

LETTER OPINION
96-L-250

December 27, 1996

Duane H. Schurman
Box 678
Walhalla, ND 58282

Dear Mr. Schurman:

Thank you for your letter asking whether a public official may continue to act in the official's capacity after pleading guilty to a felony charge and, if not, whether the city council could appoint this individual to carry out the duties of the office after the individual serves the individual's initial term of incarceration.

The facts that give rise to your questions are relatively straightforward. The official, while a city mayor, pled guilty to six counts of reckless endangerment (Class C felonies) and was sentenced to a period of one year to serve an initial one-hundred and fifteen days in incarceration, with the balance of the one-year period of incarceration suspended for two years. The criminal judgment and commitment order was filed in the district court on September 24, 1996, with the beginning of the initial period of incarceration set for October 18, 1996.

North Dakota Century Code (N.D.C.C.) § 44-02-01(8) provides, in part, that "[a]n office becomes vacant if the incumbent shall . . . [b]e convicted of a felony." Interpreting language identical to that in N.D.C.C. § 44-02-01(8), the North Dakota Supreme Court in State ex rel. Salisbury v. Vogel, 256 N.W. 404, 407 (N.D. 1934), commented:

The crucial question involved is not the removal of the respondent from office. The statute says an office becomes vacant when the incumbent is convicted of a felony. The conviction of a felony ipso facto causes a vacancy. The Governor knows that, if [an] incumbent has been convicted of a felony, automatically a vacancy occurs, and he has the power and authority to fill the vacancy. He need not take steps to remove from office. The conviction did this. The vacancy is an incident to the conviction.

(Citations omitted.) Thus, pursuant to N.D.C.C. § 44-02-01(8), a vacancy exists immediately and automatically when an official is convicted of a felony. However, you ask whether this result is different when the conviction is one which could be commuted to a misdemeanor pursuant to N.D.C.C. § 12.1-32-02. This section provides

that "[a] person who is convicted of a felony and sentenced to imprisonment for not more than one year is deemed to have been convicted of a misdemeanor upon successful completion of the term of imprisonment and any term of probation imposed as part of the sentence." (Emphasis added.)

The primary purpose of statutory construction is to determine the intent of the Legislature, which initially must be sought from the language of the statute. Kim-Go v. J. P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990). Words in a statute are to be given their plain, ordinary, and commonly understood meanings. Id.

The plain language of N.D.C.C. § 12.1-32-02(9) provides that the conversion of a felony conviction to a misdemeanor only happens when the term of imprisonment and all conditions of probation are successfully completed. Therefore, it is my opinion that a vacancy occurs immediately and automatically when the official is convicted of a felony notwithstanding that the conviction may be commuted to a misdemeanor under N.D.C.C. § 12.1-32-02(9) if certain conditions are later met. See generally State v. Patten, 380 N.W.2d 346 (N.D. 1986)(concluding that it is the sentence imposing the term of incarceration that controls, as opposed to the actual time served in prison).

Your second question is whether the city council, after the former mayor serves the initial term of incarceration, could appoint this individual to the vacant office.

N.D.C.C. § 40-08-16 addresses how a vacancy in the office of mayor is to be filled:

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. Upon petition of five percent of the qualified electors, as determined by the total number of votes cast in the city in the last general election, the council shall call a special election to fill a vacancy occurring more than six months prior to the next city election, provided such petition is submitted within fifteen days of the date of such vacancy. During the interim between the date when a vacancy occurs in the office of mayor and election and qualification of a

successor, the president of the city council shall be the acting mayor.

Thus, the office of mayor is not technically filled by appointment; it is filled by election, by either the electors of the city or the city council, in the manner authorized by N.D.C.C. § 40-08-16. If a special election to fill the vacancy is not held, the city council elects one of its members to act as mayor until the next election, and until that is accomplished, the president of the city council acts as mayor. Because the former mayor is no longer a member of the city council as the result of the automatic vacancy, it is my opinion that the city council may not elect the former mayor to act as mayor.

Another issue that may arise is whether the mayor may again become a candidate for the office of mayor. That issue is specifically addressed in N.D.C.C. § 12.1-33-01. That section provides that "[a] person sentenced for a felony to a term of imprisonment, during the term of actual incarceration under such sentence, may not . . . [b]ecome a candidate for or hold public office." (Emphasis added.) N.D.C.C. § 12.1-33-02, meant to be read in conjunction with N.D.C.C. § 12.1-33-01, provides that "[e]xcept as otherwise provided by law, a person convicted of a crime . . . retains all of [the person's] rights, political, personal, civil, and otherwise, including the right to hold public office" (Emphasis added.)

Treating N.D.C.C. § 44-02-01(8) and 12.1-33-01 as addressing distinct issues, one dealing with office vacancies and the other with civil rights of convicted felons, is consistent with the general rule of statutory construction that statutes are read to avoid conflicts. Dundee Mut. Ins. Co. v. Balvitsch, 540 N.W.2d 609, 614 (N.D. 1995)(VandeWalle, C.J., concurring in result with a separate opinion). One would also expect from the phrase "except as provided by law" that the Legislature would by express legislation limit the civil rights of a convicted felon and not do so by implication. After all, "[i]t must be presumed that the Legislature intended all that it said, and that it said all it intended to say." City of Dickinson v. Thress, 290 N.W.2d 653, 657 (N.D. 1940).

The original North Dakota civil disability statute was codified in 1895. It provided: "A sentence of imprisonment in the penitentiary for any term less than life, suspends all civil rights of the person so sentenced, and forfeits all public and private trusts, authority or power, during the term of imprisonment." (Emphasis added.) N.D.C.C. §§ 12.1-33-01 and 12.1-33-02 were enacted in 1973 and reaffirmed the original statutory principle that a felon's civil rights are suspended only "during the term of imprisonment" and made

Duane H. Schurman
December 27, 1996
Page 4

it clear that the prohibitions outlined in those two sections were to be suspended only during actual incarceration. See 1973 N.D. Sess. Laws ch. 116, § 32.

"In interpreting statutory provisions, every effort must be made to give each word, phrase, clause, and sentence meaning and effect." Stewart v. Ryan, 520 N.W.2d 39, 45 (N.D. 1994). Actual has been defined by one source, in part, to mean "[b]eing, existing, or acting at the present moment; current." The American Heritage Dictionary, 77 (2d coll. ed. 1991)

Giving full meaning and effect to the term actual and the long standing tradition in North Dakota of civil rights only being withheld during the term of imprisonment, it is my opinion that N.D.C.C. § 12.1-33-01 and 12.1-33-02 provide that a convicted felon may become a candidate for public office if the felon is not in prison.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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