

**OPINION
67-67**

April 13, 1967 (OPINION)

Mr. Frank F. Jestrab, President

State Bar Association

RE: Courts - Vacancies and Qualifications of Appointees

This is in reply to your letter of April 10, 1967, relative to Senate Bill 58 enacted by the 1967 Legislative Assembly. You state the following facts and question:

"The captioned statute authorizes and empowers the Governor of North Dakota to fill judicial vacancies created by the act within 30 days after the effective date of the act which I understand is July 1, 1967. It provides for the filling of two vacancies in the First District with the judges to have their offices in Grand Forks and Fargo respectively and for one vacancy in the Fifth District with the appointee to have his chambers in Minot, North Dakota. Governor Guy has asked me as President of the State Bar Association to appoint committees to assist him in the evaluation of the qualifications of potential appointees.

"It is not clear to the Association whether persons appointed for these vacancies must reside in the district at the time the appointment is made or may the appointment be made of persons presently residing outside of the district who may then move into the district so as to be a resident and to qualify for election."

As you have noted in your letter, Senate Bill 58 provides in part: "The governor shall, within thirty days after the effective date of this Act, in order to fill vacancies created by this Act, appoint two additional district judges for judicial District One and one additional district judge for judicial District Five, all of whom shall hold office until the next general election and until their successors are elected and have qualified."

Section 107 of the North Dakota Constitution provides:

No person shall be eligible to the office of district judge, unless he be learned in the law, be at least twenty-five years of age, and a citizen of the United States, nor unless he shall have resided within the state or territory of Dakota at least two years next preceding his election, nor unless he shall at the time of his election be an elector within the judicial district for which he is elected."

In the present situation an appointment of a district judge will be made to fill the vacancies in office. Senate Bill 58 refers to "vacancies created by this Act", and while the North Dakota Supreme Court in *State v. Friederich*, 108 N.W.2d. 681 (1961) indicated that neither the Governor nor the Legislature had the power to create vacancies but only to fill them (See pages 690 and 691 of the reported case) it would appear the court was considering vacancies in

office which had previously been in existence rather than vacancies caused by the creation of a new office. The court referred to vacancies in fact such as those resulting from the death, disability or resignation of an incumbent or his abandonment of the office as opposed to a vacancy in a constitutional office where one does not naturally exist. In this instance a vacancy would appear to naturally exist as a result of the creation of a new office and we believe this is properly considered a vacancy in office as indicated in Senate Bill 58. See also 42 Am. Jur. 978, Public Officers, Section 134. The manner of filling the vacancy, as specified in the Act, i.e., by appointment of the Governor, is in accord with Section 78 of the North Dakota Constitution and Section 44-02-03 of the North Dakota Century Code.

We note that Section 107 of the North Dakota Constitution requires, among other qualifications, that a person shall, at the time of his election to the office of district judge, be an elector within the judicial district for which he is elected. In order to be an elector such person must have resided within the state for one year, the county ninety days and the precinct thirty days. See Section 121 of the North Dakota Constitution. In this instance the person elected to office must have resided within the state for two years. With respect to the other residency requirements, however, he must meet only the requirements of an ordinary elector within the judicial district.

While Section 107 of the North Dakota Constitution refers to qualifications at the time of the "election" of a district judge, we must presume, in view of the lack of any statutory or constitutional provision to the contrary, that the same qualifications apply to a person appointed to fill a vacancy in the office of district judge. We know of no authority, nor for that matter any reason, why an appointee to fill a vacancy in an office should be required or permitted to have any different qualifications than should a person to be elected to fill that office.

It is therefore our opinion that the persons appointed to fill the vacancies in the office of district judge, under the provisions of Senate Bill 58, must be electors of the district for which they are appointed at the time of their appointment. It is our further opinion that a person who presently resides outside the district may be appointed only if he meets the qualifications of an elector of the district at the time of the appointment. In other words we believe the person appointed to fill the vacancy must be an elector of the judicial district at the time of his appointment.

HELGI JOHANNESON

Attorney General