

LETTER OPINION
2005-L-15

May 12, 2005

The Honorable John Hoeven
Governor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Governor Hoeven:

Thank you for your letter requesting my opinion on whether N.D. Const. art. IV, § 6 would preclude your appointing current members of the Legislative Assembly to the Supreme Court Justice vacancy and the pending vacancy in the office of State Tax Commissioner since the salary for those offices has been increased by the 59th Legislative Assembly. As is more fully explained below, it is my opinion that N.D. Const. art. IV, § 6 would preclude your appointing current members of the Legislative Assembly to the vacancy in the office of Supreme Court justice and the pending vacancy in the office of State Tax Commissioner because the salary for those offices has been increased by the 59th Legislative Assembly.

ANALYSIS

As you note in your letter, a vacancy was created on the Supreme Court with the resignation of Justice William Neumann. A number of attorneys have applied for the appointment to the vacant Supreme Court Justice position, including a current state legislator. The vacancy in the office of State Tax Commissioner will occur on the effective date of the resignation of current Tax Commissioner Rick Clayburgh. You indicated there may be some interest from current state legislators in filling the State Tax Commissioner vacancy.

The 59th Legislative Assembly approved salary increases for these two offices, among others. Annual increases of 3% and 4% during the 2005-2007 biennium were approved for both offices. See Senate Bill 2002, § 6 and House Bill 1006, § 5, amending N.D.C.C. §§ 27-02-02 and 57-01-04, respectively. Those statutes were further amended in the latter part of the session by House Bill 1015, §§ 14 and 24 to provide for July salary increases of 4% and 4% during the upcoming biennium. See also House Bill 1050. The increases in House Bill 1015 for the positions of Supreme Court Justice and State Tax Commissioner made those salaries consistent with the percentage increases granted generally to state employees and all elected officeholders, other than for the offices of Governor and Lieutenant Governor. See House Bill 1001, §§ 5 and 6.

North Dakota Constitution art. IV, § 6, provides:

While serving in the legislative assembly, no member may hold any full-time appointive state office established by this constitution or designated by law. During the term for which elected, no member of the legislative assembly may be appointed to any full-time office which has been created, or to any office for which the compensation has been increased, by the legislative assembly during that term.¹

(Emphasis added.)

I found no North Dakota case law or opinion from this office addressing the precise issue you raise in your letter;² however, constitutional provisions similar to N.D. Const. art. IV, § 6 are somewhat common among the states.

Members of state legislatures are sometimes expressly prohibited by constitutional provisions from accepting or holding any office the emoluments³ of which have been increased by the legislature during their terms of office. The purpose sought to be accomplished by such provisions is not merely to prevent an individual legislator from profiting by an action taken by him with bad motives, but to prevent all legislators from being influenced by either conscious or unconscious selfish motives.

63C Am. Jur. 2d Public Officers and Employees § 67 (2d ed. 1997). In construing a predecessor provision to N.D. Const. art. IV, § 6, which was worded somewhat differently,⁴ the North Dakota Supreme Court likewise quoted with approval the following passage concerning the purpose of such provisions:

“The reasons for excluding persons from offices who have been concerned in creating them, or increasing their emoluments, are to take away, as far as

¹ The limitation on members of the Legislature is restricted to being appointed to an office, not to being elected.

² Similarly, the legislative history for N.D. Const. art. IV, § 6 is somewhat sparse and sheds no light on the issue you raise.

³ “The term ‘emoluments’ covers profits from an office. It does not refer to the fixed salary alone that is attached to the office, but includes such fees and compensation as the incumbent of the office is by law entitled to receive. In determining whether there has been an increase in the emoluments of a particular office, the various items of salary and other compensation which the incumbent was entitled to receive under the statute previously in effect must be taken together.” 63C Am. Jur. 2d Public Officers and Employees § 67 (2d ed. 1997).

⁴ One of the main differences between the predecessor provision (former N.D. Const. § 39) and the current provision was the use of the term “emoluments.”

possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness.”

State ex rel. H. W. Lyons v. Guy, 107 N.W.2d 211, 218 (N.D. 1961) (quoting *Story on the Constitution of the United States*, 5th ed., vol. I, § 867).

A literal reading of N.D. Const. art. IV, § 6 would preclude appointing any current member of the Legislative Assembly to either vacancy since both are an “office for which the compensation has been increased, by the legislative assembly⁵ during that term.”⁶ Id. However, case law from other jurisdictions interpreting somewhat similar constitutional provisions is mixed on this precise issue. See, e.g., Warwick v. Chance, 548 P.2d 384 (Alaska 1976), and the cases cited therein.

Some courts have ruled that small or across-the-board adjustments to salary for a biennium do not violate such constitutional provisions and do not render legislators ineligible to be candidates for state offices. See, e.g., Shields v. Toronto, 395 P.2d 829 (Utah 1964) (general, comparatively small salary increases of 5% given across the board do not violate constitutional prohibition against appointment or election of legislator to civil office if the emoluments of an office increase during the term which the legislator was elected; the court explained its rationale in part by stating that this is not a situation which would lend itself to any ulterior scheme by a legislator to set up a high paying sinecure to take advantage of what the constitution was designed to prevent). See also Brown v. Strake, 706 S.W.2d 148 (Tex. App. 1986) (3% across-the-board adjustment in salary for a biennium does not constitute a pecuniary benefit, gain, or advantage as to be an emolument of office in the meaning of constitutional provision).

While there is a certain amount of intuitive appeal to the argument that small across-the-board raises should not be the type of increased compensation which would prevent a legislator from being appointed to another office, I believe such arguments are less availing here.⁷

⁵ Arguably, the prohibition would not be applied if the compensation for the office is increased by an entity other than the Legislative Assembly. See Letter from Chief Deputy Attorney General Gerald W. VandeWalle to Kenneth Raschke (May 9, 1977).

⁶ The prohibition is against appointment to an office. The North Dakota Supreme Court held that a prior version of N.D. Const. art. IV, § 6 did not apply to the appointment of a legislator as a receiver by a court because that position is not a public office. Baird v. Lefor, 201 N.W. 997 (N.D. 1924). See also Gottschalck v. Shepperd, 260 N.W. 573, 575 (N.D. 1935) (“A professor or teacher is not a public officer.”). In the present two instances, it cannot be reasonably questioned that the positions are public offices within the scope of N.D. Const. art. IV, § 6.

⁷ While not having ruled on the precise issue, the North Dakota Supreme Court may have had an opportunity to address whether to adopt a *de minimis* or across-the-board

Most courts have read the terms of such constitutional provisions as being clear and unambiguous and not subject to exceptions for *de minimis* or across-the-board compensation increases. See, e.g., Warwick v. Chance, 548 P.2d at 391-92 (“The terms of art. II, sec. 5 of the Alaska Constitution are clear and unambiguous. . . . As applied to this case, the intent and purpose of the provision involved is as cogent today as it was in 1955, and we hold that the clear language of art. II, sec. 5 proscribes Mr. Warwick’s appointment during the period of the term for which he was elected and one year thereafter to an office, the salary of which was increased by the legislature of which he was a member.”); Opinion of the Justices, 202 N.E.2d 234 (Mass. 1964) (appointment of state legislator as motor vehicle registrar violated constitutional provision against appointment of legislator during term elected to an office for which the emoluments are increased where salary of registrar and 35 other positions administratively increased to upper ranges legislatively authorized; fact that raise later reduced back to original amount not deemed significant); State ex rel. Hawthorne v. Wiseheart, 28 So.2d 589 (Fla. 1946) (legislator ineligible for appointment as circuit judge or any other civil office created or the emoluments thereof increased during legislative term, and statute raising compensation of circuit judge with provision withholding increase from legislators during their term does not make them eligible for appointment); Miller v. Holm, 14 N.W.2d 99 (Minn. 1944) (state senator ineligible to file as candidate for lieutenant governor under constitutional provision prohibiting senators from holding state office, the emoluments of which are increased during session where senator was a member, and where bill was enacted raising legislative pay which triggered an automatic constitutional pay raise for lieutenant governor).

In N.D.A.G. 2003-L-50, in discussing the interpretation of constitutional provisions, I noted the following:

“When interpreting constitutional sections, we apply general principles of statutory construction. Our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement.” North Dakota Comm’n on Medical Competency v. Racek, 527 N.W.2d 262, 266 (N.D. 1995) (citations omitted). In State of North Dakota ex rel. Link v. Olson, 286 N.W.2d 262 (N.D. 1979), the North Dakota Supreme Court

exception, but issued its ruling based on other arguments. Under a prior version of N.D. Const. art. IV, § 6, which concerned an increase in emoluments of office, the Supreme Court held that increases in the travel allowance for official business, furnishing a car for official functions, and payment of a federally mandated increase in Social Security taxes were not disqualifying because they did not benefit the officeholder as contemplated by the constitution or were mandated by federal, not state, law. State ex rel. Lyons v. Guy, 107 N.W.2d at 216-219.

quoted with approval the following language about construing constitutional provisions from Newman v. Hjelle, 133 N.W.2d 549, 556 (N.D. 1965):

The questions must be answered, if possible, from the language of the constitutional provision itself but, if the language is ambiguous or the answer doubtful, then the field of inquiry is widened and rules applicable to construction of statutes are to be resorted to. In fact, a wider field of inquiry for information is proper where needed in construing constitutional provisions than legislative enactments.

(Emphasis added.)

Consistent with these principles, I do not believe a current legislator could be appointed even if small across-the-board raises were given. While there are precedents from courts in other jurisdictions supporting the view that similar constitutional provisions do not prohibit such appointments, and there may be sound public policy reasons to circumvent the prohibition, I do not believe the pertinent provisions in N.D. Const. art. IV, § 6 are unclear or ambiguous or leave room for interpretation. There is no language in the constitutional provision which makes an exception for small⁸ or across-the-board increases. Also, current N.D. Const. art. IV, § 6 uses the more clear and precise term “compensation,” rather than the more expansive and imprecise term “emoluments” used in other states and in prior versions of North Dakota’s constitutional provision. The use of the word “emolument” may interject some uncertainty and room for interpretation that is not present in North Dakota’s current constitutional provision.

In a strongly worded dissent in Shields v. Toronto, Chief Justice Henriod noted the lack of any explicit language in the Utah constitution providing for any exceptions and the difficulty with ascertaining how any exceptions would be determined, stating:

After this case, a little increase in the emoluments of office will not affect one’s eligibility, but a big increase apparently would. The Constitution does not say this, but says just the opposite. Nowhere in that erstwhile divinely inspired document can one find any language that deifies a 5% increase but damns a 50% raise. To reason that just a little “across-the-board” raise is not actually a raise at all not only strains one’s credulity, but suggests that a little pregnancy conveniently but temporarily may be acceptable.

⁸ The annual salary increases for the office of Supreme Court justice work out to \$3,965 beginning July 1, 2005, and \$4,123 beginning July 1, 2006; the increases for the State Tax Commissioner work out to \$2,953 and \$3,071. See House Bill 1015, §§ 14 and 24.

There is nothing in the Constitutional language that suggests any such arithmetic formula

. . . .

The Constitution does not exempt one where a 1% increase in emolument is involved, nor one with a 10% increase, [nor] a 100% increase, nor “an across-the-board” increase. It does not say it favors the “little” increase but not the “big” one. Yet this court says it does without resort to any [lexicographical] sense or meaning.

395 P.2d at 836. Likewise, the Brown v. Strake decision involves a Texas statute which took away any increase in compensation for a member of the Legislature elected to another office, obviating the constitutional issue in the view of the court, and in any event, the case was overruled *sub nom.*, Strake v. First Court of Appeals, 704 S.W.2d 746 (Tex. 1986). See Meyer v. Brown, 782 S.W.2d 315 (Tex. App. 1989). While some case law supports the view that small or across-the-board increases in compensation do not disqualify a legislator from appointment under N.D. Const. art. IV, § 6, the majority of state supreme courts that have ruled on this precise issue have not read such an exception into their states’ constitutions, and the argument against creating an exception in the absence of constitutional language supporting an exception is stronger and more compelling.

Consequently, based on the foregoing and on a plain reading of N.D. Const. art. IV, § 6, it is my opinion that provision precludes appointing any current members of the Legislative Assembly to the Supreme Court Justice vacancy or the pending State Tax Commissioner vacancy since the 59th Legislative Assembly provided for statutory salary increases for those positions and the constitutional provision provides no exceptions.⁹

You may be asked whether current members of the Legislative Assembly could be appointed to the vacancies if they refused to accept the statutory salary increases provided for by the 59th Legislative Assembly for the vacant offices. A related issue was addressed in a previous opinion issued by this office. See N.D.A.G. 82-54 (as a matter of public policy, a public official who is a state or judicial officer and not currently a candidate for public office may not return or offer to return all or any part of the salary for that office). That portion of N.D.A.G. 82-54 has not been superseded or overruled and continues to be the opinion of this office. Thus, absent a statute permitting it, incumbent legislators may not lawfully refuse a salary increase provided for by law for another state office in order to make them eligible for appointment to that office.

⁹ Any question of a legislator’s ineligibility to hold office because of the constitutional provision must be raised during the time the constitution prohibits the legislator’s appointment or election. 67 C.J.S. Officers § 33 (2002).

LETTER OPINION 2005-L-15
May 12, 2005
Page 7

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).