

OPINION
66-333

May 16, 1966 (OPINION)

The Honorable Ben Meier

Secretary of State

RE: Supreme Court - Vacancy - No Election Required

This is in reply to your letter of May 9, 1966, in which you state the following facts and question:

The death of the Honorable Thomas Burke created a vacancy on the Supreme Court. This vacancy was filled by an appointment of the governor until the first general election. The term for which the Honorable Thomas Burke was elected is to end on the first Monday in January, 1967.

Section 16-04-11 provides in part that between the first day of June and the first day of July in each primary election year, the Secretary of State shall direct and cause to be delivered to the county auditor of each county a notice specifying the several officers to be nominated at the next primary election.

I respectfully request your opinion whether or not I should notify the county auditors of North Dakota that a person is to be nominated at the primary election for the office of judge of the Supreme Court for the unexpired term of the Honorable Thomas Burke."

Section 98 of the North Dakota Constitution provides:

Any vacancy happening by death, resignation or otherwise in the office of judge of 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."

Section 90 of the North Dakota Constitution provides in part:

The judges of the supreme court shall be elected by the qualified electors of the state at general elections. The term of office shall be ten years and the judges shall hold their offices until their successors are duly qualified* * * *."

We note that the constitutional provision relative to the appointment merely provides the appointee shall hold office "until the first general election thereafter" and not "until the next general election and until his successor is elected and qualified," or words to that effect, as is the case with other appointments. See section 44-02-08 of the North Dakota Century Code, State v. Byrne 231 N.W. 862 (N.D. 1930); State ex rel. Foughty v. Friederich, 108 N.W.2d. 861 (N.D. 1961). However we believe the words "until the next general election

thereafter" must be construed to mean until the election of a successor at the next general election. A candidate is not deemed elected until issued a certificate of election by the Secretary of State after the certification and determination by the State Canvassing Board. See section 16-13-48 of the North Dakota Century Code; State ex rel. Sathre v. Byrne, 65 N.D. 283, 258 N.W. 121.

The next general election in this state will be held on November 8, 1966. The State Canvassing Board must meet within fourteen days thereafter (Section 16-13-36 of the North Dakota Century Code, as amended) and the certificates issued within three days after the date of the meeting. Section 16-13-41 of the North Dakota Century Code. State officials qualify on or before the first Monday of January next succeeding their election, or within ten days thereafter.

Section 44-01-03 relates to the time when the officers qualify and assume their respective duties. It provides as follows:

WHEN STATE AND DISTRICT OFFICERS SHALL QUALIFY. Except when otherwise specially provided, all state and district officers shall qualify on or before the first Monday of January next succeeding their election, or within ten days thereafter, and on said first Monday of January or within ten days thereafter, shall enter upon the discharge of the duties of their respective offices." (Emphasis supplied).

It thus appears that regardless as to when the official may qualify within the time limits of said section he cannot assume his duties until the first Monday of January next succeeding the election or within ten days thereafter.

The election referred to is the one in November because the election in September is a primary election for purposes of nominating candidates, but is not an election in itself. As pointed out, Section 98 of the Constitution provides that the appointment is until the first general election thereafter when said vacancy shall be filled. It is observed that neither the Constitution nor any specific legislative act provides when such elected person to fill the vacancy of an unexpired term in the Supreme Court shall take office. However, in the absence of any other provisions to the contrary, the opinion of the Supreme Court in State ex rel. Linde v. Roberson, 35 N.D. 417, 160 N.W. 514, would prevail and as such, section 44-01-03 would apply. There is no provision similar to the one in Section 25 of the North Dakota Constitution as to when measures take effect.

On the premise of this construction, it appears that the election of a person for the unexpired term would be a useless act, because the elected person would not undertake the duties any earlier than January 2, 1967. The law does not require the performance of an idle act. To hold that two positions or terms are up for election could bring about the ridiculous results of electing a person to an office who would never be able to assume the office.

It thus appears that where the election to fill an unexpired term coincides with an election to fill the regular term, in which event the person elected would not assume the duties until the first Monday

in January succeeding the election, there is no need to fill such "unexpired term" and, in reality, there is only one term to be filled at such election and that is the regular term.

It is therefore our opinion that you are required to notify the county auditors that there is a regular term of office to be filled in the North Dakota Supreme Court and you are not required to give any notice of filing for any unexpired term for, in reality, no unexpired term exists. Any attempt to fill an unexpired term would merely result in an idle gesture and might be confusing to the electorate.

HELGI JOHANNESON

Attorney General