

OPINION
64-78

April 24, 1964 (OPINION)

COUNTIES

RE: Officer - Vacancy - Appointment - Term - Qualifications

This is in reply to your letter of April 22, 1964, relative to the office of register of deeds. The present register of deeds was elected for a four-year term beginning in 1963. He now contemplates resigning. The questions presented are first, whether the board of county commissioners can appoint a successor who would hold office by virtue of such appointment until January 1, 1967, and second, whether the manager of the Rolette County Abstract Company, Inc., being part owner of such corporation, may be appointed as register of deeds and whether he may serve as register of deeds and manager of the abstract company at the same time.

As you have noted in your letter, section 44-02-04 of the North Dakota Century Code, as amended, would be applicable to the first question. Section 44-02-04, as amended, provides:

VACANCY IN COUNTY OFFICE - APPOINTMENT. A vacancy in any county office, other than that of county commission, shall be filled by the board of county commissioners, with the exception that if a vacancy has occurred in the office of state's attorney by reason of his removal under section 44-11-01, the appointment shall be made by the board of county commissioners by and with the advice and consent of the governor. The board of county commissioners may declare a county office to be vacant whenever the officeholder is unable to perform the duties of the office for six months or more. However, if within one year the officeholder should become able to perform his duties the county commissioners may, for good cause shown, reinstate such officeholder."

Section 173 of the North Dakota Constitution, as amended, provides in part that the register of deeds, among others, shall hold his office for a term of four years and until his successor is elected and qualified. There is no provision limiting the appointment made by the county commissioners under section 44-02-04 to the next regular election nor is there any provision for a person to be elected at the next regular or special election to fill out the term. We therefore are in agreement with your conclusion that an appointment made by the board of county commissioners to fill a vacancy in the office of register of deeds is an appointment for the unexpired term. Thus, in this instance, the person so appointed would hold office until January 1967.

With regard to your second question, there is no statutory provision prohibiting the county abstracter from holding the office of register of deeds. We must, therefore, consider whether there is an

incompatibility of positions which would prevent the same person from holding both positions. As you have noted in your letter, the register of deeds is required, upon request, to continue abstracts and may charge a fee for same. This fee is to be the same as that permitted to be charged by registered abstracters. See sections 11-18-01(6) and 11-18-05(c) of the North Dakota Century Code.

The fees collected by the register of deeds for this service are to be turned over to the county treasurer. See section 11-10-14. The abstractor is, of course, entitled to retain the fees he is permitted to charge by statute. This situation would, we believe, raise an apparent conflict. The instances in which the person would be acting as register of deeds and required to turn over the fees to the county and the instances in which he would be acting as a private abstractor entitled to retain the fees would be difficult to distinguish. As you have noted in your letter section 44-04-18 makes it a misdemeanor for any public officer to use his office or position for the purpose of effecting the sale or purchase of any service for which he will benefit financially. It is obvious that a person who would hold the office of register deeds and, at the same time, serves as county abstractor, would be open to charges of violation of this statute even though such charges might, in actuality, be unfounded. The fact that the register of deeds does not, in most instances, continue abstracts would not be significant in this matter. It is the possibility of a conflict which makes the positions incompatible. We do not believe the county abstractor should be appointed to the office of register of deeds.

HELGI JOHANNESON

Attorney General