

Office of the Attorney General
State of North Dakota

Opinion No. 81-94

Date Issued: August 26, 1981
Requested by: Honorable William Heigaard
State Representative

--QUESTION PRESENTED--

Whether a state representative is precluded from resigning from the House of Representatives to seek election to the Senate at a special election called to fill a vacancy in the Senate.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that neither the Constitution nor the laws of North Dakota preclude a state representative from resigning from the House of Representatives to seek election to the Senate at a special election called to fill a vacancy in the Senate.

--ANALYSIS--

The North Dakota Century Code contains nothing which would prohibit a person from seeking one office during the term for which that person was elected to another office, whether or not that person resigns one office to seek another. The North Dakota Constitution contains three sections relating to the seeking and holding of office by legislators. None of those sections prohibit a member of the House of Representatives from seeking election to the Senate, whether or not the member of the House of Representatives resigns prior to the Senate election.

Article IV, Section 17 of the North Dakota Constitution provides as follows:

SECTION 17. No member of the legislative assembly shall, during the term for which he was elected, be appointed or elected to any civil office in this state, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected; nor shall any member receive any civil appointment from the governor, or governor and senate, during the term for which he shall have been elected.

Since a vacancy in the office of state senator is to be filled by election pursuant to Section 16.1-13-10 of the North Dakota Century Code rather than appointment, only the first clause of this section applies. Obviously, the office of senator was not created during the term of office of a representative, so a representative would only be prohibited from

seeking election to the Senate by Article IV, Section 17, N. D. Const., if the emoluments of office of senator were increased during the representative's term of office.

Chapter 520 of the 1981 Session Laws increased the expense allowance of legislators from \$70 to \$85 per day during a session and the additional payment for uncompensated expenses from \$50 to \$80 per month. Compensation for service on the Legislative Council or its committees was increased from \$52 to \$62.50 per day.

In my opinion, these increases do not represent increases in the emoluments of office of a senator. In construing Article IV, Section 17, N. D. Const., the North Dakota Supreme Court has said that the term 'emoluments' implies a pecuniary gain or profit and that provisions for the expenses of travel of public officers while engaged in official duties did not constitute salaries or emoluments. See State ex rel. Lyons vs. Guy, 107 N.W.2d 211 (N.D. 1961). In Verry vs. Trenbeath, 148 N.W.2d 567 (N.D. 1967) the court also said that these same payments (which were increased by Chapter 520, 1981 Session Laws), were not additional compensation in violation of Article IV, Section 46, N. D. Const. Furthermore, an interpretation of these increases as increases in emoluments would result in the ineligibility of all legislators to succeed themselves, which is an obviously absurd result.

Article IV, Section 13, N. D. Const., provides that no person holding any office of profit in North Dakota may become a member of the Legislative Assembly. This provision is obviously intended to prevent conflicts of interest from arising between the duties of a person as a legislator and as some other officer. In my opinion, Article IV, Section 13, N. D. Const., would not be violated so long as a current member of the House who is elected to the Senate resigns prior to taking office as a Senator.

Article IV, Section 18, N. D. Const., which prohibits a member of the Legislative Assembly from being appointed to any civil office during the term for which he was elected, does not apply.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

Robert O. Wefald
Attorney General

Prepared by: John W. Morrison
Assistant Attorney General