



# *South Dakota Legislative Research Council*

## *Issue Memorandum 98-11*

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### VACANCIES, QUALIFICATIONS, AND CONFLICTS OF INTEREST

#### INTRODUCTION

This report supplies background information on three legislative issues--filling vacancies, qualifications of office, and conflicts of interest.

Each issue relates to the office held by a legislator. The first issue concerns how the office is filled if a death, resignation, or other occurrence creates a vacancy. The second issue addresses who is eligible to hold the office. The third issue pertains to the limitations on those who hold the office.

#### FILLING LEGISLATIVE VACANCIES

##### Background

Originally, the South Dakota Constitution directed the Governor to issue writs of election to fill legislative vacancies. The writ was directed to the sheriff of the county in which the vacancy occurred commanding the sheriff to notify the judges of election of the county to hold a special election. The Governor selected the day of the election.

A constitutional amendment passed in 1948 revised the method for filling legislative vacancies. This method has remained unchanged since that time. Article III, ¶ 10 of the South Dakota Constitution gives the Governor the power to make a legislative appointment in case of a vacancy.

¶ 10. The Governor shall make appointments to fill such vacancies as may occur in either house of the Legislature.

The Constitutional Revision Commission in 1974 recommended that this section be replaced with one requiring the Legislature to provide, by law, a method of filling vacancies. The proposal to revise Article III failed in two attempts on the ballot.

##### Constitutional v. Statutory Provisions

Some state constitutions provide the method for filling legislative vacancies while other states are governed by statutory provisions. In ten states, the issue of filling legislative vacancies is left to the legislative body. The constitutions of Alaska, Colorado, Connecticut, Hawaii, Indiana, Kansas, North Carolina, Oregon, Utah, and Wyoming provide that legislative vacancies are to be filled as provided by law. Most of these states' constitutions provide little more. While providing nothing in the way of specifics regarding the filling of the vacancy, the states of Alaska and Hawaii do provide that the Governor shall make the appointment if no law has been enacted.

Two states have no constitutional provision regarding the filling of legislative vacancies. Although the constitutions of Arizona and Idaho are silent on this issue, a procedure for filling vacancies is provided in statutory provisions of those states.

The remaining thirty-eight states have constitutional provisions which provide a method of filling legislative vacancies. Some of these constitutional provisions provide great

detail while others do not, leaving the more detailed provisions to statutes.

### **Methods of Filling Legislative Vacancies**

A majority of the states, twenty-eight in number, fill legislative vacancies with an election, usually a special election. In the remaining twenty-two states, legislative vacancies are filled by appointment. Of these, sixteen states require that the replacement be of the same political party as the former incumbent. Political party committees are directly involved in the appointment process in twelve of these states, and in three states the designated party committee fills the vacancy directly.

#### *Election*

Of the twenty-eight states that fill legislative vacancies by an election, no fewer than half of these states specifically provide that the Governor issue writs of election to fill the vacancies. In other cases, the presiding officer of the body in which the person was a member is required to issue the writ of election.

Tennessee, by a constitutional provision, combines the possibility of election and appointment. An election is required if twelve months or more remain prior to the next general election for legislators. If less than twelve months remain, the successor is filled by appointment.

#### *Appointment*

In addition to the state of Tennessee, twenty-two other states provide for appointment to fill a legislative vacancy. There are various methods by which these states fill those appointments. Six states, including South Dakota, provide for appointment of a person to fill a legislative vacancy without requiring the successor to be of the same political party as the vacating member. In South Dakota, as well as in the states of Alaska, Nebraska, and

Vermont, the appointment is made by the Governor. In New Mexico the appointment is made by the county commissioners in the county in which the vacancy occurred. Similarly, in Tennessee, the appointment is made by the county legislative body of the replaced legislator's county of residence.

Other states require that the vacancy be filled by a person of the same political party as the person who vacated the office. In some cases, political parties are involved. In three states--Colorado, Illinois, and Indiana--political party committees fill the legislative vacancies. The constitutions in each of these states provide that a vacancy is to be filled as provided by law. The constitutions of Colorado and Illinois further provide that the person appointed be of the same political party as the person who vacated the office. A Colorado statute provides that a vacancy committee of the same political party and the same district of the person vacating is to select a replacement by majority vote. Upon failure to agree on a replacement, the Governor fills the vacancy with a person meeting the same qualifications. An Illinois statute provides that a vacancy be filled by the senatorial or representative committee of the party in the legislative district from which the person creating the vacancy was elected. An Indiana statute provides that the precinct committeemen from the same district and the same political party as the person vacating are to meet and, by majority vote, select a replacement.

Nine states provide for legislative vacancies to be filled by appointment by an elected official or officials, from a short list selected by a designated party committee. In six of these states--Idaho, Kansas, Maryland, North Carolina, Utah, and West Virginia--the appointing authority is the Governor. The remaining three states--Montana, Washington, and Wyoming--provide for appointment by county commissioners on recommendation of party officials. In Kansas, Montana, North Carolina, Utah, West Virginia, and Wyoming,

the respective constitutions provide that legislative vacancies are to be filled as provided by law. Idaho's constitution is silent on the filling of legislative vacancies. The remaining two states, Maryland and Washington, provide specificity in their constitutions.

In Ohio, a legislative vacancy is filled by election of those members of the Senate or the House of Representatives, wherever the vacancy occurred, who are affiliated with the same political party as the person last elected to the seat which is vacant.

Arizona, Hawaii, and Nevada require that the person appointed to fill a legislative vacancy be of the same political party as the vacating member. However, in these states there is no direct party involvement. Arizona has no constitutional provision regarding legislative vacancies, but by statute, the board of supervisors of the county in which the legislative district is located are to fill the vacancy by majority vote, and the successor must be of the same political party. The constitution of Hawaii provides that vacancies are to be filled by the Governor as provided by law. As in Arizona, a statute requires that the vacancy be filled with a person of the same political party. The Nevada Constitution provides that county commissioners of the county of the vacating member must appoint a person of the same political party as the person who vacated.

The methods used for filling vacancies can also be demonstrated in a more simplistic manner by dividing the methods into election and appointment and further dividing the category of appointment into those appointed by the Governor and those appointed by an official or entity other than the Governor. This is illustrated in Attachment A.

## **QUALIFICATIONS FOR LEGISLATIVE OFFICE**

### **Constitutional Articles**

The primary provision regarding qualifications for legislative office is Article III, ¶ 3 of the South Dakota Constitution.

¶ 3. No person shall be eligible to the office of senator who is not a qualified elector in the district from which he may be chosen, and a citizen of the United States, and who shall not have attained the age of twenty-five years, and who shall not have been a resident of the state or territory for two years next preceding his election.

No person shall be eligible to the office of representative who is not a qualified elector in the district from which he may be chosen, and a citizen of the United States, and who shall not have been a resident of the state or territory for two years next preceding his election, and who shall not have attained the age of twenty-five years.

No judge or clerk of any court, secretary of state, attorney general, state's attorney, recorder, sheriff or collector of public moneys, member of either house of Congress, or person holding any lucrative office under the United States, or this state, or any foreign government, shall be a member of the Legislature: provided, that appointments in the militia, the offices of notary public and justice of the peace shall not be considered lucrative; nor shall any person holding any office of honor or profit under any foreign government or under the government of the United

States, except postmasters whose annual compensation does not exceed the sum of three hundred dollars, hold any office in either branch of the Legislature or become a member thereof.

Article III, ¶ 4, refers to disqualifications for office, those things that make a person ineligible for legislative office.

¶ 4. No person who has been, or hereafter shall be, convicted of bribery, perjury, or other infamous crime, nor any person who has been, or may be collector or holder of public moneys, who shall not have accounted for and paid over, according to law, all such moneys due from him, shall be eligible to the Legislature or to any office in either branch thereof.

Also related to this discussion is the first sentence of Article III, ¶ 9.

¶ 9. Each house shall be the judge of the election returns and qualifications of its own members.

Finally, Article III, ¶ 12 is also pertinent to this discussion of qualifications for legislative office. This article provides that legislators are ineligible to receive certain offices or appointments or to be interested in certain business dealings with the state.

¶ 12. No member of the Legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have

been increased during the term for which he was elected, nor shall any member receive any civil appointment from the Governor, the Governor and senate, or from the Legislature during the term for which he shall have been elected, and all such appointments and all votes given for any such members for any such office or appointment shall be void; nor shall any member of the Legislature during the term for which he shall have been elected, or within one year thereafter, be interested, directly or indirectly, in any contract with the state or any county thereof, authorized by any law passed during the term for which he shall have been elected.

In contrast to sections 3 and 4 which address a person's fitness to hold legislative office, section 12 assumes the legislator is qualified and has become a member of the Legislature. Section 12 then serves to restrict the legislator's activities. A violation of section 12 would not impair the legislator in holding legislative office. Instead, the legislator who received the appointment or office or engaged in a business contrary to this section would have to relinquish the appointment or office or benefits of the business arrangement.

### **Qualifications**

The first two paragraphs of Article III, ¶ 3, address those minimum positive qualifications which a person must possess to hold legislative office. A legislator must be (1) a qualified elector for the legislative district, (2) a citizen of the United States, (3) at least twenty-five years of age, and (4) a citizen of the state for at least two years preceding election. These requirements in various forms are found in all fifty states. All states require that either the

person be a resident of the district to be represented or that the person be an elector in the district. Twenty-nine states require that a legislator be a qualified voter. Other states require that a legislator both be a qualified voter and a district resident. Some address the requirement only in terms of being a district resident.

Including South Dakota, twenty-one states require that a legislator be a United States citizen. These states with a formal provision for United States citizenship are mainly located in the midwestern and western parts of the country.

All states have a minimum age requirement. The minimum age varies from eighteen to twenty-five for house members and eighteen to thirty for senate members.

About two-thirds of the states have a state residency requirement. The length varies from one year to seven years, with two and three years being most typical. For a summary of these qualifications, see Attachment B.

The last paragraph of section 3 of the South Dakota Constitution (prohibiting any member of the Legislature from holding a lucrative state or federal job) was not an unusual one for its time. It is clear that the authors were addressing a much different economic and political situation than that of today. The provision includes a detailed listing of specific offices and a general prohibition “against holding any lucrative office.” The authors were likely primarily concerned with the possibility of “double-dipping.” At a time when many postmasters made less than three hundred dollars, there is little doubt that the salaries of legislators were viewed as lucrative.

Section 3 is the original language of the South Dakota Constitution from the time of statehood. The Constitutional Revision Commission in their recommendation in 1974 greatly simplified this provision on legislative

qualifications deleting from the first two paragraphs all requirements as to citizenship, age, and duration of residence. The commission’s recommendation was as follows:

The senate shall not have more than thirty-five or fewer than twenty members, and the house of representatives shall not have more than seventy or fewer than forty members. Each must be a qualified voter of the district which he represents.

The only subsequent attempt to revise this section was in 1994 when a constitutional amendment proposing to revise the age qualification of legislators was placed on the ballot. The proposal, overwhelmingly defeated by the electorate, would have deleted the words “and who shall not have attained the age of twenty-five years” for both senators and representatives, resulting in the age being dependent on the phrase “qualified elector.” Qualifications of electors are provided in the South Dakota Constitution in Article VII, ¶ 2, and in the South Dakota Codified Laws (SDCL) in ¶ 12-3-1. The age required by these provisions is eighteen. Therefore, if the constitutional amendment had passed, the minimum age for senators and representatives would be eighteen.

Section 4 of Article III provides for disqualifications for bribery, perjury, or other “infamous crime.” The section is quite straightforward aiming to keep certain criminals out of the legislature. An attorney general’s opinion in 1934 defined an “infamous crime” as “one punishable for a term of years in the Penitentiary” (1933-34 AGR 213). This section was omitted by the Constitutional Revision Commission when it made its recommendation.

## **CONFLICTS OF INTEREST**

Although related to the discussion of legislative qualifications, section 12 more directly addresses the issue of conflicts of interest. Section 12 duplicates section 3 in some respects but also goes beyond it. This section covers civil appointments. The distinction may be that the authors of section 12 were attempting to prohibit legislators from using their political influence to secure offices or appointments that may or may not be lucrative.

While section 3 prohibits a legislator from holding certain offices, section 12 prohibits a legislator from acquiring certain offices since the public might assume, whether justified or not, that the legislator was using undue influence to gain the position.

Section 12 also prohibits a legislator from being interested in a state contract. Like the civil appointments provision, this provision is not directly concerned with legislative qualifications. It, too, is aimed at avoiding any appearance of impropriety. The result of this provision is that a business person who is unwilling or unable to forego doing business with the state is foreclosed from being a legislator.

The South Dakota Supreme Court has found that the last portion of that section clearly prohibits legislators from having any interest in any contract with the state or any county. The court has been consistent in strictly interpreting this section since statehood. In *Palmer v. State*, 11 S.D. 78 (1898), the court stated:

The language of the constitution is plain. Its meaning cannot be mistaken. The purpose of the provision is apparent. It is intended to preclude the possibility of any member deriving, directly or indirectly, any pecuniary benefit from legislation enacted by the legislature of which he is a member. It is one of the most important of the many reforms attempted by the framers of our

organic law. It is intended to remove any suspicion which might otherwise attach to the motives of the members who advocate the creation of new offices or the expenditure of public funds. . . .

This interpretation of the constitution was reconfirmed by the court as recently as 1986 in the case, *Asphalt Surfacing Co. v. South Dakota Department of Transportation*, 385 N.W. 2d 115 (SD 1986). In that case, the court also ruled that this section applied to the general appropriations bill as well as to more specific legislative decisions.

There have been unsuccessful attempts to remove this section or to change it. The Constitutional Revision Commission recommended that the substance of section 12 be omitted from the constitution. More recently, in 1990, there was a proposed amendment that would have allowed a legislator to benefit from a contract with the state or the county if the contract was let as a result of competitive bidding. The voters, by nearly a two-thirds majority, rejected this constitutional amendment that would have exempted contracts let on the basis of competitive bidding.

In addition to the constitutional provision, there are two statutes (SDCL 5-23-14 and 5-23-24) which prohibit the award of state contracts to legislators. These statutes currently read as follows:

5-23-14. No contract may be awarded to any officer or employee of the state, nor shall any part of any contract be awarded to any firm, association, or corporation, in which any state officer or employee is interested, either directly or indirectly, and any contract made in violation of the

provisions of this chapter is void. However, the provisions of this section do not apply to notaries public nor to state officers or employees or persons serving on boards or commissions, who may be paid per diem compensation provided by § 4-7-10.4, but who are not drawing a salary from the state. The provisions of this section do not apply to a member of the state Legislature when such person is the lowest responsible bidder in accordance with the provisions of chapter 5-18 if such contract award is not in violation of the provisions of section 12 of Article III of the state constitution. The provisions of this section do not apply to any officer or employee of the state who is a stockholder of a corporation and does not participate in the management or operation of the corporation or an officer or employee of the state whose interest may be held in trust, the corpus and income of which are unknown to the beneficiary. The provisions of this section do not apply to members of the South Dakota national guard who in their official state capacity, are not directly or indirectly involved in awarding or in preparing, recommending or determining the specifications or requirements of the bid and are not otherwise prohibited from contracting by the provisions of this section. The provisions of this chapter do not apply to members or employees of the South Dakota building authority authorized by chapter 5-12.

This section shall supersede all provisions of state law to the contrary. Any officer or employee of this state who knowingly violates this section is guilty of a Class 2 misdemeanor.

5-23-24. No contract shall be awarded to any officer or employee of the state nor shall all or any part of any contract be performed in any printing plant or publishing house in which any state officer or employee shall be interested, either directly or indirectly, and any contract made in violation of the provisions of this chapter shall be null and void; provided, however, that the provisions of this section shall not apply to such notaries public nor to such other state officers or employees serving on boards or commissions, who are not drawing a salary from the state.

The provisions of this section shall also not apply to a member of the state Legislature if such person is the lowest responsible bidder in accordance with the provisions of chapter 5-18 when such contract award is not in violation of the provisions of section 12 of Article III of the state Constitution. Any officer or employee of this state who knowingly violates this section is guilty of a Class 2 misdemeanor.

The origin of these statutes dates back more than eighty years. They were created when the Bureau of Public Printing was established to handle the state's printing needs and when the superintendent of the Capitol was created to, among other things, purchase the equipment,

furniture, and janitorial supplies needed for the Capitol building and grounds. These laws prohibited a state legislator from having an interest in a printing or publishing house doing business with the state or being under contract to provide supplies to the state. The maximum penalties established at that time were a fine of one thousand dollars or a prison term of one year.

From the time of their adoption until 1977 these statutes remained largely unchanged. In 1977, legislation was passed that added a sentence to SDCL 5-23-14 and 5-23-24 as follows:

The provisions of this section do not apply to a member of the state Legislature when such person is the lowest responsible bidder in accordance with the provisions of chapter 5-18 if such contract award is not in violation of the provisions of section 12 of Article III of the state Constitution.

This added sentence was intended to make it less restrictive for any businessman who did business with the state or counties to serve in the Legislature. The legislation, which had bipartisan sponsorship, easily passed the Legislature. It was vetoed by Governor Kneip. The Governor felt it was a violation of section 12 of Article III of the Constitution. In his veto message the Governor pointed out the difficult position a public administrator would be placed in to enforce the terms of a contract in which a legislator had an interest if the future existence of that administrator depended on the continued goodwill of the legislator. The Governor in his veto message said, "The best way to avoid conflicts of interest is to avoid the occasions for such conflict." Despite the Governor's objections, the Legislature overrode his veto and this language was added to the statutes.

Later in 1977, under the provisions of the new law, Attorney General Janklow issued an opinion which stated if a current legislator is low bidder on a state contract authorized by any law passed during that legislative term, including the General Appropriations Act, and the contract is awarded to the legislator, that would constitute a violation of section 12 of Article III of the Constitution. It was his reasoning that the constitutional prohibition in section 12 against direct and indirect benefits indicated an intended broad scope of prohibition by the framers of the Constitution. Consequently, it was his opinion that this provision applied not only when a contract arose from a whole new act of the current Legislature but also when the contract was a recurring one that was bid and paid for from general appropriated funds (Opinion No. 77-62). This opinion for all practical purposes nullified the purpose of the new legislation.

The most recent and most significant interpretation of SDCL 5-23-14 by the Supreme Court occurred in 1986. In the case of *Asphalt Surfacing Co. v. South Dakota Department of Transportation*, 385 N.W. 2d 115 (SD 1986) the court construed the statute to be constitutional but with limited application. The court in construing section 12 of Article III with the sentence added in 1977 to SDCL 5-23-14 said the following:

Construing these enactments together, a present legislator may benefit from a contract with the state if the contract was not authorized during his term and he is the lowest responsible bidder. A former legislator, less than one year out of office, may benefit from a state contract if it was not authorized during his elected term. If a legislator has been out of office more than one year, neither the constitutional

provision nor statute prohibit his contracting with the state.

Consequently, except for these limited situations, a state legislator is still prohibited under section 12 of Article III from having any interest in a contract with the state or a county.

In 1985, SDCL 5-23-14 was further amended by adding this sentence.

The provisions of this section do not apply to any officer or employee of the state who is a stockholder of a corporation and does not participate in the management or operation of the corporation or an officer or employee of the state whose interest may be held in trust, the corpus and income of which are unknown to the beneficiary.

This sentence was to apply to state employees. Although legislators are officers of the state, a strict interpretation of section 12 of Article III would seem to prohibit this sentence from applying to legislators.

The issue of a legislator's interest in a state contract was addressed in a 1990 attorney general's opinion regarding an insurance policy issued to members of the Legislature by an agency which had as one of its partners a recently elected legislator. The accidental death or dismemberment insurance policy was effective May 1, 1990, and the recently elected legislator was to begin serving in the 1991 legislative session. The opinion concluded that the election of the partner to the legislature did not affect the validity of the current contract. The constitutional prohibition under Article III, § 12, was not applicable in this case since the

legislative enactment that resulted in the contract was the general appropriations bill passed during the 1990 session, and the partner of the insurance agency was not a legislator at that time. In addition, SDCL 5-23-14 was not applicable since the partner was not a member of the Legislature and the policy was competitively bid. Under these circumstances, though, if any new insurance policy was to be paid for by funds appropriated by the Legislature during the 1991 legislative session, the insurance agency could not submit bids as long as the legislator remained a partner in the firm (Opinion No. 90-45).

## CONCLUSION

In South Dakota, the constitution provides that legislative vacancies are filled by appointment of the Governor. Other states' constitutions require simply that the Legislature should enact laws providing for the filling of legislative vacancies. This was the approach recommended by the Constitutional Revision Commission of the 1970s. Similarly, the approach recommended by the commission with regard to qualifications of legislative office was also simplified as compared with the provisions currently found in our constitution. The constitution requires that a legislator be at least twenty-five years old, a qualified elector, a state resident for at least two years, and a United States citizen. The recommendation of the commission would have simplified this to require that a legislator be a qualified voter. In regard to the issue of conflicts of interest, the commission recommended omitting this from the constitution, leaving the issue to be dealt with by legislative enactments. The current language has been strictly interpreted by the Supreme Court to prohibit any legislator from having any interest in any contract with the state or any county.

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**This issue memorandum was written by Jacquelyn Storm, Principal Legislative Attorney, for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.**

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