

Opinion No. 76-40

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OPINION OF: TONEY ANAYA, Attorney General

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TO: Richard L. Johnson, Director, Legislative School Study Committee, 327 State Capitol, Santa Fe, New Mexico 87503

QUESTIONS

Would it be constitutional through legislation, to require those individuals initiating a recall of school members pursuant to Article XII, Section 14 of the New Mexico Constitution to be responsible for paying a portion or all of the cost of that recall election?

CONCLUSION

No.

ANALYSIS

{*135}

Article XII, Section 14 of the New Mexico Constitution provides:

Any elected local school board member is subject to recall by the voters of the school district from which elected. A petition for a recall election must cite grounds of malfeasance or misfeasance in office or violation of the oath of office, by the member concerned. The recall petition shall be signed by registered voters not less in number than 33 and 1/3 percent of those who voted for the office at the last preceding election at which the office was voted upon. The petition shall be filed with the superintendent of schools for the school district who shall determine whether sufficient valid signatures have been submitted and, if so, the superintendent shall call a special election in the school district concerned. If at the special election the majority of the votes cast on the question of recall are in favor thereof, the local school board member is recalled from office and the vacancy shall be filled {*136} as provided by law.

This section is self-executing, but legislation may be enacted to facilitate its operation.

It is our conclusion that the legislature, in enacting such facilitating legislation, may not require individuals initiating the recall to be responsible for the cost of the recall.

The underlying principle of the recall doctrine is to permit the voters to remove from office those public officials whose actions and policies do not have the approval of the majority. See e.g. **Dunham v. Ardery**, 43 Okla. 619, 143 P. 331 (1914). And, as expressed in a recent case, **Shroyer v. Sokol**, 550 P.2d 309 (Colo. 1976):

. . . the power of recall -- like that of the initiative and referendum -- is a fundamental right of citizens within a representative democracy. Neither the legislature nor local law making bodies may infringe constitutionally protected fundamental rights. Reservation of the power of recall in the people must be liberally construed in favor of the ability to exercise it; conversely, limitations on the power of recall must be strictly construed.

Like the right to vote, the right to petition for recall is a fundamental freedom protected by the First and Fourteenth Amendments of the United States Constitution. **Pena v. Nelson**, 400 F. Supp. 493 (D.C. Ariz. 1975). It is a right which cannot be burdened by the requirement that those who chose to exercise it must pay for it. In **Harper v. Virginia State Board of Education**, 383 U.S. 663, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966), the Supreme Court of the United States held that the Virginia state poll tax was unconstitutional on the grounds that wealth or ability to pay is an impermissible burden on the right to vote. The Court explained:

We conclude that a state violates the equal protection laws of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. 383 U.S. at 666.

The Court continued:

To introduce wealth or a payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor. 383 U.S. at 668.

And finally, the Court concluded that:

. . . wealth or fee paying has, in our view, no relation to voting qualification; the right to vote is too precious, too fundamental to be so burdened or conditioned. 383 U.S. at 370.

Although the issue in **Harper** was the poll tax, see also United States Constitution, Amendment 24, we find that the holding in **Harper** is equally applicable to the issue here. The state cannot condition a fundamental right on wealth or the ability to pay.

The State Constitution clearly grants the people the power of recall over school board members. As suggested by **Shroyer v. Sokol, supra**, that power must be liberally construed in favor of the ability to exercise it and the legislature may not enact any measures, such as the responsibility for the costs of the election, which would inhibit the public's exercise of its right to the power of recall.