

LETTER OPINION
98-L-197

November 24, 1998

Mr. Doug Mattson
Ward County State's Attorney
PO Box 5005
Minot, ND 58702-5005

Dear Mr. Mattson:

Thank you for your letter raising several questions about N.D.C.C. § 11-10-05.1 which changes the commencement of the term of office for county commissioners. Until the enactment of this statute, the terms of county commissioners would normally have commenced on the first Monday in January next succeeding the officer's election. See N.D.C.C. § 11-10-05. N.D.C.C. § 11-10-05.1 was enacted to change that date and provides, in part:

The regular term of office of each county commissioner, when the commissioner is elected for a full term, commences on the first Monday in December next succeeding the officer's election and each such commissioner shall qualify and enter upon the discharge of the commissioner's duties on or before the first Monday in December next succeeding the date of the commissioner's election or within ten days thereafter.

Your first question concerns the effective date of the statute. Because the statute moves the commencement date of a county commissioner's term back about a month, the net effect will be to shorten the term of either the current officeholders or the newly elected ones by that period of time. 1997 N.D. Sess. Laws ch. 110, § 2 sets out the effective date for the change in commencement of the term of office, providing:

This Act is effective for any full term of office of a county commissioner beginning after July 31, 1997.

As your letter points out, this provision has caused some confusion among county officials about when the law is effective and which officeholders' terms will be shortened.

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In your letter you note that the North Dakota Constitution provides that elective county offices have four year terms. N.D. Const. art. VII, § 8. Thus, the full term of a county commissioner elected in 1994 and taking office in January of 1995 would run until the first Monday in January of 1999. Similarly, the full term of a county commissioner elected in 1996 and taking office in January of 1997 would run until the first Monday in January of 2001.

Based on a plain reading of 1997 N.D. Sess. Laws ch. 110, § 2, it is my opinion that N.D.C.C. § 11-10-05.1 would not become effective for county commission positions until after the expiration of the full four-year terms for county commission positions which began in January of 1995 and 1997. This is the case because the new terms referred to in the effective date provision cannot commence until the full constitutionally required four-year terms have expired. In other words, the full terms of office beginning after the effective date of July 31, 1997, cannot begin until the existing terms have expired.

This interpretation is supported by the legislative history to Senate Bill 2370, which was enacted as 1997 N.D. Sess. Laws ch. 110. In written testimony presented to the House Political Subdivisions Committee by Mark Johnson, executive director of the North Dakota Association of Counties, he indicated that the bill was not intended to reduce any current terms of office and that the effective date provision was offered as an amendment "to clearly state that this change will not affect current terms." Id. Thus, it was intended that county commissioners elected to full terms prior to July 31, 1997, would serve their full four-year terms, while those persons elected to the position of county commissioner in 1998 and 2000 would have their terms shortened by approximately one month.

You then asked whether the shortening of a county commissioner's term would violate the mandate in Article VII, Section 8 of the North Dakota Constitution, which provides, in part:

Any elective county office shall be for a term of four years.

(Emphasis supplied.)

In State v. Hagerty, ____ N.W.2d ____, 1998 W.L. 293750 (N.D. 1998), the North Dakota Supreme Court noted:

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"When interpreting constitutional sections, we apply general principles of statutory construction." *Comm'n on Med. Competency v. Racek*, 527 N.W.2d 262, 266 (N.D. 1995). "Our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement." *Id.* "The intent and purpose of a constitutional provision is to be determined, if possible, from the language itself." *Bulman v. Hulstrand Constr. Co., Inc.*, 521 N.W.2d 632, 636 (N.D. 1994).

The use of the word "shall" (as in the constitutional provision) is generally mandatory. *E.g.*, *State v. McMorrow*, 332 N.W.2d 232 (N.D. 1983). Thus, a plain reading of the pertinent provision in Article VII, Section 8 of the North Dakota Constitution is that the term of a county commissioner must be four years. The question then arises whether the Legislature may shorten a constitutionally mandated term of office.

"It is a well-established principle that 'the legislative power of a State except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service.'" *Goldsmith v. Mayor & City Council of Baltimore*, 845 F.2d 61, 64 (4th Cir. 1988) (quoting *Higginbotham v. Baton Rouge*, 306 U.S. 535, 538, rehearing denied, 307 U.S. 649 (1939)) (emphasis supplied).

In *State ex rel. Stutsman v. Light*, 281 N.W. 777, 778-79 (N.D. 1938), the North Dakota Supreme Court noted that "[i]f the [public] office is created by the legislature that body may, in the absence of any constitutional restriction, abolish the office entirely. The legislature may shorten the term of such an office after the election or appointment of the incumbent. However, the intention to so change the term of an office must be clearly expressed." (Citations omitted.)

In *O'Laughlin v. Carlson*, 152 N.W. 675 (N.D. 1915), the court noted: "[I]n the absence of a constitutional prohibition, the Legislature may change the term of an office even after the election or appointment of the incumbent thereof."

One well-known authority has written that "[a]ll changes in terms of office must be authorized and made in the manner provided to be valid. Terms of office may be changed by constitutional amendment, and unless restricted by the organic laws of the state, terms of office may be statutorily changed if the legislature has jurisdiction

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. . . . However, the legislature cannot change a term fixed by the constitution." 3 Eugene McQuillin, The Law of Municipal Corporations, § 12.114 (3d ed. 1990) (emphasis supplied). Similarly, in State ex rel. Wheeler et al. v. Stucht et al., 71 N.W. 941 (Neb. 1897), the court noted:

[I]t is disclosed that police magistrates are constitutional officers, with a term of office prescribed by that instrument at two years. The term as fixed by the constitution cannot be extended by legislative act. Neither can the term of such an officer be shortened by legislative enactment.

See also New Castle County Council v. State, 688 A.2d 888 (Del. 1997) (office of county council member is statutory office and may be modified, abridged, or abolished as the legislature sees fit unless the legislation offends some constitutional limitation).

As is apparent from the foregoing discussion, the Legislature generally may not shorten the term of a constitutional office or one that is set in the Constitution. Thus, the constitutionality of N.D.C.C. § 11-10-05.1 is in doubt.

Traditionally, this office has been very reluctant to question the constitutionality of a statutory enactment. E.g., 1980 N.D. Op. Att'y Gen. 1. This is due, in part, to the fact that in North Dakota the usual role of the Attorney General is to defend statutory enactments from constitutional attack and because "[a] statute is presumptively correct and valid, enjoying a conclusive presumption of constitutionality unless clearly shown to contravene the state or federal constitution." Traynor v. Leclerc, 561 N.W.2d 644, 647 (N.D. 1997) (quoting State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996)). Further, Article VI, Section 4 of the North Dakota Constitution provides that "the supreme court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide."

Nevertheless, in 1992 then Attorney General Nicholas Spaeth opined that a statutory provision limiting the terms of some senators elected in 1990 to two years was unconstitutional as it clearly contravened the constitutional requirement that senators be elected for terms of four years contained in Article IV, Section 4 of the North Dakota Constitution. Letter from Attorney General Nicholas J. Spaeth to Representative William E. Kretschmar (March 4, 1992).

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Likewise, in the present case, the reduction of the term of office of a county commissioner by the operation of N.D.C.C. § 11-10-05.1 clearly contravenes the express mandate of Article VII, Section 8 of the North Dakota Constitution requiring county elective offices to be for a term of four years. While it is certainly arguable that a one-time transitional shortening of a four-year term by a mere month is an incidental and insubstantial legislative infringement on a constitutional term, I found no authority to support such an argument. Consequently, and reluctantly, it is my opinion that if a court were to consider a challenge to N.D.C.C. § 11-10-05.1, it would likely rule that provision, insofar as it shortens the length of a constitutional term of a county officer, is in direct conflict with Article VII, Section 8 of the North Dakota Constitution and thus unconstitutional.

In this instance, there is, however, ample time for the Legislature to address this problem before any terms are actually cut short. Because the statute only operates to shorten the term of the recently elected county commissioners, there is sufficient time for the Legislature to either propose a constitutional amendment to alleviate the conflict or to repeal the statutory provision shortening the term of office for the affected commissioners.

Sincerely,

Heidi Heitkamp
Attorney General

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