

OPINION
78-44

November 24, 1978 (OPINION)

Mr. Howard J. Snortland, Superintendent
North Dakota Department of Public
Instruction
State Capitol
Bismarck, ND 58505

Dear Mr. Snortland:

This is in response to your letter of October 30, 1978, wherein you requested our opinion on the following questions:

1. Can the county commissioners appoint a nonqualified individual as county superintendent?
2. If there isn't a qualified person available, how should this position be handled in the county?
3. How long would a term consist of for an appointed official? When would this position be placed on the county ballot?

While the office of County Superintendent of Schools is established by the North Dakota Constitution, the Constitution provides that the qualifications of the person holding the office shall be fixed by law; North Dakota Constitution Section 150. The statute setting forth the qualifications required for a person holding the office of County Superintendent of Schools is North Dakota Century Code Section 15-22-02. This sections provides:

15-22-02. QUALIFICATIONS. The county superintendent of schools shall be a qualified elector under the general laws of the state, a graduate of a reputable college, or other institution of higher learning, shall hold at least a first grade professional certificate, and successful experience in teaching. Be it further provided that this section shall not be retroactive but that anyone serving as county superintendent on the effective date of this section shall show evidence annually of work toward a first grade professional certificate.

It is clear that no exception appears in this section which would in any way exempt from these qualifications a person appointed by the Board of County Commissioners to fill the vacancy. Section 44-02-04 provides for appointment by the Board of County Commissioners. This section states:

44-02-04. VACANCY IN COUNTY OFFICE - APPOINTMENT. A vacancy in any county office, other than that of county commissioner, shall be filled by the board of county commissioners, with the exception that if a vacancy has occurred in the office of state's attorney by reason of his removal under section 44-11-01, the appointment shall be made by the board of county commissioners by and with advice and consent of the governor. The board of county commissioners may declare a county office

to be vacant whenever the office holder is unable to perform the duties of the office for six months or more. However, if within one year the office holder should become able to perform his duties the county commissioners may, for good cause shown, reinstate such office holder.

Other sections in this chapter also clearly demonstrate that a person appointed to the office of county superintendent of schools must possess the same qualifications for office as a person elected under Section 15-22-02. Section 44-02-09 provides as follows:

44-02-09. APPOINTMENT - HOW QUALIFIED. A person appointed to office as provided in this chapter shall qualify within the time and in the manner required of a person elected or appointed to such office for a full term.

Similarly, Section 44-02-01 provides in pertinent part:

44-02-01. VACANCIES - CAUSES THEREOF. An office shall become vacant if the incumbent shall:

* * *

6. Fail to qualify as provided by law;

* * *

No exception is provided in either of these sections for the failure of an appointed, as opposed to an elected, county official to qualify. We therefore believe that it is clear that the qualifications set forth in Section 15-22-02 are applicable to both appointed and elected county superintendents of schools. We note, however, that Section 44-02-01 does not provide that the Board of County Commissioners may not appoint a nonqualified person, but only that a vacancy occurs if the incumbent (appointee) is not qualified. Thus, a technical distinction may exist between whether an appointment may be made, and the legal effect of such an appointment. As a practical matter, this may be a distinction without a difference because North Dakota courts have held for some time that the election of a person unqualified in law for public office is a void election and of no force and effect. This was the hold of the North Dakota Supreme Court in the case of Jenness v. Clark, 21 N.D. 150, 129 N.W. 359 (1910), in which the Court held that the election of an unqualified person to the position of County Superintendent of Schools was a void election and that it constituted a "nullity". We see no reason why this same rationale should not apply to the appointment of an unqualified person would be a void appointment and, while a lawsuit may be necessary to unseat the unqualified appointee, a serious question might be raised as to the official character of the acts performed pursuant to a void appointment. Because we do not believe that a Board of County Commissioners would knowingly appoint an unqualified person after the lack of such person's qualifications became clear, the distinction between the bare authority to appoint and an appointment which may later be declared by a court to be void, may not be a significant one. Nevertheless, the distinction may exist.

Concerning your second question of how the situation in which no qualified person is available should be handled in the counties, we can only give you a very general indication of the provisions made in the law for that eventuality. The application of the statutes we refer to, as well as others, will depend upon the relevant facts of circumstances of the individual case, such as the availability of office deputies, whether the former superintendent is holding over with the expectation of resignation when a qualified replacement is found, the time at which a vacancy occurs, etc. Any such facts may have a bearing on the application of the statutes discussed herein.

In those counties in which no qualified person has been elected, or "in which a vacancy exists for other reasons", North Dakota Century Code Section 15-22-24 controls. This Section provides:

15-22-24. CONTRACT FOR SERVICES FROM OFFICE OF ADJACENT COUNTY SUPERINTENDENT OF SCHOOLS. In any county in which no qualified person has been elected to the office of county superintendent of schools or in which a vacancy exists for other reasons, the board of county commissioners of such county shall, if no qualified person is appointed to such office, enter into an agreement, pursuant to the provisions of section 54-40-08 of the North Dakota Century Code, with the board of county commissioners of an adjacent county which has a county superintendent of schools to have such county's superintendent of schools provide county superintendent of school services to the county in which the office is vacant. The board of county commissioners of each county shall determine the salary of such county superintendent of schools for providing such service, and the combined population of both counties may be taken into consideration for determining such salary. Such salary paid may exceed the limitation set forth in section 11-10-10 of the North Dakota Century Code for a single county. Any contracts or agreement entered into pursuant to the provisions of this section shall be approved by the state board of public school education. Each agreement entered into shall not exceed one year in duration and each such agreement shall expire on January first of each year.

It is apparent that no limitation upon the reason for the vacancy in the office has been provided for in this section. We would therefore believe that the procedure specified in Section 15-22-24 is application in the situation in which a vacancy exists by reason of the lack of qualified appointee.

In connection with your second question, we would also briefly draw your attention to the provisions of North Dakota Century Code Section 15-22-25, which may also be applicable in some instances. We enclose herewith a copy of two letters concerning both sections 15-22-24 and 15-22-25 which may be helpful in understanding these two sections. Enclosed are copies of the letters sent by this office on August 30, 1968, to the Honorable M. F. Peterson, Superintendent of Public Instruction, and on August 24, 1967, to Mr. Victor Nordloef of Bowbells, North Dakota.

In response to your third question concerning the term of any person appointed to the office of County Superintendent of Schools, we refer

you to Section 44-02-08 which provides:

44-02-08. 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.

Under this section any person appointed to an unexpired term of county superintendent of schools after the 1978 general election but prior to the 1980 general election would hold office until that position is filled by the 1980 general election. The incumbent would then be subject to election every four years thereafter. See Section 150 of the North Dakota Constitution as amended.

We trust that the foregoing adequately sets forth our position on the question you have presented.

Sincerely,

ALLEN I. OLSON

Attorney General