

OPINION
62-84

February 21, 1962 (OPINION)

DISTRICT JUDGE

RE: Elections - Vacancy

This is in response to your request for an opinion on the question whether or not the office now held by Ray R. Friederich as judge of the Second Judicial District is to be certified to the County Auditors in the Second Judicial District as one for which nominations will be made at the 1962 primary elections pursuant to the provisions of Section 16-04-11.

The facts to be taken under consideration are as follows:

At the November General Election of 1960, Roland A. Heringer was elected a judge of the second judicial district for the term to commence on the first Monday in January, 1961. The then incumbent to the office was Asmunder Benson whose term would normally expire on January 2, 1961. After being declared elected but before qualifying for office, Mr. Heringer died on December 23, 1960. Before the term of Judge Benson expired, he resigned, and the then Governor appointed Ray R. Friederich, to fill the vacancy created by the resignation of Judge Benson and to serve until his successor was elected and qualified."

To your request is attached a letter from Judge Ray R. Friederich, wherein he expresses the position adopted and urged at the time the case of State v. Friederich, 108 N.W.2d. 681, was presented to the North Dakota Supreme Court. The position urged at that time was that the office would be open for nomination and election in the 1962 primary and general election. The position adopted at that time apparently is still being adhered to.

The pertinent provisions of law are Section 104 of the North Dakota Constitution, which shows as material to the question here as follows:

. . . . The term of office of a judge of a district court hereafter elected shall be six years from the first Monday in January succeeding his election, and he shall hold his office until his successor is duly qualified. . . ."

and section 27-05-02, which provides as follows:

. . . . There shall be elected in each judicial district of this state the number of judges for such district provided for by law. Any judge so elected shall

take office on the first Monday in January next succeeding his election and shall hold office for six years or until his successor is elected and has qualified. . . ."

It is observed that the constitutional and statutory provisions pertaining to district judges are somewhat different than those pertaining to the supreme court. If the constitutional provisions pertaining to supreme court judges were applicable to district court judges, our conclusion would well be that the office in question is to be filled by the primary and general election in 1962. Section 98 pertaining to supreme court judges provides as follows:

. . . . Any vacancy happening by death, resignation or otherwise in the office of judge in the supreme court shall be filled by appointment by the Governor, which appointment shall continue until the first general election thereafter, when said vacancy shall be filled by election. . . ."

However, this provision has no application to district judges. We have carefully examined the decision of *State v. Friederich*, 108 N.W.2d. 681, and are unable to find any expression by the court which could be construed that the office in question is to be or may be filled by an election in 1962.

In examining the foregoing provisions and other related provisions, we are unable to find any authority whatsoever under which the office in question could be filled by an election in 1962. In order to permit such office to be filled by an election in 1962, it would be necessary to conclude that the office would become vacant in January of 1963. Such conclusion would not be in accord with existing constitutional and statutory provisions. Even though the incumbent is desirous and willing to have the office filled by election, such does not constitute a legal basis for permitting such office to be filled by election.

The supreme court had under consideration the office of district judge in *State ex rel Gunderson v. Byrne* in 59 N.D. 543 (231 N.W. 862). In this case, Charles E. Wolf was elected to the district court in 1928. His term commenced in January, 1929, for a term of six years. He filed his oath and entered his duties of said office. Subsequently thereto, he died, whereupon the Governor in April, 1929, appointed William H. Hutchinson as district judge for the remainder of the term of Charles E. Wolf. The term of office for the judges was six years. O. S. Gunderson then applied for a writ of mandamus to compel the Secretary of State to certify to the county auditors that said office was to be filled by election in the primary general election of 1930. The Supreme Court said that there was no provision for such election, and that the appointment made by the Governor to fill the vacancy continues in force until the expiration of the term in which the vacancy occurs and until a successor is elected and qualified.

In *State v. Friederich*, the court in effect said that no vacancy existed so long as the office was held by an incumbent. We do observe that in a dissenting opinion, the following comment was made with reference to the majority opinion - "they (majority

opinion) would, in effect, provide that the failure of the regularly elected successor to assume his office would automatically create a holdover term of six years for the benefit of the incumbent." Thus, while the majority opinion did not in so many words say that the incumbent would continue for a six year term beginning with January, 1961, the dissenting opinion does indicate that the majority opinion in effect reaches such result.

In considering the foregoing and related provisions, and in direct response to your inquiry, it is our opinion that the office now held by Judge Ray R. Friederich is not one which may be certified to the county auditors for nomination and election in the year 1962.

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