

**LETTER OPINION**  
**80-86**

April 15, 1980 (OPINION)

Honorable Ben Meier  
Secretary of State  
Department of State  
State Capitol  
Bismarck, North Dakota 58505

Dear Mr. Meier:

This is in response to your letter of March 3, 1980, wherein you state:

I would like your opinion on the following:

If a vacancy occurs in a constitutional office according to Section 78 of the North Dakota Constitution, the Governor shall have the power to fill such vacancy by appointment.

Section 44-02-08 of the North Dakota Century Code indicates that the appointment shall be made in writing and shall continue in force until the first general election or until a successor is elected and qualified.

In your opinion what constitutes the first general election following an appointment as stated in section 44-02-08 of the North Dakota Century Code. Is it the primary held in September every two years as provided by law, or is it the general election held in November every two years as provided for by law?

My question is, our present State Treasurer was appointed by the Governor to fill out the unexpired four year-term of the later Walter Christensen. On what election does the office of the State Treasurer appear on the ballot to fill the unexpired term:

1. Primary election, September 2, 1980?
2. General election, November 4, 1980?
3. Will the Governor's appointee hold office until January when all other state officers elected take office for their four-year terms?

Section 82 of the North Dakota Constitution, as amended by Article 80, provides in part:

SECTION 82. There shall be chosen by the qualified electors of the state at the times and places of choosing members of the legislative assembly, a secretary of state, auditor, treasurer, superintendent of public instruction, commissioner of insurance, an attorney general, a commissioner of agriculture

and labor, and a tax commissioner, who shall have attained the age of twenty-five years and shall have the qualifications of state electors. They shall severally hold their offices at the seat of government for the term of four years beginning with the year 1965, and until their successors are elected and duly qualified; but no person shall be eligible for the office of treasurer for more than two consecutive terms.

Section 78 of the Constitution provides:

SECTION 78. When any office shall from any cause become vacant, and no mode is provided by the constitution or law for filling such vacancy, the governor shall have power to fill such vacancy by appointment.

Section 44-02-03 of the North Dakota Century Code provides, in part:

44-02-03. VACANCY IN STATE OR DISTRICT OFFICE - HOW FILLED. Any vacancy in a state or district office, except in the office of a member of the legislative assembly, shall be filled by appointment by the governor. . . .

Section 44-02-08, as amended in 1975, 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.

Prior to the 1975 amendment, section 44-02-08 provided that the appointment to fill a vacancy "shall continue in force until the expiration of the term in which the vacancy occurs, and until the appointee's successor is elected and qualified."

This office had occasion to give interpretation to the meaning of the term "first general election" as used in section 44-02-08 shortly after the 1975 amendment. In an opinion dated August 23, 1976, relating to a vacancy in a county office we stated:

We believe section 44-02-08, as amended by the 1975 Legislature, is plain on its face. It provides that unexpired terms are to be filled at the next general election. In this instance that election is November 2, 1976.

This conclusion is supported by the provisions of section 16-01-01, which identifies "primary, general, and special election" as the three types of elections in this state, section 16-06-01, which defines the general election as being held on the first Tuesday after the first Monday in November of each even-numbered year, and the language of the North Dakota Supreme Court in *State ex rel. Lanier v. Hall*, 23 N.W.2d., at page 47, defining and considering the meaning of the terms general, primary and special elections.

This conclusion is also supported by the interpretation given to

Section 97 of the North Dakota Constitution which provides that the governor shall appoint a person to fill a vacancy in the office of Supreme Court justice or district court judge and that the appointment "shall continue until the next general election." The North Dakota Supreme Court construed Section 97 in State ex rel. Vogel v. Garaas, 261 N.W.2d. 914 (N.D. 1978). In that decision the Court stated at pages 920-921 of the reported decision:

Pursuant to section 44-02-08, N.D.C.C. (as amended, S.L. 1975, ch. 416, section 1), any appointment to fill a vacancy under section 44-02-03, N.D.C.C., is to continue in force until the first general election thereafter "except as otherwise expressly provided by law." Likewise, section 97 of the North Dakota Constitution provides that an appointment to fill a vacancy shall only continue until the next general election. This part of section 97 is self-executing and currently operative. Any other conclusion would thwart the intent of the people to limit the term of appointment. Consequently, any appointment by the Governor to fill a vacancy in the office of district court judge, whether pursuant to his authority under section of the Constitution or under section 44-02-03, shall continue until a successor is elected at the next general election and thereafter qualifies. See section 44-01-03, N.D.C.C.

The footnote at the bottom of page 921 states:

The term "general election" contemplates following the regular election procedures, including the nominating procedures of the primary election unless time does not permit, in which case nominations would be accomplished in the same manner as in special elections for no-party offices.

While the decision in the Garaas decision concerned the appointment of a district court judge pursuant to Section 97 of the Constitution, the term "general election" is used in similar context to the use of that term in section 44-02-08.

Based on the foregoing it remains our opinion that the term "general election" as used in section 44-02-08 means a general election held on the first Tuesday after the first Monday in November of each even-numbered year as defined in section 16-06-01.

With regard to your questions concerning the application of section 44-02-08 to the unexpired term of State Treasurer for purposes of determining whether the remainder of that term will be filled by election at the general election on November 4, 1980, it is necessary to give careful consideration to the language of section 44-02-08.

Pursuant to this section, "except as otherwise expressly provided by law," an appointment continues in force until the first general election thereafter "and thereafter until the appointee's successor by election is qualified." In an opinion dated November 24, 1976, regarding the time when a person elected to a county office pursuant to section 44-02-08 would qualify for the office we stated:

We conclude that since section 44-02-08 provided that the

person appointed to fill a vacancy holds office 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. (Emphasis added).

This conclusion is supported by the statement of our Supreme Court in Hall, supra, at page 48:

When an elective office becomes vacant it is the policy of the law to give the people a chance to fill it by the elective process as soon as practicable.

The 1977 Legislature, by amendment to section 11-10-05 and section 44-01-03 of the North Dakota Century Code adopted the policy stated in Hall as applied to county and district offices. For purposes of county offices section 11-10-05 now provides, in part:

11-10-05. WHEN TERMS OF COUNTY OFFICERS COMMENCE - WHEN OFFICERS QUALIFY. . . . If an officer is elected to fill an unexpired term in an office then held by an appointee, such officer may qualify and enter upon the discharge of the duties of such office at any time after receiving a certificate of election to that office but not later than the first Monday in January next succeeding the date of his election to the unexpired term of office.

For purposes of district offices section 44-01-03 now provides, in part:

44-01-03. WHEN STATE AND DISTRICT OFFICERS SHALL QUALIFY. . . . When a person is elected to fill an unexpired term in a district office then vacant or then held by an appointee, such person may qualify and enter upon the discharge of the duties of such office at any time after receiving a certificate of election to that office but not later than the tenth day of January next succeeding the date of his election to the unexpired term of office. (Emphasis added).

It is clear that persons elected at a general election to fill the unexpired term of a county or district office may take office immediately after receiving a certificate of election from the appropriate canvassing board.

The Legislature has not, however, chosen to extend this policy to state officers. Section 44-01-03 provides that all state officers elected, without regard to the nature of the term, i.e.: regular or unexpired.

. . . 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. . . .

No proviso exists, as in the case of county or district officers, for a state officer to qualify and take office immediately upon receipt of a certificate of election. Therefore, a person elected at a general election to fill the unexpired term of a state office does not enter upon the discharge of the duties of such office before the first day of January thereafter.

With regard to the unexpired term of State Treasurer presently filled by appointment, any person elected at the November 4, 1980, general election to fill the remainder of the term would not qualify for and assume the duties of that office as provided by section 44-01-03 at any time before January 1, 1981. Accordingly, such an election would be of no effect since the remainder of the term would expire before the person elected could, by operation of section 44-01-03, assume office.

Such an election would, therefore, be a useless and idle act. A basic maxim of jurisprudence, codified in this state by subsection 23 of section 31-11-05 of the North Dakota Century Code provides that "the law neither does nor requires idle acts." This maxim has been recognized and adopted by our Supreme Court. See: Apple Creek Township v. City of Bismarck, 271 N.W.2d. at 586 (N.D. 1978) and State v. Odegaard, 165 N.W.2d. 677 (N.D. 1969).

After full consideration of the facts and circumstances presented, the statutory provisions quoted above, previous Attorney General opinions and the decisions of the North Dakota Supreme Court cited herein, it is our opinion that an election is not required by section 44-02-08 to be held at the 1980 general election to fill the remainder of the unexpired term of State Treasurer. It is our further opinion that the appointment by the Governor to fill the vacancy resulting from the death of the previously elected State Treasurer will continue in force through the remainder of the present term and until the appointee's successor to be elected to a four-year term of office at the November 1980 general election is qualified. The statutes so provide and a different result may only be effected by the Legislature or upon review and determination by the courts.

It is hoped that the foregoing will be of assistance.

Sincerely,

ALLEN I. OLSON

Attorney General