

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-22

Date issued: September 28, 1990

Requested by: Jim Kusler
Secretary of State

- QUESTION PRESENTED -

Whether a vacancy in the office of a member of the Legislative Assembly, whose term will not expire this year, occurring less than 55 days prior to a general election may be filled at that general election.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a vacancy in the office of a member of the Legislative Assembly, whose term will not expire this year, occurring less than 55 days prior to a general election may not be filled at that general election.

- ANALYSIS -

The North Dakota Constitution authorizes the Governor to issue writs of election to fill vacancies occurring in either house of the Legislative Assembly. N.D. Const. art. IV, ' 11. N.D.C.C. ' 16.1-13-10 provides the procedures that must be followed in filling a vacancy occurring in the office of a member of the Legislative Assembly. The statute requires the county auditor to notify the Governor of the vacancy unless the Governor has received a letter of resignation. If there is a legislative session between the time the vacancy occurs and the next general election, the Governor designates the date of a special election to fill the vacancy. Id. The statute then provides:

If there is no session of the legislative assembly between the time such vacancy occurs and the time of the holding of the next general election, the special election shall be held at the same time as the general election.

The office of a member of the Legislative Assembly is one for which a party nomination may be made. N.D.C.C. " 16.1-11-08, 16.1-11-26. Thus, in a special election to fill a vacancy in this office, party nominations may be made. N.D.C.C. ' 16.1-13-14. A nominating convention may be held to make such a party nomination so long as a six-day notice is provided before the holding of that convention. N.D.C.C. ' 16.1-13-15. Individual nominations for a special election to fill a vacancy in the office of a member of the Legislative Assembly may also be made. N.D.C.C. ' 16.1-13-14. A notice of the special election to fill a vacancy in the Legislative Assembly, as well as

a copy of the sample ballot, must be published once each week for two consecutive weeks prior to the election in the appropriate official county newspaper. N. D. C. C. " 16.1-13-05, 16.1-13-12.

In a special election to fill a vacancy, all certificates of nomination must be filed and in the actual possession of the appropriate election officer no later than 4:00 p.m. on the 60th day prior to the special election. N. D. C. C. ' 16.1-12-04(5). Furthermore, not less than 55 days prior to that special election to fill a state or district office, the Secretary of State must certify to the county auditor of each county in which electors may vote for candidates for that office, the name and post office address of each person nominated for the office as indicated by certificates of the nomination filed with the Secretary of State's Office. N. D. C. C. ' 16.1-12-05.

Where the vacancy occurs several months prior to the next general election, there is no difficulty in complying with these various time requirements. A problem arises, however, when the vacancy occurs shortly before the next general election. The question presented involves a situation where a vacancy occurs less than 55 days before the general election day. The primary difficulty is the impossibility of meeting the 60-day requirement of N. D. C. C. ' 16.1-12-04(5) when fewer than 60 days remain. Furthermore, the Secretary of State would be unable to certify the names of candidates 55 days prior to the election as required by N. D. C. C. ' 16.1-12-05. Depending upon when the vacancy occurs, the time requirements concerning the publication of the sample ballots, notice of special election, and the holding of nomination conventions, may not be met.

In a September 20, 1982, letter opinion to Secretary of State Ben Meier, former Attorney General Robert Wefald relied upon N. D. C. C. ' 16.1-12-08 as authority to allow the use of stickers for persons who had been nominated to fill a vacancy occurring in the Legislative Assembly although the time deadline for filing the certificates of nomination had already passed. In the 1982 situation, a nominee declined a nomination following the primary election but after the deadline for filing petitions to fill the vacancy had passed. Attorney General Wefald concluded that although the nomination was submitted beyond the deadline for submission of nominations, the provisions of N. D. C. C. ' 16.1-12-08 allowed a person who has been properly nominated to fill the vacancy to have his name printed on the ballot if the ballots had not been printed. The opinion also concluded that if the ballots had already been printed, stickers with a candidate's name must be printed and made available at the time of election so that voters may vote for the individual by placing the sticker on the ballot at the appropriate location.

The relevant portion of N. D. C. C. ' 16.1-12-08 provides:

If a vacancy occurs before election day and after the printing of the ballots, and any person is nominated according to the provisions of this title to fill the vacancy, the officer whose duty it is to have the ballots printed and distributed shall have printed on a requisite number of stickers the name of the substitute candidate and no other name.

The 1982 Attorney General's opinion concluded that had the Legislature not desired a candidate's name be placed on the ballot after the filing deadlines had passed, then the "sticker provision" of N. D. C. C. ' 16.1-12-08 would have been unnecessary and useless. However, the provisions of N. D. C. C. ' 16.1-12-08 contemplate a situation where a vacancy has occurred in an office which was otherwise scheduled to appear on the general election ballot. For example, the statute speaks of the name of the "substitute" candidate and of the duty of election judges to "cross out or otherwise obliterate the name of the original nominee causing the vacancy." N. D. C. C. ' 16.1-12-08. Therefore, the conclusion of the 1982 Attorney General's opinion is not applicable to a situation, such as the one at hand, where a vacancy occurs in an office not scheduled to appear on the next general election ballot.

A paramount rule of statutory construction is to ascertain and fulfill the objective and intent of the Legislature. Larson v. Wells County Water Resource Board, 385 N. W. 2d 480 (N. D. 1986). Although the Legislature's intent must be sought initially from statutory language, Stutsman County v. State Historical Soc. of North Dakota, 371 N. W. 2d 321 (N. D. 1985), statutory language must be construed to avoid absurd and ludicrous results. Skoog v. City of Grand Forks, 301 N. W. 2d 404 (N. D. 1981).

N. D. C. C. ' 16.1-13-10 requires a special election to fill a vacancy in the office of a member of the Legislative Assembly to occur at the next general election when there is no session of the Legislature between the time the vacancy occurs and the holding of that election. However, the Legislature also expressed its intent that the special election to fill that vacancy allow for both party and individual nominations for those who wish to seek that office. N. D. C. C. ' 16.1-13-14. Because of the various time constraints involved in scheduling an election, especially one in which nominations may be made by political parties, it must be assumed that the Legislature did not intend for the special election to occur at the next general election when time simply does not permit the various nomination, publication, and notice events to be completed. To allow a special election to fill this vacancy to be held at the next general election when no procedure exists whereby persons may have their names placed upon a special election ballot is an absurd and ludicrous result which must be avoided.

Therefore, it is my opinion that in a situation where a vacancy occurs in the office of a member of the Legislative Assembly less than 55 days prior to the next general election, the special election to fill that vacancy may not be held at that general election. Instead, N. D. Const. art. IV, ' 11 and N. D. C. C. ' 16.1-13-10 authorize the Governor to issue a writ of election to hold a special election to fill that vacancy at a time designated by the Governor.

Ultimately, this is a matter that requires legislative attention and direction. It is my recommendation that N. D. C. C. ' 16.1-13-10 be amended to provide specific guidance for the Secretary of State and all other election officials in determining the procedures in filling a vacancy occurring after the various nomination, notice, and publication deadlines have passed.

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- EFFECT -

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

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