

**LETTER OPINION  
2011-L-11**

November 9, 2011

Ms. Sally Holewa  
State Court Administrator  
600 East Boulevard Avenue, Dept. 180  
Bismarck, ND 58505-0530

Dear Ms. Holewa:

Thank you for your letter requesting my opinion on the length of the term of office for the two newly created judgeships which will appear on the November 2012 general election ballot. Based on a plain reading of N.D. Const. art. VI, § 13, it is my opinion that the term of office for the two newly created district court judgeships to be decided in the November 2012 general election is the remainder of the six-year terms which commenced in January 2010.

**ANALYSIS**

You explain in your letter that the 2009 Legislature created two new district court judgeships effective January 1, 2010.<sup>1</sup> You also indicate that the Governor appointed two individuals to the newly created judgeships on October 21 and November 9, 2009, and that both individuals began serving as district court judges on January 1, 2010.<sup>2</sup> You further indicate that both of these judgeships will appear on the November 2012 general election ballot. You question how to apply the provisions for filling judicial vacancies contained in N.D. Const. art. VI, § 13 to calculate the length of the terms of office for these two newly created judgeships.

The normal term of office for a district court judge is six years and until the judge's successor is duly qualified.<sup>3</sup> Notwithstanding the normal term of office for a district judge, the constitution provides that the "term of the judge elected at the subsequent general election provided for in subsection 2 is reduced to the number of years remaining in the subsequent term after the appointee has served at least two years."<sup>4</sup>

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<sup>1</sup> 2009 N.D. Sess. Laws ch. 261, § 4.

<sup>2</sup> See N.D.C.C. § 44-01-03.

<sup>3</sup> See N.D. Const. art. VI, § 9 and N.D.C.C. § 27-05-02.

<sup>4</sup> N.D. Const. art. VI, § 13(3).

The Legislature, in creating the judgeships, directed that “[w]ithin thirty days after January 1, 2010, the judgeship vacancies created by this section shall be filled in accordance with section 13 of article VI of the Constitution of North Dakota.”<sup>5</sup> The process for filling judicial vacancies is governed by N.D. Const. art. VI, § 13 which provides as follows:

1. A judicial nominating committee must be established by law. The governor shall fill any vacancy in the office of supreme court justice or district court judge by appointment from a list of candidates nominated by the committee, unless the governor calls a special election to fill the vacancy for the remainder of the term. Except as provided in subsection 2, an appointment must continue until the next general election, when the office must be filled by election for the remainder of the term.
2. An appointment must continue for at least two years. If the term of the appointed judgeship expires before the judge has served at least two years, the judge shall continue in the position until the next general election immediately following the service of at least two years.
3. Notwithstanding sections 7 and 9 of this article, the term of the judge elected at the subsequent general election provided for in subsection 2 is reduced to the number of years remaining in the subsequent term after the appointee has served at least two years.<sup>6</sup>

In construing constitutional provisions, the North Dakota Supreme Court has noted that:

The sole object sought in construing a constitutional provision is to ascertain and give effect to the intention and purpose of the framers and of the people who adopted it, and all rules of construction are subservient to and intended to effectuate such objects. Primarily such intention and purpose are to be found in and deduced from the language of the Constitution itself . . . .<sup>7</sup>

I note your uncertainty as to the applicability of these constitutional vacancy provisions regarding vacant district court judgeships to judgeships newly created by the Legislature. While it is clear the Legislature intended that new judgeships be filled in accordance with

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<sup>5</sup> 2009 N.D. Sess. Laws ch. 261, § 4

<sup>6</sup> N.D. Const. art. VI, § 13.

<sup>7</sup> Newman v. Hjelle, 133 N.W.2d 549, syllabus 7 (N.D. 1965) (syllabus by the Court).

N.D. Const. art. VI, § 13, there may be confusion as to whether newly created judgeships are actually vacant offices.<sup>8</sup>

“The word ‘vacancy,’ as applied to a public office, generally has no technical meaning, and means, in its ordinary and popular sense, that an office is unoccupied, and that there is no incumbent. ‘Vacancy’ refers not to the incumbent, but to the term or to the office.”<sup>9</sup> As noted in one treatise:

In general, when a law establishing an office takes effect, a vacancy in the office at once exists, unless the language of the law imports futurity of selection, or unless other restrictions are imposed. Accordingly, a newly created office, which is not filled by the tribunal which created it, becomes vacant on the instant of its creation, and remains so until it is filled by an incumbent.<sup>10</sup>

This issue was also discussed in a prior opinion issued by this office, also involving two newly created judgeships for which the judges were to be appointed by the Governor.<sup>11</sup> Similar to the legislation creating the two district judges here, the bill referred to “vacancies created by this Act.”<sup>12</sup> The opinion noted that “[i]n this instance a vacancy would appear to naturally exist as a result of the creation of a new office and we believe this is properly considered a vacancy in office as indicated in Senate Bill 58.”<sup>13</sup>

Likewise, in this instance, the Legislature referred to the newly created judgeships as “the judgeship vacancies created by this section.”<sup>14</sup> Consequently, I believe it is appropriate to apply the terms of the constitutional vacancy provisions for judicial vacancies to the two newly created judicial offices appearing on the November 2012 election ballot.

In reviewing N.D. Const. art. VI, § 13 and applying it to the current situation, it is clear that the Governor is authorized to fill a vacancy in the office of district court judge by appointment and, as you indicate in your letter, that was done here.<sup>15</sup> Further, the

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<sup>8</sup> See N.D.A.G. 67-67 (distinguishing State ex rel. Foughty v. Friederich, 108 N.W.2d 681 (N.D. 1961)).

<sup>9</sup> 63C Am. Jur. 2d Public Officers and Employees § 109 (2d ed. 2009); see also Friederich, 108 N.W.2d 681 (N.D. 1961).

<sup>10</sup> 63C Am. Jur. 2d Public Officers and Employees § 111 (2d ed. 2009).

<sup>11</sup> N.D.A.G. 67-67.

<sup>12</sup> Id.

<sup>13</sup> Id. To the extent that N.D.A.G. Letter to Schaible (Feb. 8, 1982) is inconsistent with this letter, it is hereby overruled.

<sup>14</sup> 2009 N.D. Sess. Laws ch. 261, § 4.

<sup>15</sup> N.D. Const. art. VI, § 13(1).

constitution requires that an appointment must continue for at least two years.<sup>16</sup> That requirement would be met, in this case on January 1, 2012. As you note, the two new appointed judges assumed office January 1, 2010, and the judgeships will be on the ballot in November 2012. Thus, the appointments will continue for more than the minimum two-year requirement contained in the constitution.

I do not believe this constitutional provision is ambiguous or unclear. By its plain terms it provides that the normal six-year term for a district court judge elected at the general election following appointment is to be reduced by the number of years remaining in the subsequent term after the appointee has served at least two years.<sup>17</sup>

In this instance, the two appointed judges will have served the minimum two-year appointment on January 1, 2012. The new judgeships will not appear on the ballot until November 2012. Consequently, at the time of the election they will have served almost three years and, pursuant to the plain language of N.D. Const. art. VI, § 13(3), the term for these two judgeships must be reduced to the number of years remaining in the subsequent term which equals the normal six-year term minus the tenure of the two appointed judges currently occupying these offices.

Based on the foregoing, and on a plain reading of N.D. Const. art. VI, § 13, it is my opinion that the term of office for the two newly created district court judgeships to be decided at the November 2012 general election is the remainder of the six-year terms which commenced in January 2010.<sup>18</sup>

Sincerely,

Wayne Stenehjem  
Attorney General

jjf/pab

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.<sup>19</sup>

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<sup>16</sup> N.D. Const. art. VI, § 13(2).

<sup>17</sup> N.D. Const. art. VI, § 13.

<sup>18</sup> The remaining term of office may commence at the time the persons elected at the November 2012 general election receive a certificate of election but in no event later than January 1, 2013. See N.D.C.C. § 44-01-03.

<sup>19</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).