

LETTER OPINION
97-L-112

July 28, 1997

Mr. Michael N. Steffan
Minnewaukan City Attorney
PO Box 1045
Devils Lake, ND 58301-1045

Dear Mr. Steffan:

Thank you for your letter concerning the recent resignations of four of the five city council members of the city of Minnewaukan.

You indicate that the four council members submitted their resignations effective immediately, but that the resignations had not been acted upon by the council as a body. You raise a number of questions regarding how city business can be conducted in the absence of a quorum of its governing body for such matters as the upcoming special election on September 2, 1997, as well as routine and emergency city business including the approval of payment of bills, etc.

While the questions you raise are certainly pertinent, I believe that initially it is necessary to analyze the legal effect of the simultaneous resignations of a majority of the governing body of a city. Normally, city council members "hold office for four years and until their successors are elected and qualified." N.D.C.C. § 40-08-06. Vacancies on a city council normally are governed by N.D.C.C. § 40-08-08, which states as follows:

If a vacancy occurs in a city council office by death, resignation, or otherwise, the city council may call a special city election to fill the vacancy for the unexpired term, or may, after fifteen days of the date of the vacancy appoint a person from the ward in which the council member previously holding was elected or appointed to fill the vacancy until the next city election, at which election the unexpired term must be filled. Upon petition of five percent of the qualified electors of the ward, as determined by the total number of votes cast in that ward in the last general election, the council shall call a special election to fill a vacancy occurring more than six months before the next city election, if the petition has been submitted within fifteen days and before four p.m. of

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the fifteenth day of the date of the vacancy or of the vacancy being filled by appointment. If the petition is mailed it must be in the possession of the council or its representative before four p.m. on the fifteenth day after the vacancy occurs or after the vacancy was filled by appointment.

In this case, it is my understanding that the resigning city council members as a body did not call a special city election to fill any of the vacancies nor did they appoint persons to fill the vacancies as provided in N.D.C.C. § 40-08-08. This apparently unprecedented action by the four city council members is interfering with the normal operations of city government and raises a great deal of uncertainty among city officials and others who may be dependent on the actions of the city governing body.

While N.D.C.C. § 40-08-08 does provide a method for the filling of individual vacancies on a city council, by its plain terms it clearly does not contemplate that vacancies would occur simultaneously for a majority of the board. This question is not squarely addressed by any other statutory or constitutional provision in this state, nor has the North Dakota Supreme Court had occasion to rule on the basic question presented here regarding the legal effect of en masse resignations. Other courts and commentators have had occasion to address the question of how and when mass or critical resignations by public officials take effect.

"At common law officers were not at liberty to resign their offices This is not to say that in all cases the officer cannot resign -- rather, that the right to resign is subordinate to the right of the people to the maintenance of orderly government. . . ." Eugene McQuillen Municipal Corporations § 12.122 (3rd ed. 1990). In Badger v. United States ex rel. Bolles, 93 U.S. 599 (1876), the United States Supreme Court was presented with a situation similar to the one Minnewaukan faces. A number of township officials purportedly resigned their offices and would not discharge their official duties so that town debts could be duly paid. Under state law, the resigning officers held positions which were effective for a definite period and "until their successors are elected and qualified."¹ Id. at 602. The Court determined that even though the officials resigned, they were not relieved from their duties and responsibilities until successors were appointed or chosen and

¹ See similar provision in N.D.C.C. § 40-08-06 above.

qualified, particularly where the officials had resigned in order to delay or defeat the valid claims of creditors of the township. Id. at 604-605. Although the Minnewaukan city officials reportedly did not resign to delay or defeat the claims of creditors, their action may well have that effect since there is no governing body to approve payment of legitimate claims of creditors or salaries for city employees.²

In a subsequent United States Supreme Court case, Edwards v. United States, 103 U.S. 471 (1880), the Court also applied the common law rule that the resignation of a public officer is not complete until accepted by the proper authority or until appointment of a successor. The Court discussed the tension between the right of a public official to resign and its effect on the orderly administration of government, noting:

As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and he subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community and of good government, to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws.

Id. at 473-74.

Similarly, in Commonwealth ex rel. Wootton v. Berninger, 74 S.W.2d 932 (Ky. App. 1934), the Court noted:

² Although state law does authorize the expenditure of certain city funds in an emergency, it requires a vote by the governing body (even if less than a quorum). See N.D.C.C. § 40-40-18. This authority would not be available to the city here since all the voting members of the city council resigned.

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Nor are we impressed with the argument that an officer has the absolute right to resign when he pleases, and that our rule infringes this right. The basis of the rule is that the right of the incumbent is subordinate to the right of the people to the maintenance of an orderly government.

Id. at 933.

Likewise, in State ex rel. Royse v. Super. Ct. of Kitsap County, 91 P. 4 (Wash. 1907), the Court cited with approval the long-standing common law rule that if a public officer resigns the office, no vacancy exists until the resignation is accepted or a successor is appointed or elected, noting:

The long-standing rule is wholesome. It insures a continuous responsible incumbent in an office. One may not lightly throw aside responsibilities which he has assumed, and leave the public without an official when some possible emergency might make the existence of a qualified officer of great importance.

Id. at 6. See also State v. Blair, 105 S.E. 830 (W.Va. 1921) (Resignations of majority of town council preventing appointments to fill vacancy for lack of quorum are ineffective and don't absolve resigning officials from discharge of official duties.); Jones v. City of Jefferson, 1 S.W. 903, 904-905 (Tex. 1886). (An officer whose resignation has been tendered and accepted continues in office and is not released from the duties and responsibilities until his successor is appointed or chosen and qualified.); Annotation, When Resignation of Public Officer Becomes Effective, 95 A.L.R. 215, 218-20 (1935); 67 C.J.S. Officers and Public Employees § 102 (1978) ("... while the right of an officer or public employee to resign is well recognized, generally the right to resign is not absolute, and is subordinate to the right of the people to an orderly government.").

In the present instance, it is clear that the mass resignations of the city council members will have a deleterious effect on the rights of the people of the city Minnewaukan and those who depend on the actions of the city governing body and will have a negative impact on the maintenance of an orderly government. In your letter you point out the immediate impacts on the city of the lack of a governing body to receive election petitions, give public notice of the elections, call the special election, appoint election officials, and conduct normal or emergency city business by approving the payment of bills,

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etc. Because of the particular facts and circumstances involved here and the very real threat of harm to the public and in view of the foregoing authorities, it is my opinion that the en masse resignations of a majority of the governing body of a city council are ineffective until their successors are elected and qualified or until such successors are appointed pursuant to law.

I do not arrive at this conclusion lightly. However, the right of public officials to resign must temporarily yield to the greater rights of the citizens of Minnewaukan to have the affairs of their government conducted on an orderly and predictable basis. Under more normal circumstances, the procedures in N.D.C.C. § 40-08-08 are sufficient to deal with individual vacancies that occur and which do not affect the ability of a city council to have a quorum to conduct business. Because I have concluded that the resignations of the four city council members are not yet effective, it is unnecessary to specifically respond to the questions you raise which presupposed the resignations were immediately effective.

I would further note that if the resigning members do not reconstitute themselves as a city council to conduct the public's business, mandamus may lie to compel that duty. See Eugene McQuillen Municipal Corporations § 12.122 (1990) (citing, e.g., United States v. Green, 53 F. 769 (Circuit Court, W.D. Missouri 1892); State v. Blair, 105 S.E. 830 (W.Va. 1921)). See also N.D.C.C. § 40-06-03 (the governing body may compel attendance of absentees).

If you would like to consult with a member of my staff to discuss different ways in which to balance the city's need to function with the council members' desire to resign, please call Assistant Attorney General Beth Baumstark at 701-328-2210.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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