

N.D.A.G. Letter to Jaeger (July 14, 2000)

July 14, 2000

Honorable Alvin A. Jaeger
Secretary of State
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Secretary of State Jaeger:

Thank you for your letter raising several questions about temporary gubernatorial succession. You first asked whether there are current provisions in the laws of the state for the secretary of state to become acting governor when the governor and lieutenant governor are physically absent from the state. The current constitutional provision dealing with gubernatorial succession is contained in Article V, Section 11 of the North Dakota Constitution, which provides as follows:

The lieutenant governor shall succeed to the office of governor when a vacancy occurs in the office of governor. If, during a vacancy in the office of governor, the lieutenant governor is unable to serve because of death, impeachment, resignation, failure to qualify, removal from office, or disability, the secretary of state shall act as governor until the vacancy is filled or the disability removed.

According to the source note, this section of the Constitution became effective July 1, 1997; it was part of a complete revision of article V.

As is apparent from a plain reading of this constitutional provision, gubernatorial succession is no longer based upon physical absence from the state, but rather upon vacancy in office or disability. Under prior Article V, Section 2 of the North Dakota Constitution, the lieutenant governor succeeded to the powers and duties of the office of governor upon, inter alia, the governor's "absence from the state." However, even under former Article V, Section 7, the lieutenant governor's absence from the state was not one of the specified reasons for the secretary of state to act as governor. See e.g. Letter from Attorney General Nicholas Spaeth to former Governor George A. Sinner (Mar. 25, 1987) (under prior law when there was vacancy in lieutenant governor's office and governor absent from state, secretary of state would act as governor).

Thus, under the existing constitutional provisions, absence from the state is no longer a basis for temporary gubernatorial succession. Physical absence from the state no longer deprives the governor of any authority or responsibility. The secretary of state's authority to act as governor only arises upon the "death, impeachment, resignation, failure to qualify, removal from office, or disability" of the lieutenant governor. N.D. Const. art. V, § 11.

However, N.D.C.C. § 54-08-02 does provide that in the case, inter alia, of the lieutenant governor's absence from the state, the powers and duties of the lieutenant governor's office "devolve upon the president pro tempore of the senate, except that the president pro tempore of the senate does not succeed to the office of governor by virtue of his having the powers and duties of the office of lieutenant governor." Thus, this statute is not a statute of gubernatorial succession, but rather succession of the powers of the office of lieutenant governor to the president pro tempore of the Senate.

Finally, N.D.C.C. § 44-02-03 provides for a gubernatorial succession beyond the lieutenant governor and secretary of state to the speaker of the House of Representatives, president pro tempore of the Senate, and finally attorney general, in that order. Id.

The other questions you raise deal with circumstances where the secretary of state might temporarily act as governor in the absence of the governor and lieutenant governor from the state. It is unnecessary to address those questions because mere absence from the state would not be pertinent under current law.

I would note, however, that in the event of a vacancy in the governor's office N.D.C.C. § 54-07-03 provides that the powers and duties of the governor "extends to the person performing for the time being the duties of the governor."

Sincerely,

Heidi Heitkamp
Attorney General

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