

**LETTER OPINION
2002-L-60**

October 21, 2002

Honorable Roger Johnson
Agriculture Commissioner
600 East Boulevard Avenue, Dept. 602
Bismarck, ND 58505-0020

Dear Commissioner Johnson:

Thank you for your letter asking whether the North Dakota Potato Council ("Council") has statutory authority beyond that provided in N.D.C.C. § 4-10.1-04 to appoint one of its members. According to your letter, in May 2002, the Council mailed nominating petitions to eligible potato growers in District 4 seeking candidates. The incumbent District 4 member sent in a petition nominating himself. On conclusion of the nominating process, the incumbent's name was placed on the ballot as the only candidate nominated in that district. In June 2002, the Council mailed ballots to eligible growers in District 4. No ballots were returned, including the incumbent's own ballot, because, you indicated, he did not believe it was appropriate to vote for himself. At its July 10, 2002, meeting, the Council "appointed" the incumbent member from District 4 to a second 3-year term since no votes were cast in the District 4 election.

Section 4-10.1-04, N.D.C.C., discusses under what conditions an elective Potato Council office is "deemed vacant." An office is deemed vacant "[i]f at any time during a member's term he ceases to possess any of the qualifications provided for in this chapter." Id. Then, and only then, does this statute authorize the Council to appoint another qualified participating grower for the remainder of the term of the office vacated. The circumstances here do not constitute a vacancy as N.D.C.C. § 4-10.1-04 defines it, and N.D.C.C. ch. 4-10.1 is silent as to a remedy when no votes are cast in the election and the incumbent's term has expired.

Article V, section 8 of the North Dakota Constitution provides that "the governor may fill a vacancy in any office by appointment if no other method is provided by this constitution or by law." Section 44-02-03, N.D.C.C., further provides that "[a]ny vacancy in a state or district office, except in the office of a member of the legislative assembly, must be filled by appointment by the governor." While the Constitution does provide methods for filling vacancies in certain constitutional or judicial offices, article V, section

8 appears to be the only constitutional direction provided for filling the Potato Council opening. Further, N.D.C.C. § 44-02-03 appears to be the only other method provided by statute to address this issue, although its guidance is limited. Article V, section 8 and N.D.C.C. § 44-02-03 authorize the Governor to appoint officers only in the event of a “vacancy,” which raises the issue of whether the office is “vacant.” As a general rule, the power of the executive branch to make a valid appointment does not arise until there is a vacancy in fact. 63C Am. Jur. 2d Public Officers and Employees § 105 (2002). It is generally held to be the right of the appointing executive to determine whether a vacancy exists in each particular case. Id. at § 109 (2002).

Part of the procedure set up by the Legislature for filling a vacancy in office is a requirement that the appointing authority make a substantive and factual determination concerning the reason a vacancy has occurred. To that end, the Legislature has provided general guidance in N.D.C.C. § 44-02-01 to determine whether a vacancy exists. Under that statute, an office becomes “vacant” if the incumbent shall:

1. Die in office;
2. Be adjudged mentally ill;
3. Resign from office;
4. Be removed from office;
5. Fail to discharge the duties of office . . . ;
6. Fail to qualify as provided by law, which includes taking the designated oath of office prescribed by law;
7. Cease to be a resident of the state, district, county or other political subdivision in which the duties of the office are to be discharged, or for which the person may have been elected;
8. Be convicted of a felony or any offense involving moral turpitude or a violation of the person’s official oath;
9. Cease to possess any of the qualifications of office prescribed by law; or
10. Have the person’s election or appointment declared void by a competent tribunal.

N.D.C.C. § 44-02-01.

Under the circumstances here, it would seem obvious a vacancy has occurred because the eligible electors in District 4 have failed to cast a single ballot for a new elective officer. This position is further supported by the fact that the Legislature, under N.D.C.C. § 4-10.1-04, did not authorize Council incumbents to “hold over” until a successor is elected and qualified. Cf. N.D.C.C. § 4-28-03 (Wheat Commission members hold office for 4-year terms and until the member’s successor has been selected and qualified). But N.D.C.C. § 44-02-01 does not declare an office “vacant” upon the expiration of the term of office and the failure to elect a successor. Moreover, the office is not deemed “vacant” under N.D.C.C. § 4-10.1-04 since the facts do not involve a member who ceased to possess all the qualifications of office. Thus, in my opinion, the office is not “vacant” within the meaning of N.D.C.C. §§ 4-10.1-04 or 44-02-01.

Nonetheless, the law generally abhors a vacancy in an office. State v. Scow, 164 N.W. 939, 943 (N.D. 1917); Standish v. Boucher, 56 N.W. 142, 145 (N.D. 1893). The North Dakota Supreme Court, in Foughty v. Friederich, 108 N.W.2d 681 (N.D. 1961), said:

The word “vacancy” has no technical meaning; an office is vacant whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event.

. . . .

The greater number of cases have held that during the period in which a public officer holds over after the expiration of his term, under constitutional or statutory authority entitling him to do so until the election and qualification of a successor, there is no vacancy in office which may be filled by an interim appointment.

Id. at 685-86 (internal citations omitted).

Under the rationale discussed in Foughty, the Council’s District 4 office would be vacant. The office is unoccupied because no one was elected and the incumbent has no constitutional or statutory authority entitling him to hold over after the expiration of his term. Id. Nor does the fact that N.D.C.C. § 44-02-01 fails to deem the present circumstances as a vacancy bar the Governor from finding a vacancy in fact. In Fausett v. Harris, 45 N.W. 1101 (N.D. 1890), the Supreme Court considered a statute similar to N.D.C.C. § 44-02-01. Section 1385 of the Compiled Laws of Territory of Dakota

enumerated the events that caused vacancies in office. 1877 Compiled Laws of the Territory of Dakota, § 1385. In discussing Section 1385, the Court said, "[i]ts full scope is the statement of causes which will create vacancy. It does not purport to exclude all other causes." Fausett at 1102. Likewise, it is my opinion that N.D.C.C. § 44-02-01 does not exclude the Governor from considering the present circumstances as causing a vacancy in the Council's District 4 office.

In my opinion, the Council does not have the authority to fill a vacancy caused by the failure of voters to elect a candidate. It is my further opinion that N.D.C.C. § 4-10.1-04 does not authorize the incumbent to hold over after the term expires. Article V, section 8 of the North Dakota Constitution authorizes the Governor to "fill a vacancy in any office by appointment if no other method is provided by this constitution or by law." N.D.C.C. § 44-02-03 similarly provides that a vacancy in a state or district office is to be filled by gubernatorial appointment. Notwithstanding the fact that N.D.C.C. § 44-02-01 does not deem an office "vacant" under these circumstances, no method, other than article V, section 8 and N.D.C.C. § 44-02-03, is provided by law to fill the vacancy. Therefore, it is my opinion that the Governor may exercise his power of appointment to fill the vacancy created in the Potato Council's District 4 office. See State ex rel. Gunderson v. Byrne, 231 N.W. 862 (N.D. 1930) (under predecessor provisions to article V, section 8 of the North Dakota Constitution and N.D.C.C. §§ 44-02-03 and 44-02-08, North Dakota Supreme Court determined Governor had power to fill a judicial vacancy).

An additional question may arise as to whether the Governor's appointee may serve the remainder of the statutory term of office, or only until a successor can be duly elected and qualified at the next election. While the issue was not raised in your letter, I would note that N.D.C.C. § 44-02-08 provides that an appointment to fill a vacancy under N.D.C.C. ch. 44-02 "continues in force until the first general election thereafter, when the vacancy will be filled by election, and thereafter until the appointee's successor by election is qualified." The North Dakota Supreme Court in Gunderson, noted above, cited the predecessor to N.D.C.C. § 44-02-08 in determining the length of time an appointee was to serve upon appointment by the Governor to fill a vacancy. 231 N.W. at 864. While the predecessor statute, Section 699, Comp. Laws 1913, permitted vacancy appointments to continue until the expiration of the term of office, the current version of the law, N.D.C.C. § 44-02-08, only extends a vacancy appointment until the next general election and until the successor by election is qualified. It is my opinion that in this instance, N.D.C.C. § 44-02-08 should be followed, and the appointment should extend until the first general election and thereafter until the appointee's successor by election is qualified. See N.D.C.C. § 44-02-08; State ex rel. Gunderson v. Byrne, 231 N.W. at 864.

LETTER OPINION 2002-L-60

October 21, 2002

Page 5

Finally, the Council may wish to consider legislation addressing this issue if it contemplates recurring problems with the election process. Such legislation may grant incumbents the authority to hold over until a successor can be duly elected and qualified, or some other authority to address vacancies in office.

Sincerely,

Wayne Stenehjem
Attorney General

pcg/pg

cc: Governor John Hoeven
Potato Council Members
Diane Peycke, Executive Director, North Dakota Potato Council