MEMORANDUM

November 20, 1970

To: Senator Stanley Holmquist - Senate Majority Leader

From: Office of Senate Counsel - Bruce Campbell

I. What affirmative steps may be taken in expiditing an election contest suit to insure a final resolution prior to the convening of the Legislature?

A. Chronology of election contest based on number of votes case.

The notice of contest must be filed within ten days after the final report of the canvassing board. M.S. 1969, § 209.02, subd. 3. If the contestee desires to offer testimony on points not specified in the contestant's notice he must file a notice thereof within ten days after service of the contestant's notice upon him. M.S. 1969, § 209.03. The notices are to be treated as the pleadings in the case and may be amended in the discretion of the court. M.S. 1969, § 209.04. The contest proceedings must be brought on for trial by either the contestant or contestee as soon as practicable within 20 days after the filing of the notice of contest at a general or special term of the district court, or if none is regularly scheduled, the judge must set a special term to be held within that time. M.S. 1969, § 209.04. The matter is to be tried by the court in the manner provided for the trial of civil actions so far as practicable. M.S. 1969, § 209.04; Franson v. Carlson, 272 Minn. 376, 137 N.W. 2d 835 (1965). Either party in preparing for trial may have the ballots inspected by appointed inspectors who shall recanvass the ballots and report to the court disputed ballots upon which the inspectors cannot agree. M.S. 1969, § 209.06. The function of the district court in hearing such a suit is limited to determining which candidate received the highest number of votes legally cast at the election and who is entitled to receive the certificate of election. M.S. 1969, § 209.10. An appeal of the decision of the district court may be taken to the supreme court. The notice of appeal must be served and filed no later than 10 days after the determination of the district court and the return of the appeal must be made within 15 days after service of the notice of appeal. M.S. 1969, § 209.09. The appeal may be brought on for hearing in the court at any time while it is in session upon such notice from either party as the court may determine and the appeal shall be heard and determined summarily by the court. M.S. 1969, § 209.09. After either the appeal has been resolved, or the time for appeal has expired, the party declared the winner is entitled to a certificate of election.

B. Method of gaining timely judicial determination.

Consonant with the contest procedure previously outlined, the best method of gaining a timely judicial determination appears to be as follows:

1. Bring each phase of the litigation, including the appeal, at the earliest time permitted by statute, bearing in mind that the opposite party will probably delay his actions as long as permitted by statute.

2. While stressing the need for an expeditious hearing, formally move both the trial court and the supreme court for the earliest hearing date compatible with adequate preparation.

3. Oppose by motion any amendment of the notices, continances, protracted ballot inspection, or other dilatory tactics of the opposing party.

II. Assuming that the holder of a certificate of election is the subject of an unfair campaign practice charge to be determined by the Senate, what restrictions are applicable to his participation as a member prior to the determination of the charge?

A. May he be seated pending resolution of the charge?

The law is not clear. By tradition members subject to an unfair campaign practices charge have not been seated pending resolution of the charge. But here, a majority vote would be required and the necessary majority is not available. The law seems to indicate that the holder of a certificate of election is entitled to be seated as a member. M.S. 1969, § 3.02 provides:

> For all purposes of organization of either house of the legislature, a certificate of election thereto, duly executed by the auditor of the proper county, or by the secretary of state when the member is elected from more than one county, shall be prima facie evidence of the right to membership of the person therein named.

When an election suit involves an alleged unfair campaign practice rather than a vote recount, the party receiving the highest number of votes is entitled to a certificate of election upon the report of the canvassing board.

M.S. 1969, §§ 204.32, subd. 2; 209.10, subd. 1. Further evidence that the holder of a certificate of election is entitled to be seated irrespective of an unfair campaign practices charge to be determined by the membership can be found in M.S. 1969, § 209.10, subd. 2(d) which provides:

> The vote upon the contest shall be viva voce, any member may offer reasons for the vote he intends to give and a majority of the votes given shall decide; but no party to the contest shall vote on any question relative thereto . . .

The statutory prohibition noted appears to presuppose that the party holding the certificate of election has been seated as a member; only a member would be entitled to vote in any event. A contrary conclusion renders the prohibition mere surplusage contradicting all recognized rules of statutory construction. See also, M.S. 1969, § 3.05 ". . . All whose certificates are so presented shall then stand and be sworn."

B. Assuming he has a right to be seated, under what restrictions, if any, does he act?

Assuming that the holder of an election certificate subject to an unfair campaign practices charge has the statutory right to be seated as a member pending resolution of the charge, the only restriction on his right to act as a member is that portion of M.S. 1969, § 209.10, relative to the legislative trial of an election contest, previously noted:

> . . . but no party to the contest shall vote on any question relative thereto . . .

The proper construction of the phrase "any question relative thereto" is unclear. Clearly the phrase is broader than merely a final vote on the contest itself, or the statute would be so limited. Obviously a matter may be more or less directly related to the election contest. But a matter unrelated to the election contest itself — such as the election of a president pro tem and other officers, the appointment of employees, or the organization of the committee structure— may be voted on by a member pending the resolution of an unfair campaign practices charge. It could be argued, however, that such a member may not be counted for purpose of organizing the committee structure if one such committee is an elections committee that will hear evidence and make recommendations concerning the charge to the legislative body. Here it

could be suggested that by participating in the selection of his own "intermediate jury" he is influencing the course of the legislative determination in much the same manner as a final vote which is statutorily prohibited. While the argument advanced should not be entirely overlooked, its importance can probably be discarded.

III. May the Lieutenant Governor, as presiding officer rule, before the Senate is sworn into office, that the holder of an election certificate subject to an unfair campaign practices charge may not be seated as a member and what remedy is available if any such attempt is made?

A. Authority of Lieutenant Governor.

Article V, Section 6 of the Minnesota Constitution provides, "the Lieutenant Governor shall be ex officio president of the Senate." It should be noted that the Lieutenant Governor is in no sense a member of the Senate; he may not vote on any matter before the body. Once the Senate has been constituted, his sole function as presiding officer is to maintain parliamentary order pursuant to the rules the body adopts. The normal authority of a non-member presiding officer, in the constitutional sense, is found in 1969 Senate Rule 3 which in part provides:

> He shall preserve order and decorum; may speak on points of order in preference to members, and shall also decide all questions of order, subject to an appeal to the Senate . . . .

In accordance with the doctrine of separation of powers any authority granted the executive branch to intervene in the conduct of the internal affairs of the Legislature must be narrowly construed.

The Lieutenant Governor may not rule that the holder of an election certificate is not entitled to be sworn as a member for the following reasons:

(1) As previously noted, the holder of an election certificate possesses a statutory right to be sworn as a member. A ruling in derogation of that right is null.

(2) Until the body is constituted or sworn there is no occasion or authority to make any parliamentary ruling.

(3) The right of a holder of a certificate of election to be sworn and seated as a member can in no sense be construed as a question of order or parliamentary procedure. It is a question which the Minnesota Constitution clearly provides must be determined by the legislative house involved. Article IV, section 3 provides, in relevant part:

> Each house shall be the judge of the election returns and eligibility of its own members. . . .

The Lieutenant Governor is not a member of the Senate in a constitutional sense. Hence, he can have no substantive participation, by ruling or otherwise, in a decision as to membership in the body. That conclusion is reinforced by the doctrine of separation of powers.

The only authority the Lieutenant Governor may exercise prior to swearing of the Senate is carefully limited by statute to the appointment of a clerk pro tem who must accept the election certificate of the holder. M.S. 1969, § 3.05. The statute provides no occasion for the Lieutenant Governor to make a ruling.

B. Remedy

If the Lieutenant Governor should attempt to rule that the holder of an election certificate subject to an unfair campaign practices charge may not be seated as a member, the individual in question should present his certificate of election to the clerk pro tem and stand to be sworn. M.S. 1969, § 3.05. Failure of the clerk to accept the document for filing may not be relevant; the statute merely requires presentation of the certificate. If, as a consequence of the clerk pro tem's failure to accept the certificate for filing, swearing in as a member is denied, the rather unwieldly remedy of a writ of mandamus would appear to be available.

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