

Date Issued: January 2, 1985 (AGO 85-1)

Requested by: Representative Serenus Hoffner

- QUESTION PRESENTED -

Whether a newly elected governor may take office on the first day of January following his election.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a newly elected governor may take office on the first day of January following his election so long as he has taken, subscribed, and filed his oath of office.

- ANALYSIS -

Certain qualifying steps, which are distinct and separate from the election to office, are usually required to be performed by a newly elected public officer before he may assume his office and perform official functions. When the newly elected public officer has performed those required conditions within the statutorily required time period, his right to enter into the office for which he was elected is complete. 63A Am. Jur.2d. Public Officers and Employees section 127, p. 760 (1984).

Article V, Section 1 of the Constitution of North Dakota provides for the office of governor and his term of office. That constitutional section states as follows:

Section 1. The executive power shall be vested in a governor, who shall reside at the seat of government and shall hold his office for the term of four years beginning in the year 1965, and until his successor is elected and duly qualified.

This constitutional section does not state the time at which a newly elected governor assumes office. Indeed, the entire Constitution is silent as to the time at which a newly elected governor may assume the position of governor with all of its rights and responsibilities. Under common law principles, however, the use of the phrase "beginning in the year 1965," in the absence of any other language, presupposes a calendar year beginning the first day of January. 46 Words and Phrases, Year 520-25 (1970).

In addition, the North Dakota Legislature has answered this question and has directed all state and district officers to qualify for their positions and to enter upon the discharge of their duties on or before the first day of January following their election or within ten days thereafter. This legislative command is found at section 44-01-03 of the North Dakota Century Code which states as follows:

44-01-03. WHEN STATE AND DISTRICT OFFICERS SHALL QUALIFY. Except when otherwise specially provided, all state and district officers shall qualify on or before the first day of January next succeeding their election or within ten days thereafter, and on said first day of January or within ten days thereafter, shall enter upon the discharge of the duties of

their respective offices provided that when a person is elected to fill an unexpired term in a district office then vacant or then held by an appointee, such person may qualify and enter upon the discharge of the duties of such office at any time after receiving a certificate of election to that office but not later than the tenth day of January next succeeding the date of his election to the unexpired term of office. (Emphasis supplied).

The North Dakota Legislature has clearly provided for all state officers to qualify for the assumption of their new responsibilities on or before the first day of January following their election nor within ten days thereafter. Furthermore, the Legislature has stated that state officers shall enter upon the discharge of the duties of their offices on the first day of January following their election or within ten days thereafter, depending upon when the officer qualifies for his office. By requiring said officers to "qualify" for their positions, the Legislature has referred to the requirements for the taking and subscribing of of an oath of office, section 44-01-05, N.D.C.C., and the possible requirement to file a bond, section 44-01-06, N.D.C.C. The governor is statutorily exempt from the requirement for filing of a bond.

It is interesting to note that section 44-01-03, N.D.C.C., prior to 1975, stated that state officers shall qualify for their new positions on or before the first Monday of January. However, the 1975 Legislative Assembly of the State of North Dakota removed the phrase "the first Monday of January" and replaced it with "the first day of January." 1975 N.D. S.L. 415. By such substitution, the Legislature clearly provided that state officials may qualify on or before the first day of January regardless of what day of the week the first landed upon.

This change in the law was made at the request of the Department of Accounts and Purchases because of its desire to avoid prorating the January salary of incoming elected officials. The bill, House Bill 1199, was heard in the Senate and House Judiciary Committee where Ralph Dewing, Director of the Department of Accounts and Purchases testified regarding its meaning as follows:

HOUSE BILL 1199: Relates to the term of office of the superintendent of public instruction and to the time when state and district officers shall qualify for office.

Mr. Ralph Dewing, Director, Department of Accounts and Purchases:

This bill deals with changes in the term of office of state officials. It is to make it uniform. State officials now take office on the first Monday in January following their election. In this particular year they took office on the sixth of January and there is a problem with prorating salaries. Stated the ceremony of swearing in is a ceremony only. They actually take office on the first day of January if this bill is passed. The only affected official that this could have any real effect on could be the governor, and that could only happen if the governor might have to call out guard in an emergency on first

day in office.

Rep. Rundle: Stated if this is changed, the date of the meeting of Legislature should be changed.

Mr. Dewing: Stated the new legislators now take office on the first of December.

Rep. Winkjer: Moved Do Pass

Seconded: Rep. Rundle

Motion carried.

Rep. Benedict: Will take floor assignment.

Hearings on House Bill 1199 before the House Judiciary Committee, Forty-fourth Legislative Session, January 21, 1975. (Emphasis supplied).

House Bill No. 1199 relates to the term of office of the superintendent of public instruction and to the time when state and district officers shall qualify for office. Senator Lashkowitz moved to dispense with reading the bill, seconded by Senator Christensen.

Ralph Dewing, Director of Accounts and Purchases said that his department had asked that this bill be introduced. It is a housekeeping bill that would simplify the payment of salaries now that they use the computer system. When the elected officials take office a few days after January first, they often have to prorate salary checks for those few days. The Legislature has provided for unvouchered expense allowances that are for calendar years, but the salary paid is for a different period. The oath of office is the important date and the date of qualification which is the filing of election certificates with the Secretary of State. This date of taking office is no longer necessary.

Hearings on House Bill 1199 before the Senate Judiciary Committee, Forty-fourth Legislative Session, February 18, 1975. (Emphasis supplied).

In summary, the newly elected governor shall qualify and hold the office for which he was elected on or before the first day of January following his election or within ten days thereafter. Where the governor-elect qualifies for his office before the first day of January, he assumes that office as of the first moment of January first. In order to qualify for the assumption of his office, the governor-elect must take, subscribe, and file the oath of office as provided for by statute.

With respect to the general election of 1984, those state officials who, prior to January 1, 1985, have taken, subscribed, and filed with the Secretary of State their oaths of office and who have filed the necessary bonds, if required, shall be deemed to have qualified to enter upon the duties of their offices and, without the necessity of

any further act, shall at the earliest moment of January 1, 1985, become the incumbents of the offices for which they were elected and the possessors of all of the powers, duties, and responsibilities of the said offices.

- EFFECT -

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

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