

OPINION
46-133

July 3, 1946 (OPINION)

HEALTH OFFICER

RE: Appointment - Term of Office

This office is in receipt of your letter of June 20, 1946, in which you say that on May 4, 1938, you were appointed city health officer by the mayor of McClusky, and that your appointment was confirmed by the city council; that thereafter no appointment was made and that you continued to hold the office. You say that, "on April 18, 1946, at a special meeting of the council the new mayor, without consulting the city attorney or conforming in any manner to the statutes of the state, appointed C. E. McReynolds, M.D., as health officer of McClusky, N.D."

You request the opinion of this office as to whether or not the appointment of Dr. McReynolds was legal, entitling him to assume the office of city health officer.

The appointment of a health officer in a city under the council form of government is governed by the provisions of section 23-0402 of the 1943 Revised Code. This section reads as follows:

The mayor, at the regular meeting of the city council in April of each odd numbered year, shall appoint as city health officer a person licensed to practice medicine and surgery within this state. Such appointment shall be subject to confirmation by the city council. The health officer shall hold his office for two years and until his successor is appointed and qualified. When the state department of health is satisfied that the city health officer is neglecting or refusing to perform the duties of his office, it may report the case to the city council, and at the next meeting thereof, the mayor shall declare the office vacant and shall appoint another physician to fill the unexpired term."

It was evidently the opinion of the mayor of McClusky that since you were appointed in 1938 to serve as city health officer until the regular term expired in April, 1939, that after the regular meeting of the city council in that month and year you were merely holding over until your successor was appointed and qualified. There are some authorities that would seem to sustain that view. There are other authorities that indicate that upon the expiration of a term there is no vacancy to be filled by the general appointing power where the incumbent was entitled to hold until his successor was elected and qualified. 50 L.R.A. (N.S.) 368.

As far as this office can determine, this question has never been decided by the North Dakota supreme court. Which view the supreme court of North Dakota would take with reference to this matter is anybody's guess.

In view of the conflicting authorities concerning this legal

question, we would suggest that the only method by which you can ascertain the law with definite assurance is to challenge the appointment of Dr. C. E. McReynolds in a proper proceeding in the courts. In that manner this point will be decided, and North Dakota will have the benefit in the future of knowing the law as laid down by our courts. Whether you would want to institute such action, I do not know. We could, of course, take a view in the matter, but have no way of assuring you that our opinion would prevail.

NELS G. JOHNSON

Attorney General