

LETTER OPINION
80-93

December 24, 1980 (OPINION)

Mr. Dean L. Conrad, Director
Department of Accounts and Purchases
State Capitol
Bismarck, North Dakota 58505

Dear Mr. Conrad:

This is to acknowledge receipt of your letter of December 15, 1980, in which you set forth the following:

I request clarification on the exact time and date constitutional officers officially assume office.

Our question revolves around the warrants this office must draw for signature by the State Auditor and the State Treasurer. As of what date and time should we change the signature to reflect the new officers?

For the reasons hereinafter set forth, it is our opinion that the powers of the offices of Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Commissioner of Insurance, Attorney General, Commissioner of Agriculture, Public Service Commissioner, and Tax Commissioner devolve upon the persons elected at the November, 1980, general election, at the earliest moment of January 1, 1981, or at the moment the oath of office has been taken, subscribed, and filed, whichever moment is later.

Section 71 of the Constitution of North Dakota provides:

The executive powers shall be vested in a governor, who shall reside at the seat of government and shall hold his office for the term of four years beginning in the year 1965, and until his successor is elected and duly qualified. (Emphasis added.)

Section 82 of the Constitution of North Dakota provides in part:

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

The tax commissioner shall be elected on a no-party ballot and

he shall be nominated and elected in the manner now provided for the nomination and election of the superintendent of public instruction.

The board of railroad commissioners shall hereafter be known as the public service commission and the members of the board of railroad commissioners as public service commissioners and the powers and duties now or hereafter granted to and conferred upon the board of railroad commissioners are hereby transferred to the public service commission. The public service commissioners shall have the qualifications of state electors, have attained the age of twenty-five years, be chosen by the qualified electors of the state at the times and places of choosing members of the legislative assembly, hold office at the seat of government and until their successors are elected and duly qualified. As each of the three public service commissioners now holding office completes his term, his successor shall be elected for a term of six years.

The legislative assembly may by law provide for a department of labor, which, if provided for, shall be separate and distinct from the department of agriculture, and shall be administered by a public official who may be either elected or appointed, whichever the legislative assembly shall declare; and if such a department is established the commissioner of agriculture and labor provided for above shall become the commissioner of agriculture. (Emphasis added.)

Section 73 of the Constitution of North Dakota provides:

No person shall be eligible to the office of governor or lieutenant governor unless he be a citizen of the United States, and a qualified elector of the state, who shall have obtained the age of thirty years, and who shall have resided five years next preceding the election within the state or territory, nor shall he be eligible to any other office during the term for which he shall have been elected.

North Dakota Century Code Section 44-01-03 provides:

WHEN STATE AND DISTRICT OFFICERS SHALL QUALIFY. Except when otherwise specially 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, provided that 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.)

We note that prior to the 1975 Legislative Assembly, Section 44-01-03 of the North Dakota Century Code had provided 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 added.)

In our March 13, 1961, letter to Governor William L. Guy, we wrote:

We have no other provision pertaining to the office of Governor as to the time and when such person may qualify. From this section it appears that he may qualify on or before the first Monday or within ten days thereafter.

With the statutory substitution of "the first day of January" for "the first Monday of January" the statement is correct. The officials may qualify on or before the first day of January or within ten days thereafter.

North Dakota Century Code Section 44-01-05 provides:

OATH OF CIVIL OFFICERS. Each civil officer in this state before entering upon the duties of his office shall take and subscribe the oath prescribed in Section 211 of the Constitution of North Dakota. Such oath shall be endorsed upon the back of, or attached to, the commission, appointment, or certificate of election.

Section 211 of the Constitution of North Dakota provides:

Members of the legislative assembly and judicial departments, except such inferior officers as may be by law exempted shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm as the case may be) that I will support the constitution of the United States and the constitution of the state of North Dakota; and that I will faithfully discharge the duties of the office of _____ according to the best of my ability, so help me God" (if an oath), (under the pains and penalties of perjury) if an affirmation, and no other oath, declaration, or test shall be required as a qualification for an office or public trust. (Emphasis added.)

In our March 13, 1961, letter to Governor William L. Guy we stated relative to the above provisions:

From this it is observed that the taking of the oath is a prerequisite in taking or entering upon the duties of the office. Thus, before a person may enter upon the duties of the office of Governor, he must first have taken the oath.

North Dakota Century Code Section 44-01-06 provides:

STATE AND DISTRICT OFFICERS TO GIVE BONDS. Each state or

district officer elected by the people or appointed by the governor or by any other authority provided by law, except:

1. The governor;
2. Officers and members of the legislative assembly;
3. Judges of the supreme court and judges of the district courts; and
4. Court reporters,

before entering on his duties, shall give a bond conditioned for the faithful and impartial discharge of the duties of his office. This section shall apply in the case of the reelection or reappointment of a person to succeed himself.

We note and base our opinion on the following facts:

Allen Olson, Ernest Sands, Ben Meier, Robert Peterson, John Lesmeister, Joseph Crawford, J. O. Wigen, Robert Wefald, Kent Jones, Leo Reinbold and Kent Conrad have been issued certificates of election by the North Dakota Secretary of State. The Supreme Court of North Dakota, in the 1934 case of State ex rel. Sathre v. Byrne, 258 N.W. 121, 125, held: "It is well settled that a certificate of election, and qualification thereunder, clothes the person to whom the certificate is issued with prima facie title to the office, and entitles such person to the possession of the office and to exercise the functions thereof, even though the title to the office is assailed."

Allen Olson and Ernest Sands are citizens of the United States and qualified electors of this state who have attained the age of thirty years and have resided five years next preceding the relevant election within the State of North Dakota, as required by Section 73 of the Constitution of North Dakota.

Ben Meier, Robert Peterson, John Lesmeister, Joseph Crawford, J. O. Wigen, Robert Wefald, Kent Jones, Leo Reinbold, and Kent Conrad, have attained the age of twenty-five years, and possess the qualification of "state electors," as required by Section 82 of the Constitution of North Dakota.

The positions of Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, Superintendent of Public Instruction, Insurance Commissioner, Attorney General, Commissioner of Agriculture, Public Service Commissioner and Tax Commissioner are duly covered by blanket position bonds under the terms of Chapter 26-23 of the North Dakota Century Code, thus satisfying the requirements of Section 44-01-06 of the North Dakota Century Code.

With the addition of taking, subscribing, and filing the oath of office, we conclude the foregoing includes all steps necessary in order for the said individuals to be deemed to have "qualified" for the offices to which they have been elected. Therefore, pursuant to the terms of North Dakota Century Code Section 44-01-03 and Sections

71 and 82 of the Constitution of North Dakota, the said officials who prior to January 1, 1981, have taken, subscribed, and filed with the Secretary of State their oaths of office shall have qualified and without the necessity of any further act shall, at the earliest moment of January 1, 1981, become the incumbents of the offices for which they have been elected, and the possessors of all the powers, duties, and responsibilities of the said offices.

Should one of those elected not take, subscribe, and file the oath prior to January 1, 1981, he will become the incumbent upon taking, subscribing, and filing of the oath of office, provided the same is accomplished within the statutory time limit; the predecessor of the person elected shall serve until such taking, subscribing, and filing of the oath.

As we stated in our letter to Governor Guy, interpreting the previous law:

In construing these provisions it would appear that the term begins on the first Monday of January or when such person has qualified within the limitations. As to the specific instance, the records of the Secretary of State at 12:25 p.m. From such it follows that you entered upon the duties of Governor at such time, and until that time, Mr. Davis was the Governor of the State of North Dakota.

While we are aware that the ceremonial transfer of offices will occur on January 6, 1981, the execution of the oath of office passes the final precursor to the legal transfer of offices on January 1, 1981. The result is the same regardless of the intent of the officer-elect in taking, subscribing, and filing the oath. As the Supreme Court of North Dakota said nearly a half century ago in the case relating to the qualifications of Governor Moodie, "When you intend the facts to which the law attaches a consequence, you must abide the consequence whether you intend it or not." State ex rel. Sathre v. Moodie, 258 N.W. 558, 566.

In direct response to your question, the State Auditor and State Treasurer assume their respective offices on January 1, 1981, provided they have met the conditions described above.

We trust that the foregoing adequately sets forth our position on this matter and meets the needs of your inquiry.

Sincerely,

ALLEN I. OLSON

Attorney General