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RECALL: Disqualification from further holding of office

HOME RULE CITIES: Recall provision in city charter

A provision in the charter of a home rule city prohibiting, within 3 years after the recall petition has been filed, the election or appointment to office of a person removed from office by recall is valid.

Opinion No. 4956 April 2, 1976.

Honorable Stephen Stopczynski
State Representative, 19th District
The Capitol
Lansing, Michigan 48901

You have asked about the legality of Hamtramck Charter Ch VI, § 13, which provides:

> "No person who has been removed from any office by recall or who has resigned from such office after a petition for his recall and removal has been filed, shall be elected or appointed to any office within three years after a petition for his recall and removal."

Hamtramck's charter was adopted under the powers granted to cities by the Home Rule Cities Act, 1909 PA 279; MCLA 117.1 *et seq;* MSA 5.2071 *et seq,* which provides at § 3, MCLA 117.3; MSA 5.2073, that a charter must provide for the qualification of its officers. A limitation on election or appointment to office after recall may be a qualification for office. A city can incorporate into its charter any provisions limited to purely municipal government that it may deem proper so long as they do not run contrary to the constitution or to any general statute, *City of Pontiac* v *Ducharme,* 278 Mich 474; 270 NW 754 (1936). No statute comes to our attention which conflicts with Ch VI, § 13. Further, provision for recall is expressly authorized in city charters by 1909 PA 279, § 4i(6); MCLA 117.4i(6); MSA 5.2082(6).

Since the charter provision divides candidates for Hamtramck city offices into two classes, one class being the persons who have been recalled or who resigned upon a petition for recall being filed, and the other class being all other persons who are otherwise qualified, it is necessary to consider whether that charter provision meets the equal protection requirements of US Const, Am XIV and Const 1963, art 1, § 1.

The standard of review of state law to determine constitutionality was set forth in *Manson* v *Edwards,* 482 F2d 1076, 1077 (1973):

> "The Fourteenth Amendment does not require a state to treat all people identically. State legislation, even though discriminatory, generally will not be held violative of the equal protection clause where it can be shown that the classification bears some rational relationship to a legitimate state objective. [Citations omitted.]
>
> "In McDonald v Board of Elections, 394 U.S. 802, 809, 89 S.Ct. 1404, 1408, 22 L. Ed.2d 739 (1969) Chief Justice Warren wrote:

" 'The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as a violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.'

"Under certain circumstances a stricter scope of review will be employed, generally referred to as the 'compelling state interest' test. [Citations omitted.] The stricter standard will only be employed where the classification is inherently 'suspect,' as for example where the classification is by race, [Citations omitted.] or where the restriction infringes a fundamental right, such as the right to vote, [Citations omitted.]."

The classification of candidates by recent recall or resignation on the threat of recall has never been determined to be a suspect classification and it does not appear inherently suspect. The United States Court of Appeals, Sixth Circuit, ruled in *Manson* v *Edwards, supra,* that the right to run for public office is not a fundamental right. The federal courts are divided as to whether the right to run for office is a "fundamental right" which would require the strict standard of review. The United States Court of Appeals, First Circuit, has held that candidacy is a fundamental right which is subject to strict equal protection review. *Mancuso* v *Taft,* 476 F2d 187 (1973). The United States Supreme Court has not ruled directly on the issue, but it has said that the right to vote is a fundamental right, *Harper* v *Virgina Board of Elections,* 383 US 663; 86 S Ct 1079; 16 L Ed 2d 169 (1966).

In *Bullock* v *Carter,* 405 US 134; 92 S Ct 849; 21 L Ed 2d 92 (1972) the U. S. Supreme Court said that voter and candidate rights are intertwined. *Bullock* analyzed the impact of the Texas filing fee system and found that since the system had such a substantial impact on the wealth of the candidates, that it also had an effect on the franchise inasmuch as it affected the range of candidates from whom the voters could select. Since the exercise of the franchise was appreciably effected, the Court applied the stricter "compelling state interest" test and found the Texas fee system unconstitutional.

The United States Court of Appeals, Sixth Circuit, however, in analyzing a requirement that candidates be 25 years old found that the rational standard test should apply. *Manson* v *Edwards, supra.* An age restriction, which would eliminate many candidates, appears to have a much more severe impact on the choice of candidates than the charter provision. Therefore, the rational standard of review appears applicable to consideration of Hamtramck Charter Ch VI, § 13.

There appears to be a legitimate state objective in the removal of office holders through a reasonable and functional recall process. Hamtramck Charter, Ch VI, § 13 reinforces the recall provision of the charter by assuring that if the people recall an official, a very time consuming and

difficult task, the official will be removed from local office for a reasonable period of time and there will be afforded a reasonable cooling off period in the conflict which led to the removal of the official.

Thus, a rational basis for Hamtramck Charter, Ch VI, § 13 can be found and, under the rational standard test, it does not conflict with US Const, Am XIV and Const 1963, art 1, § 1.

Therefore, it is my opinion that Hamtramck Charter Ch VI, § 13 is valid.

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Attorney General.

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CIVIL SERVICE: Firemen and Policemen Civil Service Act

Pursuant to the firemen and policemen civil service act, an appointing authority has the power to suspend an employee for a reasonable period up to 30 days and also initiate discharge proceedings.

Opinion No. 4960 April 6, 1976.

Honorable Richard A. Young
State Representative, 32nd District
24100 W. Warren Avenue
Dearborn Heights, Michigan 48127

You have requested my opinion upon a seeming inconsistency in and between §§ 13 and 14 of the Firemen and Policemen Civil Service Act; 1935 PA 78, respectively MCLA 38.513; MSA 5.3363; and MCLA 38.514; MSA 5.3364.

The following rephrased questions are presented, and they will be answered *seriatim*:

1. Is the provision of § 14 which states: "Pending the period between the making of the charges as a basis for removal and the decision thereon by the commission the member shall remain in office.", inconsistent with the authority granted in § 13 to suspend the employee for a reasonable period not exceeding 30 days?

2. Is the language quoted in question 1 above inconsistent with other language contained in § 14?

3. Does the appointing authority have the power to suspend and terminate the employee without the approval of the civil service commission, subject to review by the civil service commission?

Section 13 contains a prohibition against reduction in pay or position, lay-off, suspension, discharge, or other discrimination by reason of religious or political considerations. The remainder of the section addresses itself to reductions, lay-offs, and suspensions. Appointing officers are authorized to suspend an employee without pay, for purposes of discipline, for a reasonable period not to exceed 30 days, and the employee is entitled to a hearing before the civil service commission as provided in § 14. A distinction should be recognized between a disciplinary suspension under § 13,