

N.D.A.G. Letter to Wilkes (Dec. 31, 1990)

December 31, 1990

Honorable Richard C. Wilkes
P.O. Box 190
Bowbells, ND 58721-0190

Dear Mr. Wilkes:

Thank you for your December 18, 1990, letter requesting my interpretation of N.D.C.C. § 11-10-05 as to when a new state's attorney could begin the discharge of his duties.

It is unclear from your letter whether your appointment as special assistant state's attorney is limited to the hearings before the county judge of Burke County referred to in your letter. Thus, I am uncertain as to whether your appointment covers this situation. I may only give legal advice or opinions to state's attorneys, state officials and certain city officials. I do offer however, the following general discussion for your assistance. Because of the uncertainty of your status, this discussion should not necessarily be considered a formal legal position of this office.

N.D.C.C. § 11-10-05 is ambiguous on its face. It states as follows:

Except as otherwise specifically provided by the laws of this state, the regular term of office for each county officer, when he is elected for a full term, shall commence on the first Monday in January next succeeding his election and each such officer shall qualify and enter upon the discharge of his duties on or before the first Monday in January next succeeding the date of his election or within ten days thereafter. If the office to which an officer is elected was vacant at the time of his election or becomes vacant prior to the date fixed for the commencement of his term, he may qualify and enter upon the duties of his office forthwith even though he was not elected to fill such vacancy. If an officer is elected to fill an unexpired term in an office then held by an appointee, such officer may qualify and enter upon the discharge of the duties of such office at any time after receiving a certificate of election to that office but not later than the first Monday in January next succeeding the date of his election to the unexpired term of office.

Thus, the term for the state's attorney begins on the first Monday in January, 1991. The newly elected state's attorney can qualify prior to that date and enter upon the discharge of his duties the first Monday in January. What is not clear from the statute alone is whether the section of the statute talking about entering upon the discharge of duties before the first Monday in January refers only to the situation when the office to which one is elected becomes vacant prior to the date fixed for the commencement of the new term.

The Supreme Court in State of North Dakota ex rel. v. Olsen ex rel Sinner, 359 N.W.2d 876 (N.D. 1985) interpreted the term of office for Governor as found in N.D.C.C. § 44-01-03. Although the wording of that statute is different than N.D.C.C. § 11-10-05, the public policies which the Supreme Court addressed in interpreting the statutes are relevant. The court stated that the need for certainty in the transfer of the duties and powers of elected officials is of primary importance to the citizens of the state. "Public interest requires that all possible certainty exists in the election of officers and the beginning and expiration of their terms, by law or resignation, and forbids that either should be left to the discretion or vacillation of the person holding the office. . . ." Id. at 881 quoting Campbell v. City of Boston, 337 Mass. 676, 678, 151 N.E.2d 68, 70 (1958). The obvious uncertainty caused by allowing an office holder or an elected official to determine the date upon which his term commenced or will commence is obvious and has been recognized by many courts. 359 N.W.2d at 882.

The North Dakota court discussed the situation where an incumbent may shorten his tenure by his resignation and the situation where an officer holder will need to hold over in his elected office until a newly elected official qualifies for office. I have found no cases however, which recognize a right of a newly elected official to unilaterally shorten the tenure of the incumbent. Because the term of office pursuant to N.D.C.C. § 11-10-05 commences on the first Monday in January, it appears the incumbent state's attorney's term would not end until such date.

I hope this information has been helpful to you.

Sincerely,

Nicholas J. Spaeth

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