

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-18

Date issued: August 16, 1990

Requested by: Terry Elhard  
McIntosh County State's Attorney

- QUESTION PRESENTED -

Whether, upon the expiration of the term of a water resource manager, the manager may be replaced without providing any notice of the reason for replacement or an opportunity for a hearing.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that upon expiration of the term of a water resource manager, the manager may be replaced without providing any notice of the reason for replacement or an opportunity for a hearing.

- ANALYSIS -

N. D. C. C. ' 61-16-07 provides that appointments are made to the water resource board by the boards of county commissioners of the respective counties. Managers are appointed for a term of three years. A manager whose term has not expired may be removed by the board of county commissioners for certain reasons upon competent evidence provided at a public hearing. N. D. C. C. ' 61-16-08.

No statute provides for a hearing with respect to a manager whose term has expired but is not reappointed. When life, liberty, or property interests protected by the Fourteenth Amendment are at stake, due process requires some kind of hearing. But when protected interests are not involved, procedural due process requirements do not apply. Board of Regents v. Roth, 408 U. S. 568, 569-70 (1972).

In Roth, the Court determined a nontenured teacher hired for a fixed term does not have a constitutional right to a statement of reasons and a hearing regarding a state university's decision not to rehire him for another year after his contract ended. The Court found that because Roth was not charged with some misconduct bringing into question his reputation, honor, or integrity, his liberty interest was not impugned. Id. at 573. The Court said to suggest a person is deprived of liberty when he simply is not rehired stretches the concept too far. Id. at 575.

Roth was found to have no property interest in being reappointed.

The Court explained that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id. at 577.

The Court further advised that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and . . . defined by existing rules or understandings that stem from an independent source such as state law . . . ." Id. at 577.

A water manager's "property" interest in his office is created by the statute under which he is appointed which provides when the term of office terminates. Thus, appointment as a water manager does not create an interest in reappointment for another term.

The North Dakota Supreme Court has followed Roth in holding that a nontenured teacher has no property interest in continued employment beyond the duration of the contract. Stensrud v. Mayville State College, 368 N.W.2d 519, 521 (N.D. 1985).

Although the issue has not been addressed in North Dakota, courts in other jurisdictions have given officeholders not retained in office short shrift absent a statute, rule, or contract giving them a right to retention. Hudgins v. City of Ashburn, 890 F.2d 396 (11th Cir. 1989); Hawkins v. Steingut, 829 F.2d 317 (2nd Cir. 1987); Schwartz v. Mayor's Comm. on Judiciary of N.Y., 816 F.2d 54 (2nd Cir. 1987).

If a manager is removed before the expiration of his term, the statute provides for a hearing in conformity with the requirements of due process. See Lee v. Walstad, 368 N.W.2d 542, 546 (N.D. 1985) (city employee not entitled to hearing where no property right conferred). However, the statute providing for appointment of a water district manager provides for a specific term. No language suggests that a manager is entitled to reappointment.

It is, therefore, my opinion that when the term of office of a water resource manager expires and a successor is appointed, there is no requirement for a notice of the reasons for not reappointing the manager or hearing on the matter.

- 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 question presented is decided by the courts.

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