

**OPINION  
61-124**

February 6, 1961 (OPINION)

GOVERNOR

RE: State Examiner - Appointment

This is in reply to your request for an opinion relating to the office of State Examiner under section 6-01-08 of the North Dakota Century Code. You advise that this section requires that the State Examiner be confirmed by the State Senate.

You then ask: "If I choose to appoint a new State Examiner at the expiration of the present State Examiner's term, which is July 1, 1961, would I be required by law to submit the name of my nominee to the Senate during this session?"

You also ask: "If I do not submit my nomination to the State Senate, is it still possible for me to make an interim appointment at the expiration of the term of the present State Examiner?"

The section as is material provides as follows:

6-01-08. APPOINTMENT OF STATE EXAMINER - QUALIFICATIONS.  
The state examiner shall be appointed by the governor and confirmed by the senate, and shall hold his office for a term of four years and until his successor has been appointed, confirmed by the senate, and has qualified, unless he is removed sooner as herein provided. His term of office shall commence on the first day of July in each year next following a national presidential election. . . ." (Underscoring ours)

As stated in your letter the present term as such will expire July 1, 1961. However, under the specific provisions of the statute, the Examiner is to continue in office until his successor has been appointed and confirmed by the Senate and has qualified. It is a general rule of law that the continuing over until the successor is properly qualified is as much of the term of office as the term itself.

The clear import of the language is that appointment to this office can only be made by the Governor, and then confirmed by the Senate. As to prospective appointments:

The general rule of law is that a prospective appointment to fill a vacancy sure to occur in a public office, made by an officer who, or if by a body which, as then constituted, is empowered to fill the vacancy when it arises, is, in the absence of a law forbidding it, a valid appointment, and vests title to the office in the appointee."

See *People v. Christian*, 123 Pac. 2d. 368; *Perkins v. Hughes*, 91 Pac. 2d. 261; *Board of Education of Boyle County v. McChesney*, 32 S.W.2d . 26; and *Pashman v. Freidbauer*, 66 A. 2d. 568.

Applying the present factual situation to the above rule, it will be observed that the present Governor would be Governor on July 1, 1961, and at that time could make the appointment if the Senate were in session to confirm it. It is also observed that the Senators now in office will also be the Senators who will be in office as of July 1, 1961. It is further observed that there is no constitutional or statutory provision which would forbid such prospective appointment. It is therefore our opinion that the Governor may submit the nominee to the Senate during the Legislative Assembly for confirmation for the office of State Examiner, which appointment will become effective upon confirmation July 1, 1961.

We must, however, also advise that it is not mandatory that the Governor submit his nominee at this time. However, if he does not submit his nominee to the present Senate, the term of the present State Examiner would continue until the Senate would confirm it in 1963, unless a special Assembly were to be called prior to such time.

Section 78 of the Constitution which provides,

When any office shall from any cause become vacant, and no mode is provided by the constitution or law for filling such vacancy, the governor shall have power to fill such vacancy by appointment."

would have no application in this instance because section 6-01-08 specifically sets forth the manner in which such office is to be filled.

As to making an interim appointment, we must advise that the Governor is not empowered to make an interim appointment as is found in some other instances. An interim appointment can be made only where the Constitution or statutes specifically so provide. An interim appointment without the confirmation of the Senate would not be a valid appointment. See *Standish v. Boucher*, 3 N.D. 389, where the North Dakota Supreme Court held that an appointment made without the confirmation of the Senate is not valid.

Thus, in response to your second question, it is our opinion that if you do not submit your nominee to the present State Senate, you will not be in a position to make a lawful or valid interim appointment at the expiration of the term of the present State Examiner. Also, if no nomination or confirmation is made during this Legislative Assembly, the current State Examiner would continue to hold office until his successor is appointed and confirmed by the Senate and qualified, which would mean sometime in the early part of 1963, unless a special session were to be held before such time.

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