

STATE OF NORTH DAKOTA
ATTORNEY GENERAL'S OPINION 94-F-34

Date issued: November 23, 1994
Requested by: Thomas L. Trenbeath
Cavalier City Attorney

- QUESTIONS PRESENTED -

I.

Whether a mayor, under the traditional council form of city government, who is elected to fill the remaining term of a vacancy, serves as mayor for the remainder of the term and until his successor is elected and qualified.

II.

Whether official acts taken by a mayor, under the traditional council form of city government, holding over beyond the mayor's term, because a successor has not been elected and become qualified, are lawful.

III.

Whether a mayor, under the traditional council form of city government, must appoint police officers every two years.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a mayor, under the traditional council form of city government, who is elected to fill the remaining term of a vacancy, serves as mayor for the remainder of the term and until his successor is elected and qualified.

II.

It is my further opinion that official acts taken by a mayor, under the traditional council form of city government, holding over beyond the mayor's term, because a successor has not been elected and become qualified, are lawful.

III.

It is my further opinion that a mayor, under the traditional council form of city government, has the authority to appoint police officers every two years, but if police officers are not appointed, the current police officers may hold office until their successors are appointed and qualified.

- ANALYSES -

I. & II.

The analyses in this opinion apply to the traditional council form of city government, as opposed to the modern council form of city government.

The factual situation may be described as follows. In April 1990, Person A was elected mayor, having a four-year term of office. See N.D.C.C. ? 40-08-14. Early in 1991, Person A resigned his position as mayor. Pursuant to N.D.C.C. ? 40-08-16, the city council elected one of its members, Person B, to act as mayor "until the next election and until a mayor is elected and qualified." Id. At the next election, Person C was elected mayor. This opinion analyzes the term and official acts of Person C.

N.D.C.C. ? 40-08-16 provides, in part:

If a vacancy occurs in the office of mayor, the city council may call a special city election to fill such vacancy for the unexpired term or may, after fifteen days from the date of such vacancy, elect one of its members to act as mayor, the member so elected shall possess all the rights and powers of the mayor until the next election and until a mayor is elected and qualified. . . .

After Person A resigned as mayor, Person B was elected by the city council to act as mayor until the next election, when Person C was elected mayor. Person C was elected to serve as mayor through the unexpired term of Person A, whose four-year term would have expired in April of 1994. See Letter from Attorney General Heidi Heitkamp to Elaine M. O'Cain (December 6, 1993); Letter from Attorney General Robert O. Wefald to

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John D. Hovey (September 14, 1984); Letter from Assistant Attorney General Gerald W. Vandewalle to Floyd M. Geiser (March 10, 1964); Letter from Assistant Attorney General Paul M. Sand to John J. Tebelius (July 13, 1962).

A mayor "hold[s] his office for four years and until his successor is elected and qualified." N.D.C.C. ? 40-08-14. It is my opinion that Person C, who was elected to serve as mayor to the end of Person A's term, i.e., April of 1994, may continue to act as mayor beyond the end of that term until a successor is elected and qualified. State ex rel. Foughty v. Friederich, 108 N.W.2d 681 (N.D. 1961); Jenness v. Clark, 129 N.W. 357 (N.D. 1910); State ex rel. Bickford v. Fabrick, 112 N.W. 74 (N.D. 1907); 1971 N.D. Op. Att'y Gen. 304; 1956 N.D. Op. Att'y Gen. 66. No vacancy has been created in the office of mayor. State ex rel. Foughty v. Friederich, 108 N.W.2d 681 (N.D. 1961).

It is my further opinion that official acts taken by a mayor holding over beyond the mayor's term, because a successor has not been elected and become qualified, have "the same force and effect as though he himself had received the new certificate of election and qualified anew." State ex rel. Bickford v. Fabrick, 112 N.W. 74, 75-76 (N.D. 1907).

III.

N.D.C.C. ? 40-08-27 provides:

The mayor may appoint any number of policemen which he and the city council may deem necessary to preserve the peace of the city, and he shall appoint one of the number as chief of police. Such appointment shall be subject to the approval of the council.

N.D.C.C. ? 40-14-05 provides:

The term of all appointive officers of a city operating under the council form of government commences on the first day of July succeeding their appointment unless otherwise provided by ordinance, and the officers shall hold their respective offices for two years, and until their successors are appointed and qualified.

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Thus, it is my opinion that a mayor, under the traditional council form of city government, has the authority to appoint any number of police officers every two years which he and the city council deem necessary to preserve the peace of the city.

See Letter from Attorney General Nicholas J. Spaeth to F. C. Rohrich (April 4, 1988); Letter from Attorney General Nicholas J. Spaeth to F. C. Rohrich (June 9, 1989). If a successor is not appointed and qualified, a police officer may remain in office until a successor has been appointed and qualified, or until it has been determined that no appointment will be made to that position. See State ex rel. Foughty v. Friederich, 108 N.W.2d 681 (N.D. 1961); Jenness v. Clark, 129 N.W. 357 (N.D. 1910); State ex rel. Bickford v. Fabrick, 112 N.W. 74 (N.D. 1907); 1971 N.D. Op. Att'y Gen. 304; 1956 N.D. Op. Att'y Gen. 66; N.D.C.C. ? 40-08-27.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: Leah Ann Schneider
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