treasurer's impeachment.

Chapter 44-11 of the Century Code also authorizes removal of certain elected officials. By its terms, however, it is limited to certain city and county officials. Further, the North Dakota Supreme Court has construed it to authorize only the removal of the city and county officials specifically listed. See State ex rel. Wenzel v. Langer, 256 N.W. 195 (N.D. 1934) (holding precursor to N.D.C.C. ch. 44-11 did not apply to workmen's compensation commissioners because they were not specifically enumerated in the statute); N.D.C.C. ' 44-11-01. The Governor is not authorized by N.D.C.C. ch. 44-11 to remove any elected state official.

Thus, it is my opinion that the Governor is not authorized by the constitution or statutes to remove an elected state official.

## II.

Although the Legislature has not authorized the Governor to remove an elected state official, the Legislature has provided a mechanism for removal of state officials who are not liable to impeachment. N.D.C.C. ' 44-10-02. N.D.C.C. ch. 44-10 does not apply to constitutional state office holders because they may be removed by impeachment as provided in article XI of the North Dakota Constitution which is implemented by N.D.C.C. ch. 44-09. N.D. Const. art. XI; N.D.C.C. ch. 44-09; State ex rel. Joos v. Guy, 125 N.W.2d 468 (N.D. 1963). However, chapter 44-10 does apply to state offices that are created by statute. The only elected state official created by statute is the Labor Commissioner.

Article V, section 12 of the North Dakota Constitution authorizes the Legislature to create a department of labor by statute. The statutorily created department is to be headed by "a public official who may be either elected or appointed." N.D. Const. art. V, ' 12. Thus the constitution only creates the possibility that there will be a labor commissioner. The office itself is created by the legislature's enactment of a statute. It is therefore not a constitutional state office liable to impeachment.

The Legislature has provided by statute for an elected Commissioner of Labor. N.D.C.C. ' 34-05-01.2. It is my opinion that the Commissioner of Labor may be removed for "misconduct, malfeasance, crime . . . misdemeanor in office, or for habitual drunkenness or gross incompetence" by judicial proceedings initiated pursuant to N.D.C.C. ch. 44-10. N.D.C.C. ' 44-10-02.

In summary, it is my opinion the Legislature by enacting N.D.C.C. ch. 44-10 has authorized the removal of elected state officials who are not liable to impeachment. The only elected state official not liable to impeachment is the Labor Commissioner. All other elected state officials may be removed through the impeachment process.

- 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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