

MEMORANDUM

**RECEIVED**

APR 04 2014

**SEC. OF STATE**

TO: Al Jaeger, Secretary of State

FROM: John J. Fox, Assistant Attorney General JJF

RE: Removal of Judicial Vacancy Position from Primary Election Ballot

DATE: April 4, 2014

I reviewed your email of March 28, 2014, asking whether the Secretary of State may remove the vacant judicial office from the upcoming primary election ballot, in view of the fact that the Governor has indicated in letters and otherwise that he intends to fill the vacancy by appointment. See, e.g., Notice of Judicial Vacancy, attached. You indicate that there is no reason to have that position remain on the primary election ballot during this election cycle because the appointee will have a term of at least two years before having to stand for election to the office. See N.D. Const. art. VI, § 13(2) ("An appointment must continue for at least two years. If the term of the appointed judgeship expires before the judge has served at least two years, the judge shall continue in the position until the next general election immediately following the service of at least two years.")

You indicate to me that as of Monday, March 31st, only one potential candidate had actually submitted the required petition for ballot access for the primary election and that one other individual had made inquiries about the petition process. You also indicate, as provided by law, that any candidate wishing to appear on the June ballot must file appropriate petitions with your office no later than Monday, April 7, and that you are required by law to transmit a certified list of nominees to county auditors at least 55 days before the primary election. See N.D.C.C. § 16.1-11-20.

Your obligation to certify the list of nominees to the county auditors and to place the names on the primary ballot occurs for those individuals who "are entitled to be voted for at the primary election." Id. Prior to the July 3, 2014, vacancy of this judicial position, any putative candidate who would have filed the necessary paperwork with your office, and who would have been otherwise qualified to appear on the primary ballot, would have been "entitled to be voted for at the primary election," and thus such individuals' names would have been placed on the primary election ballot. However, once the Governor determined that he was going to fill the vacancy through appointment, he initiated the machinery of the Judicial Nominating Committee whose purpose is to interview and investigate the qualifications of potential nominees for the vacancy and to supply a list for the Governor to make an appointment. See N.D.C.C. §§ 27-25-02 and 27-25-05. The nominating committee must then "submit to the governor a list of not fewer than two nor more than seven nominees for appointment

within sixty days after receipt of written notice from the governor that a vacancy in the office of judge exists.” N.D.C.C. § 27-25-03.

Thus, the normal nominating procedure of qualifying for the primary election ballot and seeking the nomination for the office has been superseded in this instance by the use of the Judicial Nominating Committee, whose task is to provide qualified nominees to the Governor for ultimate appointment for a term for at least two years as prescribed by the state Constitution. N.D. Const. art. VI, § 13. In other words, the nomination procedures contained in N.D.C.C. ch. 16.1-11 have been superseded by the nomination procedures contained in N.D.C.C. ch. 27-25. Consequently, there will be no need to nominate candidates under N.D.C.C. ch. 16.1-11 since this particular position will not be decided in this election cycle, but rather in the 2016 election cycle.

As you have noted, based on current facts and circumstances, there would be no valid election-related reason to have this particular judicial district judgeship appear on the primary election nominating ballot. See N.D.C.C. § 31-11-05(23) (“The law neither does nor requires idle acts.”). See also 29 C.J.S. Elections § 265 (2004) (“Statutory provisions as to the preparation and distribution of ballots must be strictly followed, as must rules and regulations of the secretary of state. However, election officials do not have the authority to order the preparation and use of a ballot which is not authorized by law . . . .”). If this judicial position remained on the primary election ballot, it would not be the one authorized by law; rather, as indicated above, the nomination process to be used in this case would be that provided by N.D.C.C. ch. 27-25 utilizing the Judicial Nominating Committee. Consequently, any interested persons who submitted timely nominating petitions pursuant to N.D.C.C. ch. 16.1-11, under these circumstances, presumably would not be “entitled to be voted for at the primary election” in this election cycle. See N.D.C.C. § 16.1-11-20. Thus, their names would not be certified to county auditors for placement on the primary election ballot. Id.

We found no North Dakota cases directly on point, although there was one case recognizing the authority of the Secretary of State to disallow a gubernatorial candidate from being placed on a primary election ballot due to failure to comply with certain filing requirements. See Riemers v. Jaeger, 827 N.W.2d 330 (N.D. 2013). However, there is some pertinent case law from Minnesota. See Winters v. Kiffmeyer, 650 N.W.2d 167 (Minn. 2002). That case dealt with a somewhat similar constitutional provision which required that a judicial appointment be effective for at least one year before a successor is elected. In that instance, an attorney filed suit for an alleged wrongful act by the secretary of state for failure to place that attorney’s name on a ballot for the 2002 election as a candidate for a judicial district judge position. The secretary of state countered by stating that because of the constitutional provision, the seat was not up for election until the 2004 general election.

Al Jaeger  
April 4, 2014  
Page 3

The court noted that an appointed judge who claims the office upon the effective date of appointment must serve at least one year before a successor is elected. The court went on to hold that:

... for purposes of [the state constitutional provision requiring appointment for at least one year], an appointment is made on its effective date and a successor must be elected to the position at the next general election occurring more than one year after the effective date of the appointment. As such, there has been no wrongful act, omission, or error on the part of the secretary of state in not designating [the appointed judge's] judicial seat for election in 2002.

Id. at 173-74 (emphasis added). That holding was reiterated in Clark v. Ritchie, 787 N.W.2d 142 (Minn. 2010). The court noted that when there have been successive vacancies and appointments to a judicial office, the relevant state constitutional provision provides that the successor to the person appointed to fill the most recent vacancy is to be elected at the next general election occurring more than one year after the most recent appointment and that when state law does not mandate an election to fill a judicial vacancy, the failure to post the seat for election or to place the seat on the ballot does not violate the rights of an individual to elective office.

Similarly, under North Dakota constitutional and statutory law, an individual appointed to a judicial seat is entitled to be appointed for not less than a two-year period if nominated by the Judicial Nominating Committee and selected for appointment by the Governor. And given that a putative candidate seeking nomination in a primary election would have no right to run for the position until the constitutional two-year appointment has run, the Secretary of State would be acting within his authority to determine that such a candidate in a primary election for a judicial seat would not be "entitled to be voted for" at the primary election within the meaning of N.D.C.C. § 16.1-11-20, and thus would not be certified to be on the primary election ballot.

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Enclosure