

**LETTER OPINION
2009-L-10**

July 1, 2009

The Honorable RaeAnn Kelsch
House of Representatives
611 Craig Dr
Mandan, ND 58554-2353

Dear Representative Kelsch:

Thank you for your letter requesting my opinion regarding several issues in relation to the upcoming Mandan School Board election. The Mandan School Board has postponed its election from June 9, 2009, to September 8, 2009,¹ which places the election after the expiration of the term of office of several board members. For the reasons stated below, it is my opinion that those school board members who are candidates for reelection this year may continue in office until their successors are elected and qualified, that the change in election date does not affect the term or tenure of office for any other board member, that school board members elected on September 8, 2009, should be installed in office at the first board meeting following their election and qualification for office, and that board members elected on September 8, 2009, to three years terms will hold tenure in office until a successor is elected, qualified, and installed at the annual meeting in July 2012.

ANALYSIS

Most of your questions relate to the term of office and tenure in office of school board members, and may be analyzed together. There is a "critical distinction between the term of the office and the term or tenure of the officeholder."² The term of office is the fixed or definite period of time which the law describes that an officer may hold an office, while the tenure of the person holding an office may vary from the term of the office, for example the term of office is not affected by a shortening of an officer's tenure or when an incumbent holds over beyond the expiration of the term.³

¹ Your letter does not ask about, and this opinion does not address, the validity of the Mandan School Board's decision to postpone the election.

² State ex rel. Spaeth v. Olson ex rel. Sinner, 359 N.W.2d 876, 880-81 (N.D. 1985).

³ State ex rel. Spaeth, 359 N.W.2d at 881. See also N.D.A.G. 2004-L-19.

State law provides for the term of office for school board members:

The term of each elected member of a school board is three years, except when the member is completing the unexpired term of another. The term of office for a school board member begins at the annual meeting in July following the member's election and continues until a successor is elected and qualified.⁴

The North Dakota Supreme Court has recognized that where the term of an elective office is stated as being until a successor is elected and qualified, the legal incumbent of the office is authorized to hold over and fulfill the duties of office after the expiration of the term until his or her successor is elected and qualified.⁵ The Court stated that an incumbent who is holding over in office does not create a vacancy in the office subject to being filled by appointment.⁶ Further, the term of office remains the same, regardless of the tenure of an individual holding the office, meaning that an officer holding over until a successor is qualified does not change the time or term of the successor's office, which remains the same, but the tenure of the successor in office is shortened.⁷ Otherwise, each holding over in office would set a new earliest date for later successors in office, gradually pushing back the time when successors in office may enter into the duties of their office, a result that the Court considered absurd.⁸

Therefore, it is my opinion that present Mandan School Board members may hold over in office after their three-year term of office has expired until the time that their successors are elected and qualify for office. Further, it is my opinion that, although their term of office has expired, their tenure in the office by reason of holding over until a successor is elected and qualified continues for them as individuals holding the elected office. It is my further opinion that the change in election date does not affect the term or tenure of office for those board members whose terms of office do not expire in July 2009, whether the board member was elected to a term of three years that had not yet expired or whether the board member was appointed to fill an unexpired term of which additional time remains. It is my further opinion that the term of office for the board members who are elected on September 8, 2009, to three year terms is unchanged, although their tenure may be less

⁴ N.D.C.C. § 15.1-09-02 (emphasis supplied).

⁵ State v. Friederich, 108 N.W.2d 681, 685 (N.D. 1961).

⁶ Friederich, 108 N.W.2d at 685-88 (distinguishing these statutes from N.D.C.C. § 44-01-04, which generally states that if a person elected to office fails to qualify and entered on the duties of the office within the time fixed by law, the office shall be deemed vacant.)

⁷ State ex rel. Spaeth, 359 N.W.2d at 881-82. See also N.D.A.G. 85-13.

⁸ State ex rel. Spaeth, 359 N.W.2d at 882.

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than three full years; specifically, their tenure in office continues until the annual meeting in July 2012.

In addition you ask whether the new board members to be elected on September 8, 2009, are to be installed at the anticipated September 21, 2009, board meeting. Section 15.1-09-02, N.D.C.C., provides that the term of office for a school board member begins at the annual meeting in July following the member's election. The postponement of the election until after July means that the letter of the statute may not be followed. However, the best approximation is that the board members elected on September 8, 2009, should be installed in office as soon as possible after the results of the election have been certified and the individual is qualified for office. If that process is completed by the September 21, 2009, scheduled board meeting, then the new board members should be installed at or before that time.

Sincerely,

Wayne Stenehjem
Attorney General

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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 question presented is decided by the courts.⁹

⁹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).