

OPINION
60-86

December 30, 1960 (OPINION)

DISTRICT JUDGES

RE: Vacancy in Office - Appointment of Successor

This is in response to your letter in which you state that Roland Heringer of Rugby, North Dakota, was elected judge of the Second Judicial District during last November's election, but died before qualifying. Inquiry has been made of you concerning a replacement if the present judge, Asmunder Benson, should decide to retire at this time. You then ask the question, if an appointment is made to fill the vacancy created by the resignation of Judge Benson, how long would such person be entitled to serve as district judge.

In determining the answer to the question, consideration must be given amongst other things to Section 104 of the North Dakota Constitution. The pertinent part thereof provides as follows:

. . . . The term of office of a judge of the district court hereafter elected shall be six years from the first Monday in January succeeding his election and he shall hold his office until his successor is duly qualified. . . ."

Under this constitutional provision Judge Benson could continue to serve the remainder of his term and also continue to serve until his successor is duly elected and qualified.

We arrive at this conclusion on the basis that no vacancy exists.

Section 44-0201 prescribes and sets forth what constitutes a vacancy. The pertinent provision of this section is:

An office shall become vacant if the incumbent shall:

and then enumerates items from one through ten as to what constitutes a vacancy. The items enumerated refer to the incumbent; for instance, if the incumbent shall die in office; resign from office; or fail to qualify as provided by law, etc.

If Judge Benson, the present incumbent, shall resign, the Governor under section 44-0203 may appoint his successor. A successor so appointed would take the place of the incumbent. A vacancy would occur only if some of the items mentioned under 44-0201 occurred to the incumbent.

While not directly in point the North Dakota Supreme Court in state ex rel. Gunderson v. Byrne, 59 N.D. 543 (231 N.W. 862) said:

When the office of judge of the district court becomes vacant, the vacancy must be filled by appointment, by the governor; and the appointment continues in force until the expiration of the term in which the vacancy occurs and until a successor is elected and qualified."

In the case mentioned a judge elect after taking office died. A successor was appointed by the Governor. At the next election an aspirant to the office sought to have his name placed on the ballot and upon refusal to do so brought a mandamus to compel the officials to place his name on the ballot. The contention of the aspirant was that the appointment was only until the next general election. However, the court held to the contrary. The court said the appointment continues until the expiration of the term in which the vacancy occurs and until a successor is elected and qualified.

The North Dakota Court in the case reported in 16 N.D. 95 with reference to county officials being elected for a term of two years and to serve until the successor is elected and qualified said this:

. . . . Under a statute like ours, holding over pending the election and qualification of a successor is as much a part of the term of office to which the superintendent is elected as are the first two years, where he continues in office. . . ."

It then goes on to cite supporting authorities.

The statute relating to the appointment of officers, including district judges, as found in section 44-0208 provides:

Any appointment to fill a vacancy under the provisions of this chapter shall be made in writing, and except as otherwise expressly provided by law shall continue in force until the expiration of the term in which the vacancy occurs, and until the appointee's successor is elected and qualified."

(Underscoring ours).

In 117 PAC. 2nd 567, the Kansas Supreme Court had under consideration the question whether upon the death of a probate judge ELECT, before the beginning of the term for which he had been elected and before he had qualified for the office, the Governor has power to appoint someone to serve during the term for which the deceased was elected. In this instance the Governor appointed the widow of the deceased probate judge ELECT, but the incumbent, the defeated probate judge refused to surrender the office to such appointee. The court in construing the constitutional and statutory provisions, which are similar to the North Dakota provisions, held that the Governor could not appoint a successor on the basis that no vacancy existed and that the incumbent was entitled to hold office during such succeeding term until his successor shall have qualified. The court went on to say that the death of the probate judge elect before the beginning of the term

for which he was elected and without having qualified for office did not create a vacancy for such term which may be filled by appointment by the Governor. See also *State ex rel. Hoyt v. Metcalfe*, 88 N.E. 738.

A similar conclusion was reached in the case reported in 111 PAC. 2nd 1021, (Ore.). However, the case under consideration before the Oregon court reached a somewhat different conclusion to the effect that the incumbent could hold office only until after the next general election, and not for a full new term of six years.

However, the main question before us is whether or not a vacancy will automatically come about at the end of the present term of Judge Benson. In this connection we refer to the majority rule as stated in 74 A.L.R. 486 which is as follows:

In a majority of jurisdictions, the rule obtains that the death or disability of an officer-elect before qualifying does not create a vacancy in the office which may be filled by the appointing power since he never occupied the office, and that under the provision that an incumbent shall hold his office until his successor is elected and qualified the prior incumbent is entitled to continue in the office until the election and qualification of his successor."

A minority view is expressed in 74 A.L.R. 494 in the case referred to. In such report, it is found that some other statute or factor was considered.

On the basis of the weight of authorities referred to above, we could conclude that the present judge or the person appointed, should he retire, would serve not only for the present unexpired term but also until his successor is elected and qualified. However, we must consider whether section 44-0104 has any application on this matter. As is material this section provides:

If any person elected to any state, district, or county office shall fail to qualify and enter upon the duties of such office within the time fixed by law, such office shall be deemed vacant and shall be filled by appointment as provided by law. . . ."

We must also consider the provisions of section 27-0502 which complements the constitutional provisions on district judgeships and provides:

ELECTION AND TERM OF OFFICE OF DISTRICT JUDGES. There shall be elected in each judicial district of this state the number of judges for such district provided for by law. Any judge so elected shall take office on the first Monday in January next succeeding his election and shall hold office for six years or until his successor is elected and has qualified.

Section 27-0502 appears to be a special statute relating to district judges whereas section 44-0104 is a general statute on offices and officers. As between these two sections there appears to be some inconsistency. The general rule of law is that general and special

statutes should be read together and harmonized if possible; but, to the extent of any repugnancy between them, the special statute will prevail over the general statute unless it appears that the Legislature intended to make the general statute controlling. In addition to this it is observed that the language, "until his successor is elected and qualified" appeared in Section 402 of the 1895 Code relating to district judges. In 1919 the laws relating to district judges and judicial districts were amended by Chapter 167 of the 1919 Session Laws. The language adopted by such amendment is substantially as we have it today except for the six-year term instead of four-year term. The title as well as Section 10 thereof provided that "All acts or parts of acts inconsistent herewith are hereby repealed."

In addition to this it is noted that the Supreme Court of Ohio had under consideration the case of *State ex rel. Hoyt v. Metcalfe*, 88 N.E. 738, referred to prior, which had facts very similar to the ones under consideration here. It is significant to note that the State of Ohio has Section 7 under general provisions of 1910 Code which contains in substance the same provisions found in section 44-0104 of North Dakota Code. However, the court in disposing of the case only on the constitutional and statutory provisions relating to judges and held that the appointed judge served not only for the unexpired term but also until his successor was elected and qualified. Apparently the court found no reason to resort to such statute (Section 7 which is similar to 44-0104 of North Dakota). We presume it did not do so on the basis that it had no application. The case is impressive.

In considering all of the provisions involved and referred to herein, we must recognize that the proposition is not free from doubt and that an ultimate final determination would result only from a decision of a court of competent jurisdiction.

However, we are strongly impressed with the majority view cited herein, and section 27-0502 of the Code and Section 104 of the Constitution, and are of the opinion that these prevail over section 44-0104. As such, either Judge Benson or the appointed judge, should Benson retire, will serve not only for the unexpired term but also until his successor is elected and qualified.

LESLIE R. BURGUM
Attorney General