

**OPINION
57-141**

December 16, 1957 (OPINION)

OFFICES AND OFFICERS

RE: Township - Vacancy

In your letter of December 4, 1957, you requested an opinion of whether the fact that a township clerk is in the hospital where he will remain for an undetermined period of time during which he is unable to perform his duties constitutes a "vacancy" in that office within the meaning of chapter 342 of the Session Laws of 1955.

Chapter 342 of the Session Laws of 1955 provides that if a vacancy occurs in any township office from death, resignation, removal from the township, or other cause the township supervisors shall fill the vacancy by appointment, (Emphasis supplied). Among the causes of "vacancy in office" supplied by section 44-0201 of the 1953 Supplement to the N.D.R.C. of 1943 is excepted in subsection 5 "failure to discharge the duties of his office, * * * for sixty consecutive days, * * * by reason of sickness, or by other unavoidable cause, * * *."

Although there appears to be no North Dakota cases in point, pertinent dictum may be found in State v. Boucher, 3 N.D. 389, 399 (1983) which says, "A vacancy (in office) exists only where no one has any legal title to the office." Attention may also be called to the Attorney General's opinion of October 24, 1949, re: officers sickness section 44-2201 of the 1947 Supplement, in which it was held that failure to perform the duties of office for a longer period than six months by reason of sickness constituted no vacancy in the office.

Subsequent amendments to the statute by the Legislature have not attempted to change the interpretation of the Attorney General indicating an acquiescence thereto.

In your letter of request you stated that the township clerk was hospitalized because of injuries sustained in an automobile accident. In so far as the term "sickness" is used in the foregoing authorities, we can see no basis for distinction between sickness caused by disease or sickness caused by injury. The determinative feature is the incapacity to perform the duties of office.

Based upon the foregoing, it is the opinion of the attorney general that in a case where a township clerk has been incapacitated from performing the duties of his office by reason of sickness requiring hospitalization, whether that period of incapacity be for less than six months or longer, the incapacity is not "other cause" within the meaning of chapter 342 of the Session Laws of 1955, and it alone is not sufficient basis to determine that a vacancy in the office exists.

LESLIE R. BURGUM

Attorney General