

OPINION
76-46

November 24, 1976 (OPINION)

Mr. John E. Jacobson
State's Attorney
Mercer County
Stanton, North Dakota 58571

Dear Mr. Jacobson:

This is in reply to your letter of November 17, 1976, relative to section 44-02-08 of the N.D.C.C., as amended in 1975. You state the following facts and questions:

"This is to request an official Attorney General's opinion regarding the interpretation of North Dakota Century Code section 44-02-08 as amended in 1975. The question I have regarding that section is as follows:

When may an individual elected under that provision of 44-02-08 take office and how would said individual qualify?

The only other section that I have that may have some bearing on the situation is section 11-10-05 relating to terms of County Officers. We do have a situation in Mercer County whereby the Register of Deeds was incapacitated because of a stroke and an individual was appointed to fill that vacancy. The appointment did take place in February of 1976. At the general election on November 2nd of this year the individual appointed to fill the vacancy lost the election to another party."

Section 44-02-08 of the N.D.C.C., as amended in 1975, provides:

"APPOINTMENT TO BE MADE IN WRITING - TERM. - Any appointment to fill a vacancy under the provisions of this chapter shall be made in writing, and except as otherwise expressly provided by law, shall continue in force until the first general election thereafter, when the vacancy will be filled by election, and thereafter until the appointee's successor by election is qualified." (emphasis supplied)

We note these situations have not arisen before since prior to 1975 the statute provided that an appointment to fill a county office should continue in force until the expiration of the term in which the vacancy occurred and until the appointee's successor was elected and qualified. Thus prior to this time any appointment to fill a vacancy in a county office continued until the expiration of the term. The 1975 Legislature amended the statute to read as set forth above.

Section 44-02-08 appears quite clear in that the appointment to fill a vacancy continues until the first general election thereafter and until the appointee's successor by election is qualified. There

could, of course, be no person elected until the county canvassing board has declared the person elected and a certificate of election has been delivered to the person elected as provided by section 16-13-18 of the N.D.C.C. We assume this has taken place in this instance.

Section 11-10-05 of the N.D.C.C. provides in part that the "regular term of office of each county officer, when he is elected for a full term," commences on the first Monday in January next succeeding his election. In this instance the officer elected was not elected to a regular term or a full term of office. This section clearly does not apply to the situation in which a person is elected to fill a vacancy as provided in section 44-02-08. We might also compare this provision with section 44-01-03 of the N.D.C.C., also amended in 1975, which pertains to State and district officers and provides as follows:

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

This section contains no limitations as to "regular" term or the officer being elected to a "full term" of office and therefore it would appear a distinction exists between the persons elected to fill vacancies in State and district offices and persons elected to fill a vacancy in a county office.

We conclude that since section 44-02-08 provided that the person appointed to fill a vacancy holds office only until the first general election thereafter and until the appointee's successor by election is qualified and since there is no time specified when the appointee's successor by election is to take office, that such successor may take office at any time after he has received his certificate of election. The purpose of the amendment of section 44-02-08, as set forth in testimony before the legislative committees that heard the bill, was to require vacancies in elective office to be filled by election rather than appointment and, in the absence of any statute to the contrary, it would appear the intent of such legislation was to permit the person elected to take office as quickly as possible after being declared elected. We can find no valid reason for concluding that a county official, as opposed to a State or district official, does not take office immediately after being declared elected when he has been elected to fill a vacancy which is currently being filled by an appointee.

With respect to the second part of your question, the person elected would qualify in the same manner as any other person elected to office, i.e., by taking and filing the oath of office pursuant to sections 11-10-19 and 44-01-05 of the N.D.C.C. and filing the bond required by section 11-10-06 of the N.D.C.C., although we assume the officer would be bonded by the State Bonding Fund pursuant to chapter 26-23 of the N.D.C.C.

I trust this will adequately set forth our position on the question presented.

Sincerely,

ALLEN I. OLSON

Attorney General