

OPINION
75-18

February 18, 1975 (OPINION)

The Honorable Wayne G. Sanstead
Lieutenant Governor
Office of Lieutenant Governor
State Capitol
Bismarck, ND 58505

Dear Lieutenant Governor Sanstead:

This is in reply to your inquiry as to whether the lieutenant governor may vote on the passage of the bill where the vote in the Senate is equally divided.

Section 77 of the North Dakota Constitution provides in pertinent part that:

"The lieutenant governor shall be president of the senate, but shall have no vote unless they be equally divided."

Section 65 of the North Dakota Constitution provides that:

"No bill shall become law except by a vote of a majority of all the members-elect in each house, nor unless, on its final passage, the vote be taken by yeas and nays, and the names of those voting be entered on the journal."

The conflict between these sections is direct and the issue is clearly framed: Does Section 77 control, empowering the lieutenant governor to vote when the Senate is equally divided even though the lieutenant governor is a member of the executive branch, not a member-elect of the Senate as apparently required by Section 65?

This office had occasion to comment on the very same issue by an opinion dated February 19, 1945. The opinion there was that the lieutenant governor may not cast the deciding vote on final passage of a bill on the basis that the lieutenant governor is not a member-elect of the Senate. At that time there were no appellate court decisions squarely on the issue presented.

The role of the Attorney General as the interlocutory interpreter of the law is not to "make" the law as he may personally see it, but to "predict" the final interpretation of the law by the appropriate appellate courts, primarily the North Dakota Supreme Court. However an Attorney General's opinion is more than guidance; it is the proper interpretation of the law until overruled by the courts and is accorded substantial weight by the courts in reaching their determination.

This is a constitutional question. Normally such questions arise when legislation is challenged as not being within the authority granted by the state constitution. In those cases this office will not ordinarily arbitrate because our first duty is to defend the constitutionality of such legislation through the due course of

litigation. We have a different situation here in that conflicting provisions of the constitutions affect the conduct of a public office, and this office has seen fit to previously speak on the question.

Although we are reluctant to withdraw a previous opinion of this office, in our opinion appellate court holdings since the 1945 opinion are persuasive and require, under these specific circumstances, a contrary opinion. Two such cases are illustrative of court interpretation of this difficult issue since the February 19, 1945 opinion. They are State ex rel Easbey v. The Highway Patrol Board, 140 Mont. 383, 372, P.2d. 930 (1962) and Opinion of the Justices (Supreme Court of Delaware), 225 A. 2d. 481 (1966).

Both of these cases considered the precise issue at hand under constitutional language substantially the same if not precisely the same as contained in the North Dakota Constitution. Both decisions were unanimous by the highest appellate courts of Montana and Delaware. Both cases held that the lieutenant governor has the power to vote on bills when the Senate is equally divided.

While there are some cases that indicate a contrary holding, they were decided prior to the two cases cited herein and considered unpersuasive by the Montana and Delaware Courts. We believe the recent decisions by the Montana and Delaware Courts are indicative of the current judicial attitude on the question. Accordingly in direct answer to your question, it is our opinion that the lieutenant governor may cast the deciding vote on the final passage of a bill.

Sincerely,

ALLEN I. OLSON

Attorney General