

**OPINION
78-182**

June 8, 1978 (OPINION)

The Honorable Ben Meier
Secretary of State
State Capitol
Bismarck, ND 58505

Dear Mr. Meier:

This is in reply to your letter of June 2, 1978, in which you set forth the following facts and questions:

"According to a letter received in Governor Arthur A. Link's office, Supreme Court Justice Robert Vogel is resigning his position effective July 31, 1978.

"Section 97 of the Constitution, effective in December, 1976, states in part, that a vacancy can be filled by appointment by the governor. The appointment shall continue until the next general election, when the office shall be filled by election for the remainder of the term.

"We, therefore, ask for your opinion on the following question. Does the person who is appointed have to run in the primary election?

"If your answer is yes to the above question, we have additional questions to ask. According to section 16-04-11, our office must certify a notice to the county auditors specifying the officers to be nominated at the next primary election between June 1 and July 1. Thus our office must certify the vacancy to the county auditors before the vacancy occurs. Should our office certify the supreme court justice six years unexpired term position to the county auditors before the effective date along with the other officers to be elected?

"Lastly, section 16-04-02 states candidates for judges of the supreme court must file nominating petitions with our office not more than sixty-six days or less than forty-six days prior to the primary election for getting their name on the primary election ballot. The deadline for filing would be July 21, which again is before the position would be vacant. Should our office accept nominating petitions for the position before it is vacant?

"We would appreciate your immediate attention and reply to this matter since we have a deadline approaching as mentioned above."

Your first question asks whether the person who is appointed has to run in the primary election. Since no person is obligated to run in the primary, or any other election, we believe your question is whether the vacancy will be filled in the forthcoming general

election in November and, if so, whether it is necessary for candidates to fill that vacancy to run in the primary election. Thus the question becomes whether the person who is appointed must run in the primary in order to have the opportunity to retain the office to which he was appointed.

As you noted, Section 97 of the North Dakota Constitution provides:

"A judicial nominating committee shall be established by law. Any vacancy in the office of supreme court justice of district court judge shall be filled by appointment by the governor from a list of candidates nominated by the committee, unless the governor calls a special election to fill the vacancy for the remainder of the term. An appointment shall continue until the next general election, when the office shall be filled by election for the remainder of the term."

The North Dakota Supreme Court construed this provision in *State ex rel. Vogel v. Garaas*, 261 N.W.2d. 914 (N.D. 1978). In that decision the Court stated, pages 920-921 of the reported decision:

"Pursuant to section 44-02-08, N.D.C.C. (as amended, S.L. 1975, ch. 416, section 1), any appointment to fill a vacancy under section 44-02-03, N.D.C.C., is to continue in force until the first general election thereafter 'except as otherwise expressly provided by law.' Likewise, section 97 of the North Dakota Constitution provides that an appointment to fill a vacancy shall only continue until the next general election. This part of section 97 is self-executing and currently operative. Any other conclusion would thwart the intent of the people to limit the term of appointment. Consequently, any appointment by the Governor to fill a vacancy in the office of district court judge, whether pursuant to his authority under section 97, of the Constitution or under section 44-02-03, shall continue until a successor is elected at the next general election and thereafter qualifies. See section 44-01-03, N.D.C.C."

The footnote at the bottom of page 921 states:

The term 'general election' contemplates following the regular election procedures, including the nominating procedures of the primary election unless time does not permit, in which case nominations would be accomplished in the same manner as in special elections for no-party offices."

While the *Garaas* decision involved a district court judge, we note that for these purposes there is no distinction drawn by the North Dakota Constitution between district and Supreme Court judges. Therefore, the decision is equally applicable to the position of Supreme Court Justice. The footnote in the *Garaas* decision indicates clearly that if time permits the nominating procedures of the primary election are to be followed. In this instance time does permit since the time for certification of offices to be filled has not expired nor, more importantly, has the time in which to file nominating petitions expired. We conclude that the unexpired term for the office of Supreme Court Justice should be certified by your office as

a position for which candidates are to be selected at the primary election and which position is to be filled at the general election in November.

In reaching the above conclusion, we are cognizant of the concerns expressed in your letter, i.e., that the office is not vacant at the time you would certify the position for the primary election ballot or at the time the nominating positions for such position must be filed for the primary election. However, we understand the resignation of Justice Vogel to be unqualified, and that the resignation has been accepted by the Governor and that the Governor has instituted procedures which will lead to an appointment to fill the vacancy until the next general election. In view of such factors we believe the office should properly be certified as one to be nominated at the next primary election. We note that in the ordinary course of events the offices certified by you are not, in fact, vacant at the time of certification or at the time of filing of nominating petitions. While the terms of those offices will expire by operation of law and while the statutes require that those offices be certified by you, we see no reason to draw a technical distinction between an office which will become vacant by operation of law and one which will become vacant by an unqualified resignation.

We believe it is apparent from an examination of section 97 of the North Dakota Constitution and the decision of the Supreme Court in Garaas that while the Governor may make an appointment that appointment is valid only until the next general election and that the general election process includes the primary election if time permits. Since time does permit in this instance, we believe the intent of the constitutional provision is fulfilled if the position is certified as one to be nominated at the primary election and filled at the general election in November.

Sincerely,

ALLEN I. OLSON

Attorney General