

N.D.A.G. Letter to McIntee (April 26, 1991)

April 26, 1991

Michael S. McIntee
McIntee Law Firm
Box 90
Towner, ND 58788-0090

Dear Mr. McIntee:

Thank you for your April 16, 1991, letter requesting an opinion on several issues relating to the City of Towner and appointment of a temporary president of its board of city commissioners.

Towner has a city commission form of government. You state the president of the board of city commissioners submitted his resignation on April 1, 1991, to be effective with the selection of a temporary president. On that date a motion was adopted appointing Commissioner Jaeger temporary president. The board then accepted the president's resignation.

It has been suggested that the appointment of Commissioner Jaeger to serve as temporary president is invalid because Commissioner Block, as vice president, assumed the president's duties upon acceptance of the resignation of the former president. The official minutes of the meeting of May 7, 1990, the meeting immediately following the most recent city election, indicate a vice president was not elected. In fact, there is no record in the official minutes of any election of a vice president at any time in the last five years. Commissioner Block's claim to the position of vice president is apparently based on action that purportedly was taken at a meeting on February 4, 1988. However, no one can find any minutes relating to a February 4, 1988 meeting.

Your first question asks whether the city is required to elect a vice president after each biennial election. The election of a vice president of a governing body in a commission city is governed by N.D.C.C. § 40-09-09, which states:

40-09-09. Vice president and acting president of board - Powers to act. At the first meeting of the board after each biennial election, one of its members shall be elected vice president. The vice president shall perform all the duties of the office of president in the absence or inability of the president to act. In the absence or inability to act of both the president and the vice president, the board shall elect one of its members as acting president, who shall have all the powers and perform all the duties of the president during his absence or disability.

The word "shall" in this statute is mandatory and not directory. Therefore, the city

commission is required to elect a vice president at the first meeting of the board "after each biennial election."

You also ask whether the city has been without a vice president. As a general rule, in the absence of an expression of legislative intent to the contrary, municipal officers hold over until their successors are provided. However, where a legislative intent is expressed to depart from the general rule and fix a definite term whether or not a successor has been provided, expiration of the term of office creates a vacancy. 3 McQuillen, Municipal Corporations § 12.110 (3d Ed. 1990).

N.D.C.C. § 40-09-04 states that commissioners and the president "shall hold office for four years from and after the date of (their) election and until (their) successor(s) shall have been duly elected and qualified". On the other hand, section 40-09-09 states that a vice president shall be elected following each biennial election and there is no language providing the occupant of the office shall continue to hold office until a successor is elected and qualified.

Members of the city commission continue to serve in their capacities as president or commissioners to the end of their terms and until their successors are elected and qualified. However, the commissioner elected vice president (although he or she continues to serve as commissioner until a successor is elected and qualified) apparently serves for a term of two years only in the capacity of vice president whether or not a successor is elected following completion of the term. See, e.g., Mann v. Key, 345 So.2d 293 (Ala. 1977) (Where traditional language 'shall hold office until his successor is elected and qualified' was not used in statutes and where statutes provided for filling of a vacancy, the incumbent mayor does not hold over pending the election of a successor). Accordingly, in response to your third question, if Commissioner Block was not elected vice president following the most recent biennial election in 1990 he does not hold that office.

Your last two questions concern whether Commissioner Jaeger may decline the position of temporary president without resigning from the board and what will happen if none of the members accept the position of temporary president. Upon acceptance of the resignation of the president of the board, that position became vacant. When a vacancy occurs, the board must either call a special election or, if fifteen days have elapsed from the date the position became vacant and a petition calling for a special election has not been filed, fill the position by appointment until the next city election. N.D.C.C. § 40-09-10.

Until the position of president is filled, either by appointment or by election, the city needs someone to chair the meetings of the board, execute contracts, etc. This was apparently taken care of at the meeting on April 1, 1991 when Commissioner Jaeger was appointed acting president. Because the office of vice president is vacant, the appointment of Commissioner Jaeger as acting president appears to be a valid appointment under section 40-09-09.

I find nothing in section 40-09-09 or elsewhere in title 40 to prevent an acting president from resigning those duties without also resigning from the board of commissioners. However, the general rule is that a resignation is not complete until accepted by the proper authority. 3 McQuillen, Municipal Corporations § 12.125 (3d Ed. 1990).

I trust this information will be helpful to you.

Sincerely,

Nicholas J. Spaeth

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