

2011 HOUSE CONSTITUTIONAL REVISION

HCR 3047

2011 HOUSE STANDING COMMITTEE MINUTES

House Constitutional Revision Committee
Prairie Room, State Capitol

HCR 3047
March 9, 2011
Job #15216

☐ Conference Committee

Committee Clerk Signature

May Main

Explanation or reason for introduction of bill/resolution:

A concurrent resolution to amend and reenact section 6 of article IV of the Constitution of North Dakota, relating to the appointment of a member of the legislative assembly to a full-time appointive state office.

Minutes:

Chairman Koppelman: We'll open the hearing on HCR 3047.

Representative Carlson, District 41, South Fargo: This issue is not new. The voters have voted on this in a different version. We are prohibited from being appointed to any position that the Governor might appoint people to because we have voted on their budget. This clarifies that. The key for the whole part of the bill is the end of it. It says that if we vote on it, 'if the rate of that increase is greater than the general increase provided to full-time state employees', then they would be eligible. The language is very simple. I think that many times there were legislators who would have loved to put their names on positions that have been opened over the years that were cabinet positions or others but, because of this law, have been ineligible. This would make them eligible for those. It doesn't guarantee you'll get them but it just gives you the option because I do think that there are very qualified people that are taken out of the pool because they voted on some body's salary. I hope that you can further expand on that Mr. Chairman. I'd be happy to answer any questions.

Representative Kasper: Looking at the wording of the last sentence of the amendment, we vote for pay increases like 2 to 3 percent across the board. We also have merit pay that the various departments can pay out. Because we did not require that merit pay be paid to a certain individual, would we be OK because of this merit pay situation or does that have to be addressed?

Representative Carlson: I wouldn't call it merit pay. We've called it equity before like the equity pays that we've established. That has never been calculated into their number. That has always been a separate number. I don't think that's the way they calculate it because it's a separate pool of money and the actual salary of the employee is a separate number. I don't believe that they would be able to calculate it because those two together go to different people. Where the problem comes in is about 2 bienniums ago we had a study and we had looked at all of our statewide officials and we adjusted many of their

salaries up and last biennium we even adjusted up the Attorney General's salary. Those were significantly different salaries than what we gave to the public employees. We compared them to South Dakota, Minnesota, and Montana. Some of them got a \$6000, \$8000, \$10,000 raises and that would have prohibited us from by voting on those from even having anything to do with being appointed. This ties it directly to the raise we gave to the public employees. I think its cleaner language. Hopefully we've got those caught up.

Chairman Koppelman, District 13, West Fargo: HCR 3047 was an idea that's been discussed in various forms for awhile. The reason that the sponsorship is such that it is, is because I drafted it. What I would have preferred is that we had both majority and minority leaders from both chambers be the prime sponsors of this but I don't think that sponsorship matters that much. The reason it didn't happen is we simply ran out of time on resolution introduction day and we had to move very quickly. Representative Carlson was aware of it and listed as the prime sponsor and I kept my name on it to help add discussion to the issue. I was able to locate the assistant majority leader and asked him to sign on. That was all we were able to do before the deadline was upon us. It's not intentional that the sponsorship is what it is. I do think what Representative Carlson said is important. As chairman of this committee, although my name has appeared on a couple of non controversial measures before this committee, I'm careful about not sponsoring a lot of things that come here. I feel it's my job to give them a fair hearing and remain as impartial as I can during that process. Our vice chairman, Representative Kretschmar, has great experience in this role so he'll do a good job of doing that on this resolution.

I believe that this resolution would restore in the modern era what the framers of our Constitution intended. In the history of North Dakota, if you look at what happened in 1889 when our first Constitution was enacted and what Dakota Territory was like and some of the revisions that were made in the earlier years to our Constitution, there was great suspicion among the public about graft and corruption. That included the business world and the Legislature and other places. I truly believe that the reason this provision is in the Constitution is for that purpose. They didn't want the Legislature to create a position in State government and fund it at an exorbitant level and have a Legislator have himself or herself appointed to that position. I think this resolution as written preserves that intent. There was an attempt a few years ago to eliminate this piece from the Constitution and that was defeated. I don't think it was a lopsided vote but it was defeated. I think the reason it was defeated is because the public looks at this and says it's not bad to have a protection in the Constitution against graft and corruption. I see that from some research that our intern did for us that in 1983 when some of the updating of modern language occurred, the language was somewhat changed but the intent was left as the framers of the Constitution in 1889 intended. What the resolution would do, if passed by this committee, passed by the Senate, and acted by the people of North Dakota, is allow legislators to be considered for positions for appointment. I can't think of a better pool for some positions than looking at the Legislative Assembly because they have some experience that others might not have and might be a good pool from which a Governor or another appointing authority might want to draw upon. The other thing is it will preserve the constitutional intent to avoid graft and corruption because if the legislature decided to create some position with a big salary and get a legislature appointed to it, this would still prohibit that. What's happened in recent years, and I don't think it was the intent of the framers of the Constitution, is that we raise salaries every time we meet. That was not the case in the early days of our State. Salaries went up on a less frequent basis than they do now. Every time we meet, every two

years, everybody in the state government gets a pay raise. What that effectively does, because of the wording, is eliminates the legislature from appointment. What this would do is if that pay raise that the legislature votes on is higher for a particular position than whatever we give other State employees, then a legislator can't be appointed to that. I think that's an appropriate provision. I'd be happy to answer any questions.

Representative Winrich: Looking at the new language, it talks about the rate of increase greater than the general increase provided for full-time State employees. When you talk about the general increase, that's like 3% or whatever comes out of the budget deliberations whereas the salaries for many of the high level administrative positions are explicitly written into the budget; a certain amount rather than falling into this pool. How do you interpret that restriction? Do you go back to the percentages or what?

Chairman Koppelman: As Legislative Counsel crafted the language and we inquired with the Attorney General's Office to try to get the best wording that we could to make the point. My interpretation was exactly what you described, whatever that general pay raise increase is which is typically 2 to 4 percent or none because of a shortfall, that that would be the standard. You're correct. We do have specific pay increase amounts for some constitutional officers and so on in appropriation bills. If you look at those you'll find that even though it's a dollar amount stated, it does track that same percentage. If we schedule the pay for the Supreme Court Chief Justice or Justices for example, and we've given State employees 3%, if you calculate it, that raise will also be 3%. It is just listed in dollar fashion.

Vice Chairman Kretschmar: We'll adjourn today.

2011 HOUSE STANDING COMMITTEE MINUTES

House Constitutional Revision Committee
Prairie Room, State Capitol

HCR 3047
March 23, 2011
Job #15910

☐ Conference Committee

Committee Clerk Signature

May Main

Minutes:

Chairman Koppelman: This resolution would clarify that legislators are not barred from appointment to office but that the pay increase provision as a bar is limited to an increase that's higher than that for other offices. What are the wishes of the committee?

Representative Owens: I'm going to agree with my counterpart from District 18's comments when he referenced this bill in our discussions and I'm going to move a do pass because I appreciated his point about it appearing to be a correction of an antiquated piece of history.

Vice Chairman Kretschmar: Second

We tried this once before and put the whole amendment as a repealer and that failed and so maybe doing it partially, we'll have better luck.

Representative Owens: I believe it failed that time because people still had a fear that if it came out completely, it's very easy for human beings to revert back to the very thing that caused it to come into existence to begin with. Having this limiter on it means I can support it. Even I couldn't support the one before.

Representative Holman: This brings back memories of my early days in teaching and negotiating with the school board who we watched very carefully. Their process was to suggest someone goes off the board six months early and then appoint a successor who would run as an incumbent. This plays in to that process. It just opens it up a little more but I'll probably support it anyway. It's going to the floor anyway if I support it or not.

Chairman Koppelman: I truly believe that our founders' at that time were concerned about graft and corruption in government. I think the intent was that they didn't want the legislature to create this nice cushy job and give him a fat salary and appoint him to that position as soon as the session's over. That's what they were trying to avoid. In that day and age the way they did it was if the legislature votes to raise the pay, we're not going to allow a legislator to be appointed. That was in a day and age when the pay did not get raised frequently. We raise pay every time we meet and so it has barred legislators from appointment to positions which I don't think was the intent initially. I think it fences off a great pool of potential people for a lot of different positions that they would be very well qualified for. That's really what is behind the thinking. Any further discussion? Call the roll on a do pass motion on HCR 3047.

House Constitutional Revision Committee
HCR 3047
March 23, 2011
Page 2

10 Yes, 0 No, 1 Absent

Do Pass

Carrier: Representative Winrich

Date: March 23, 2011
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HCR 3047

House Constitutional Revision Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Owens Seconded By Rep. Kretschmar

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman			Representative Conklin		
Vice Chairman Kretschmar			Representative Holman		
Representative Kasper			Representative Winrich		
Representative Louser					
Representative Meier					
Representative Owens					
Representative Schatz					
Representative Streyle					

Total (Yes) 10 No 0

Absent 1

Floor Assignment Representative Winrich

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HCR 3047: Constitutional Revision Committee (Rep. Koppelman, Chairman)
recommends **DO PASS** (10 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING).
HCR 3047 was placed on the Eleventh order on the calendar.

2011 SENATE JUDICIARY

HCR 3047

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HCR 3047

4/4/11

Job #16297

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the appointment of a member of the legislative assembly to a full-time appointive office.

Minutes:

There is an attachment

Senator Nething - Chairman

Committee discusses how some have been appointed to office and the difference between a hire and an appointment by the Governor.

John Bjornson – Legislative Council – Assisted in drafting this measure. He explains the purpose was to address to separate issues in the appointment of legislators to a full time state office during the time in which they were elected. Also no member may be elected to a full time office in which the compensation has been increased by the legislative assembly during that term if the rate of increase is greater than the general increase provided to full time state employees. He gives an example as to the intent of this. This addresses those not only elected but also appointed.

Senator Nething – Asks the difference between what is an appointed position.

Senator Olafson – Questions line 20 as being problematic.

Bjornson – He says it may be problematic in that it should be limited to full time office that has been created during that term or similar to the language in the next line.

Tom Trenbeth – Attorney General's Office – Explains that the office he presently holds is not created by the legislature or under the constitution.

Senator Nelson – Asks about another job he was once interested in where this was a stumbling block.

Trenbeth – He replies yes, referred to as the Trenbeth opinion at his office. He had applied for a position as a justice for the Supreme Court which prompted the Governor to ask the question to the Attorney General.

Senator Nething – Asks if he will leave that opinion with them.

Senator Sitte – Asks if he is hired or appointed.

Trenbeth – Replies technically he is appointed.

Close the hearing 3047

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HB 3047
4/5/11
Job # 16357

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the appointment of a member of the legislative assembly to a full-time appointive office.

Minutes:

Senator Nething – Chairman

Committee work

Committee discusses the appointment process while you're a sitting legislator. Senator Lyson said his understanding is that the Attorney General made a ruling that it was unconstitutional to be appointed to another elective office. Senator Nething says that is why this is here for them to decide whether to submit it to the voters. Senator Olafson questions an appointment to an elective office and says he doesn't like the language in the constitution but doesn't like this any better. Committee discusses that it is confusing. Senator Nething asks to have Jay Buringrud from Legislative Council to come in for questions.

Jay Buringrud – Assistant Director of Legislative Council – He explains what his interpretation is of this provision. He goes on to say this provides that for the term for which you're elected you can't be appointed to any full time office for which the compensation has been increased. He explains the way it used to be and a case suing Former Governor Bill Guy. He says you are eligible to be appointed as long as the compensation for the office wasn't increased substantially beyond what the cost of living is for state employees generally. He says then someone asked for the Attorney General's opinion and he said there was no exception at all, if it was increased at all you're not eligible. This provision provides if the compensation is the same rate as the general increase provided for full time state employees then you would be eligible for the office.

Senator Lyson – Asks about the term of office.

Buringrud – Replies it's your entire term of office even if you resign before. If you're elected for four years then you are disqualified for four years.

Senator Nething – Asks if we are talking about elected offices or appointed offices.

Buringrud – Replies this one is for appointed.

Senator Nething – Asks about Tom Trenbeth's opinion and his appointment.

Buringrud – Said that was because that office is not established by state law.

Senator Nelson – Asks if we aren't creating positions by adding fte's.

Buringrud – Said there is two, one is you can't be appointed for which has been created by the legislative assembly, that is statutory and the other is you can't be appointed for which the compensation has been increased. He adds that if you're the head of a department and you're elected to the legislature then you would have to resign your department position.

Senator Olafson – Says he doesn't like it the way it is in code and doesn't like this either. He said he doesn't vote for appropriation bills thinking he may benefit from a salary increase at sometime.

Senator Olafson moves a do not pass

Senator Nelson seconded

Roll call vote – 6 yes, 0 no

Motion passes

Senator Olafson will carry

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HCR 3047
4/5/11
Job # 16372

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the appointment of a member of the legislative assembly to a full-time appointive office.

Minutes:

Senator Nething – Chairman

Committee work

Senator Olafson motions to reconsider the actions of the committee on 3047.
Senator Sitte seconded.

Verbal vote – all yes

Representative Koppelman – Asks for a chance to give his opinion on the bill. He says this basically changes the measure in the constitution that says no legislator can be appointed if the legislative assembly votes for a pay raise for any position during that legislator's term of office. He goes on to say why he thought it was put in the constitution. He said this in effect fences out 141 people out of any appointment to a position. He doesn't think that was ever the intent in the constitution. He thinks the intent was to avoid graft and corruption. He says there was an attempt a few years ago to remove the language from the constitution and the people voted that down. He thinks it was a close vote. He isn't sure that was the best way to deal with it and he thinks this approach is much better. This say that if the legislature votes for a pay raise for any position that is more than the pay raise they give everyone else then no legislator can be appointed to that position.

Senator Olafson - Remarks he is uncertain whether this is a reasonable fix for this and asks if he remembers what the vote was.

Rep. Koppelman – Said he doesn't remember the exact vote. He thinks there is a good chance the public would pass this.

Senator Olafson – Gives the example of the Agriculture Commissioner.

Rep. Koppelman – Says you could vote against every pay raise and you would still be ineligible because you're a member of the legislature.

Senator Sitte – Asks him about line 18.

Rep. Koppelman – Replies that is current language in the constitution. He said his understanding of appointed state offices are is that they are offices that are either appointed on a regular basis or offices that are elected offices that happen to be vacant and open to appointment.

Senator Sitte – Thinks this is very convoluted and hard to figure out wouldn't be an effective ballot measure.

Rep. Koppelman – Said he isn't opposed to any attempt to amend or look at improving the language.

Close committee work on 2047

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HCR 3047

4/6/11

Job #16399

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the appointment of a member of the legislative assembly to a full-time appointive office.

Minutes:

Senator Nething – Chairman

Committee work

Senator Nething says the measure was defeated by voters by almost 13,000 votes. He asks should they be using that position other than that which they do in their own districts at state expense. Senator Olafson thinks this may be an improvement over what there is today but is unsure of its chances at the ballot box. He does think there would be more flexibility than what is there today but probably wouldn't effect very many. The committee discusses what the hang up with this is. Senator Sorvaag thinks this is better and says there a lot of good people in the legislature. The committee talks of amending the bill but then chooses not to.

Senator Nelson moves a do not pass

Senator Lyson seconded

Roll call vote – 5 yes, 1 no

Motion carries

Senator Olafson will carry

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HCR 3047
4/11/11
Job # 16481

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the appointment of a member of the legislative assembly to a full-time appointive office.

Minutes:

Attached amendment

Senator Nething – Chairman

Senator Olafson makes a motion to reconsider
Senator Nelson seconded

Discussion

Senator Olafson said we have voted on this two other times and he doesn't like the language because it was not clear and easy to understand. He passes out an amendment with language that he says is easier to understand. He reads through the amendment. He says with this new language he could support the resolution.

Verbal vote to reconsider – all yes

Senator Olafson moves the amendment
Senator Sorvaag seconded

Discussion

Committee discusses what is meant by term.

Roll call vote on the amendment – 5 yes, 1 no
Motion passes

Senator Olafson moves a do pass as amended
Senator Sorvaag seconded

Roll call vote – 4 yes, 2 no

Senator Olafson will carry

Date: 4/5/11
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 3047

Senate Judiciary Committee

☐ Check here for Conference Committee

*Reconsider
Action*

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Olafson Seconded By Senator

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	1		Carolyn Nelson	1	
Curtis Olafson - V. Chairman					
Stanley Lyson					
Margaret Sitte					
Ronald Sorvaag					

Total (Yes) _____ No _____

Absent _____

Floor Assignment Senator

If the vote is on an amendment, briefly indicate intent:

Verbal - all yes

Date:

Roll Call Vote #

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 3047

Senate Judiciary

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken: ☐ Do Pass ☒ Do Not Pass ☐ Amended / ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Gladson Seconded By Senator Nelson

[illegible]

Total (Yes) 6 No 0

Absent

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date:

BILL/RESOLUTION NO.

Senate

7

Legislative Council Amendment Number

Action Taken:

☐ Do Pass

☒ Do Not Pass

☐ Amended☐ Adopt Ar☐ Rerefer t☐ Reconsider

Motion Made By

[illegible]

Total

(Yes)

No

Absent

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date: 4-11-11
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 3697

Senate Judiciary Committee

☐ Check here for Conference Committee

Reconsider

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Olafson Seconded By Senator Nelson

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman			Carolyn Nelson		
Curtis Olafson - V. Chairman					
Stanley Lyson					
Margaret Sitte					
Ronald Sorvaag					

Total (Yes) _____ No _____

Absent _____

Floor Assignment Senator

If the vote is on an amendment, briefly indicate intent:

yes

Amendment to HCR 3047

Section 6. While serving in the legislative assembly, no member may hold any full-time appointive state office established by this constitution or designated by law. During the term for which elected, no member of the legislative assembly may be appointed to any full-time office that has been created by the legislative assembly, nor to any full-time office for which the legislative assembly has increased the compensation in an amount greater than the general rate of increase provided to full-time state employees.

Date: 4-11-11
Roll Call Vote # 2

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 3047

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Olafson

Motion Made By Senator Olafson Seconded By Senator Sorvaag

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	X		Carolyn Nelson	X	
Curtis Olafson - V. Chairman	X				
Stanley Lyson	X				
Margaret Sitte		X			
Ronald Sorvaag	X				

Total (Yes) 5 No 1

Absent _____

Floor Assignment Senator

If the vote is on an amendment, briefly indicate intent:

Date: 4-11-11
Roll Call Vote # 3

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 3047

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Sen. Olafson Seconded By S. Sorvaag

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	<input checked="" type="checkbox"/>		Carolyn Nelson		<input checked="" type="checkbox"/>
Curtis Olafson - V. Chairman	<input checked="" type="checkbox"/>				
Stanley Lyson	<input checked="" type="checkbox"/>				
Margaret Sitte		<input checked="" type="checkbox"/>			
Ronald Sorvaag	<input checked="" type="checkbox"/>				

Total (Yes) 4 No 2

Absent _____

Floor Assignment S. Olafson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HCR 3047: Judiciary Committee (Sen. Nething, Chairman) recommends **DO NOT PASS**
(5 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). HCR 3047 was placed on the
Fourteenth order on the calendar.

REPORT OF STANDING COMMITTEE

HCR 3047: Judiciary Committee (Sen. Nething, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (4 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HCR 3047 was placed on the Sixth order on the calendar.

Page 1, line 20, remove ". During the term for which elected."

Page 1, line 21, replace "no member of the legislative assembly may be appointed" with ". nor"

Page 1, line 22, overstrike "compensation" and insert immediately thereafter "legislative assembly"

Page 1, line 22, overstrike "been"

Page 1, line 22, overstrike "by the legislative assembly during that term"

Page 1, line 22, remove "if the rate of"

Page 1, line 23, replace "that increase is" with "the compensation in an amount"

Page 1, line 23, after "general" insert "rate of"

Renumber accordingly

2011 HOUSE CONSTITUTIONAL REVISION

CONFERENCE COMMITTEE

HCR 3047

2011 HOUSE STANDING COMMITTEE MINUTES

House Constitutional Revision Committee
Prairie Room, State Capitol

HCR 3047
April 15, 2011
Job #16639

☒ Conference Committee

Committee Clerk Signature

Mary Mann

Minutes:

Chairman Koppelman: We'll call the conference committee on HCR 3047 to order. (See attachment #1, cleaned up language in bill.)

Senator Sitte: I asked legislative counsel to bring up the bill from 2008 and it failed by 58%. (See attachment #2, copy of bill from 2008.)

Chairman Koppelman: That measure was a repeal of that provision completely. I believe that when the framers of the Constitution put this together, their intent was to avoid graft and corruption; to insure that the legislature would not be up to mischief so the legislature would not create a position and give it a big salary and then appoint one of its own to that position. The current wording of the Constitution made sense as a protection against that because it said if you raise the pay, you can't be appointed. That was in a day when that was a rare event whereas today when we meet, pay is raised every time. What the people looked at here, and as you point out, the vote was defeated but it wasn't a blowout. It was relatively close. That was for an outright repeal. I think if the people of North Dakota understood that the language we are meeting to craft would preserve that protection that the Constitution offers against that corruption or mischief, and at the same time brought it into the modern world by saying if you vote for a pay raise that is higher than the one you give everyone else, then you can't be appointed. I think that's a logical solution. My personal opinion is that the reason that we are here is to find the best way to say that. The language as it originally came from the House was bit different. We worked with the Senate on an amendment to that. The Senate passed the amendment but requested the opportunity to visit more on whether we can improve that language.

Senator Olafson: I suggested to Chairman Koppelman that we do have a conference on this resolution to see if we could brain storm and come up with language that would be more easily understood by the voters. I think we are all in agreement that this would be a good provision to change in the Constitution but we have to make it as easily understood as possible so that the voters know exactly what it is before them and they can understand that just reading it right off the ballot without any great amount of study. That was my suggestion to Chairman Koppelman that we meet to see if we can come up with something better.

Chairman Koppelman: We did consult with the attorney general's office on the language that we have that was passed by the Senate. I think it's relatively good language. I'm not married to it. I'm open to suggestions for improvement if we can come up with any in this committee. I agree with Senator Olafson that we should make this as easily understood as possible. I think the key is to make sure that the clarity and the emphasis of the wording is that it is a prohibition. In the current Constitution, it would remain so. If this measure is passed by the voters, it would be changed in its structure. I think it is good to state that no member may hold a full-time appointed state office if I think that's appropriate because this will be read by our children and grandchildren decades from now and we want the language clear.

Senator Olafson: I spoke yesterday with one of the more senior members than I in the Senate and we discussed this first part. What we need to focus in on is the second sentence. I spoke to him about the first part of that sentence "during the term for which elected, no member of the legislative assembly may be appointed to any full-time office that has been created by the legislative assembly." I was trying to grasp exactly what that meant and how that would apply and I asked him for a hypothetical on what might be a full-time office created by the legislative assembly. The best example that he could think of was the Governor had proposed in his budget a department of energy with an energy czar. He couldn't think of too many others. He said he thought that would be pretty rare. If that position had been created by the legislature in the 2011 session and then someone like me would run in 2012 and be elected, I'm into a new term now so then if that position were vacated and there was an appointment available, then you could be appointed to that position. I think that would only apply during the term that it was created. Once all the legislators were into a new term, that prohibition would no longer be in place. I think that's the correct interpretation of that part of the sentence. I'm wondering if it might be helpful, in terms of understandability for the readers, to separate that long sentence into two. I wonder if there's some merit to considering that because those are two different issues.

Chairman Koppelman: I think you're correct in your analysis. The discussion that I had with the attorney general about this was largely the same and his interpretation is exactly that. For example, when the commerce department was created, if the legislature created the commerce department and the head of that is the commerce commissioner, no legislator, during the term for which elected, (that legislators term), could be appointed to that particular office. That's what that piece says. Let's take a look at that language again. There are three issues that this section of the Constitution deals with and that this proposed amendment deals with:

1. No member of the legislature can hold any full-time appointed state office that's either established by the Constitution or designated by law. What that means is you can't be the attorney general and a legislator at the same time or the lieutenant Governor and a legislator at the same time, etc.
2. What we just discussed about.
3. The pay issue, if the legislature (not a legislator) as a body votes to raise the pay of any full-time position that is a greater increase than the pay raise we give other state employees, then that legislator could not be appointed to that position either.

I like that approach because it preserves the protection the Constitution created while at the same time having practical application today.

Senator Sitte: I have a question about the word “general” rate of increase. I think that it would be better to delete the word “general” and say “has increased the compensation in an amount greater than the rate of increase provided to full-time state employees” because we usually use a 3 in 3 or a 2 in 4, and I think that the word “general” might become open to criticism.

Chairman Koppelman: I think the reason “general” is in there is that it was designed to refer to what you’re talking about, the percentage that we give, the general increase that we’re giving as a 3 in 3, or a 2 in 2, or a 2 in 4, or whatever it is in any given legislative session. If you take the word out, my concern would be that it would be interpreted to mean that it would have to be a raise higher than a raise given to any full-time state employee. At times we will give money to an agency or an office in government and say with this money, you can give incentive increases or market increases. If you get rid of “general”, someone could look at that and say you gave a 12% increase to this particular state employee therefore if the increase is under 12%, then any legislator could be appointed. That may be a stretch but that’s why the word “general” is in there so that it’s keyed to that general percentage that we usually work with.

I would suggest separating this into 2 sentences and I believe that’s what the wording was in the original bill. (Read lines 17 through 23 of the original bill .02000).

Senator Olafson: I looked at this yesterday for a long time and I couldn’t come up with anything that I thought would improve it. If you do separate it into 2 sentences, then you have to repeat that “during the term for which elected.” I haven’t been able to find a way to improve it. I thought it would be good to have discussion and maybe somebody else could come up with something.

Chairman Koppelman: I agree. I would be willing to entertain any suggestions that this committee believes might improve the language. The attorney general’s office was involved in the original wording of the bill as well. Maybe we should be looking at whether the question of whether the original writing in the original bill or the amendment better states it. If it is clearer in three sentences, that would involve the Senate receding and going back to the House language. Another option would be that if we agree that the way the Senate adopted it with the amendment is clearer, the House could accede to the Senate amendment, or we could further amend.

Senator Olafson: I think the amended version as it passed in the Senate is more easily understood. I think it was an improvement but I don’t know what we could do to make it more easily understood. I’m having a tough time coming up with that.

Representative Owens: Early on, when you were all talking about understanding and the public understanding, I was thinking if you want it to be more understood, divide that section up into 2 sentences. It depends on what our goal is. If you want to make it simple for the voters to understand the ‘or’, put it in 2 sentences and be explicit. I know we’re

talking about the Constitution but that may not be a bad thing. I believe if we put it in 2 sentences, they're going to understand it more. If they understand it more, this is going to flip.

Senator Olafson: To put it into 2 sentences, we'd have to repeat the "during the term for which elected, no member of the legislative assembly may be appointed to any full time office" and so on. You'd have to repeat the language.

Chairman Koppelman: That would take us back to the original house bill or something similar.

Senator Olafson: It would be just a little bit different than the original house bill.

Senator Sitte: If that's what we've decided to do, should we have the intern print that out and we'll take a look at it. I do agree, as an English teacher one of my big rules was that a sentence shouldn't go on to four lines and this is almost a full four lines.

Chairman Koppelman: We can do that. What is it specifically you're asking for that would be different from the original House bill?

Senator Sitte: In the second sentence, we would say "During the term for which elected, no member of the legislative assembly may be appointed to any full-time office that has been created by the legislative assembly. During the term for which elected, no member of the legislative assembly may be appointed to any full-time office for which the legislative assembly has increased the compensation in an amount greater than the general rate of increase provided to full-time state employees."

Chairman Koppelman: The change from the house bill would be changed from current constitutional language and only in the last sentence, end of line 21 and 22 on the original bill, "for which the legislative assembly has increased" and then delete "by the legislative assembly". Would that fix it? (Read again). "During the term for which elected, no member of the legislative assembly may be appointed to any full-time office for which the legislative assembly has increased the compensation in an amount greater than the general rate of increase provided to full-time state employees." So we'd be lifting that language and it's kind of a hybrid of the two. We'd be using the House version down to line 21 and starting on line 22, we'd be incorporating that end of the Senate amendment.

Senator Olafson: The cleanest way to do that is for the House to accede to the Senate amendments and further amend.

Chairman Koppelman: We could do that.

Senator Olafson: Let's take a look at it.

(Committee took a break while the intern prepared the amendments)

Chairman Koppelman: Jessica has passed out what we've discussed. Let's read it. (Read attachment #3.) What are the wishes of the committee?

Senator Olafson: What I like about this is we are dealing with three different hypotheticals here and this separates the three different hypotheticals into three different thoughts. I move that the House accede to the Senate amendments and further amend.

Senator Lyson: Second.

Senator Sitte: In the current section 6 of article IV of the Constitution, is the phrase "by the legislative assembly during that term", do we need that? Why was that . . . ?

Chairman Koppelman: Where are you looking and talking about?

Senator Sitte: In the middle on the fourth line down, after the second sentence. I'm looking at the one that was on the ballot in 2008 and they had the phrase "during that term". That was always so much discussion in our committee. Do we need that or is that in the law now?

Senator Olafson: Yes it is.

Senator Sitte: So you just wanted to totally get rid of that? OK, that's fine.

Representative Owens: The part "by the legislative assembly" and "during that term" at the end of the original language is redundant to "during the term for which elected" so it's covered in both places.

Chairman Koppelman: The only confusion that I think could occur is, are you saying during the term of the legislature, in other words during that session or that biennium or are you saying during that term of that legislator for which he's elected if it's a four year term for which he's elected. I think this does clarify it. If I understand Senator Sitte's question correctly, I think it's probably good to say created by the legislative assembly because otherwise you could have A good example would be, we have a former colleague who was once considered for an appointment to the Supreme Court. This section of the Constitution was interpreted to prohibit his being appointed. The attorney general later created a deputy position for which that same individual was appointed and so if we don't say created by the legislative assembly, I think it's confusing as to whether a position created anywhere in the State government is a bar to appointment of a legislator. I don't think that's the intent. The intent is to make sure the legislature doesn't do anything unethical and therefore if it creates a position, they shouldn't appoint one of their own to it is the idea. I think that is necessary in my judgment.

Any further discussion? Seeing none, call the roll on the motion for the **House to accede to the Senate amendment and for the conference committee to further amend** as described.

6 Yes, 0 No, 0 Absent

Motion Carries

April 15, 2011

VK
4/15/11

PROPOSED AMENDMENTS TO HOUSE CONCURRENT RESOLUTION NO. 3047

That the Senate recede from its amendments as printed on page 1599 of the House Journal and pages 1379 and 1380 of the Senate Journal and that House Concurrent Resolution No. 3047 be amended as follows:

Page 1, line 22, overstrike "compensation has been increased"

Page 1, line 22, overstrike "by the"

Page 1, line 22, overstrike "during that term"

Page 1, line 22, remove "if the rate of"

Page 1, line 23, replace "that increase is" with "has increased the compensation in an amount"

Page 1, line 23, after "general" insert "rate of"

Renumber accordingly

2011 HOUSE CONFERENCE COMMITTEE ROLL CALL VOTES

Committee: Constitutional Revision

Bill/Resolution No. HCR 3047 as (re) engrossed

Date: 4-15-11

Roll Call Vote #: 1

Action Taken

- ☐ HOUSE accede to Senate amendments
☐ HOUSE accede to Senate amendments and further amend
☐ SENATE recede from Senate amendments
☒ SENATE recede from Senate amendments and amend as follows

House/Senate Amendments on HJ/SJ page(s) 1599

- ☐ Unable to agree, recommends that the committee be discharged and a new committee be appointed

((Re) Engrossed) HCR 3047 was placed on the Seventh order of business on the calendar

Motion Made by: Sen. Olafson Seconded by: Sen. Lyson

Representatives				Yes	No		Senators				Yes	No
Chairman Koppelman							Senator Olafson					
Representative Owens							Senator Lyson					
Representative Conklin							Senator Sitte					

Vote Count Yes: 6 No: 0 Absent: 0

House Carrier Rep. Owens Senate Carrier Sen. Olafson

LC Number 11.3062 . 02003 of amendment

LC Number _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

REPORT OF CONFERENCE COMMITTEE

HCR 3047: Your conference committee (Sens. Olafson, Lyson, Sitte and Reps. Koppelman, Owens, Conklin) recommends that the **SENATE RECEDE** from the Senate amendments as printed on HJ page 1599, adopt amendments as follows, and place HCR 3047 on the Seventh order:

That the Senate recede from its amendments as printed on page 1599 of the House Journal and pages 1379 and 1380 of the Senate Journal and that House Concurrent Resolution No. 3047 be amended as follows:

Page 1, line 22, overstrike "compensation has been increased"

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Page 1, line 23, after "general" insert "rate of"

Renumber accordingly

HCR 3047 was placed on the Seventh order of business on the calendar.

2011 TESTIMONY

HCR 3047

LETTER OPINION
2005-L-15

May 12, 2005

The Honorable John Hoeven
Governor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Governor Hoeven:

Thank you for your letter requesting my opinion on whether N.D. Const. art. IV, § 6 would preclude your appointing current members of the Legislative Assembly to the Supreme Court Justice vacancy and the pending vacancy in the office of State Tax Commissioner since the salary for those offices has been increased by the 59th Legislative Assembly. As is more fully explained below, it is my opinion that N.D. Const. art. IV, § 6 would preclude your appointing current members of the Legislative Assembly to the vacancy in the office of Supreme Court justice and the pending vacancy in the office of State Tax Commissioner because the salary for those offices has been increased by the 59th Legislative Assembly.

ANALYSIS

As you note in your letter, a vacancy was created on the Supreme Court with the resignation of Justice William Neumann. A number of attorneys have applied for the appointment to the vacant Supreme Court Justice position, including a current state legislator. The vacancy in the office of State Tax Commissioner will occur on the effective date of the resignation of current Tax Commissioner Rick Clayburgh. You indicated there may be some interest from current state legislators in filling the State Tax Commissioner vacancy.

The 59th Legislative Assembly approved salary increases for these two offices, among others. Annual increases of 3% and 4% during the 2005-2007 biennium were approved for both offices. See Senate Bill 2002, § 6 and House Bill 1006, § 5, amending N.D.C.C. §§ 27-02-02 and 57-01-04, respectively. Those statutes were further amended in the latter part of the session by House Bill 1015, §§ 14 and 24 to provide for July salary increases of 4% and 4% during the upcoming biennium. See also House Bill 1050. The increases in House Bill 1015 for the positions of Supreme Court Justice and State Tax Commissioner made those salaries consistent with the percentage increases granted generally to state employees and all elected officeholders, other than for the offices of Governor and Lieutenant Governor. See House Bill 1001, §§ 5 and 6.

North Dakota Constitution art. IV, § 6, provides:

While serving in the legislative assembly, no member may hold any full-time appointive state office established by this constitution or designated by law. During the term for which elected, no member of the legislative assembly may be appointed to any full-time office which has been created, or to any office for which the compensation has been increased, by the legislative assembly during that term.¹

(Emphasis added.)

I found no North Dakota case law or opinion from this office addressing the precise issue you raise in your letter;² however, constitutional provisions similar to N.D. Const. art. IV, § 6 are somewhat common among the states.

Members of state legislatures are sometimes expressly prohibited by constitutional provisions from accepting or holding any office the emoluments³ of which have been increased by the legislature during their terms of office. The purpose sought to be accomplished by such provisions is not merely to prevent an individual legislator from profiting by an action taken by him with bad motives, but to prevent all legislators from being influenced by either conscious or unconscious selfish motives.

63C Am. Jur. 2d Public Officers and Employees § 67 (2d ed. 1997). In construing a predecessor provision to N.D. Const. art. IV, § 6, which was worded somewhat differently,⁴ the North Dakota Supreme Court likewise quoted with approval the following passage concerning the purpose of such provisions:

"The reasons for excluding persons from offices who have been concerned in creating them, or increasing their emoluments, are to take away, as far as

¹ The limitation on members of the Legislature is restricted to being appointed to an office, not to being elected.

² Similarly, the legislative history for N.D. Const. art. IV, § 6 is somewhat sparse and sheds no light on the issue you raise.

³ "The term 'emoluments' covers profits from an office. It does not refer to the fixed salary alone that is attached to the office, but includes such fees and compensation as the incumbent of the office is by law entitled to receive. In determining whether there has been an increase in the emoluments of a particular office, the various items of salary and other compensation which the incumbent was entitled to receive under the statute previously in effect must be taken together." 63C Am. Jur. 2d Public Officers and Employees § 67 (2d ed. 1997).

⁴ One of the main differences between the predecessor provision (former N.D. Const. § 39) and the current provision was the use of the term "emoluments."

possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness."

State ex rel. H. W. Lyons v. Guy, 107 N.W.2d 211, 218 (N.D. 1961) (quoting *Story on the Constitution of the United States*, 5th ed., vol. I, § 867).

A literal reading of N.D. Const. art. IV, § 6 would preclude appointing any current member of the Legislative Assembly to either vacancy since both are an "office for which the compensation has been increased, by the legislative assembly⁵ during that term."⁶ Id. However, case law from other jurisdictions interpreting somewhat similar constitutional provisions is mixed on this precise issue. See, e.g., Warwick v. Chance, 548 P.2d 384 (Alaska 1976), and the cases cited therein.

Some courts have ruled that small or across-the-board adjustments to salary for a biennium do not violate such constitutional provisions and do not render legislators ineligible to be candidates for state offices. See, e.g., Shields v. Toronto, 395 P.2d 829 (Utah 1964) (general, comparatively small salary increases of 5% given across the board do not violate constitutional prohibition against appointment or election of legislator to civil office if the emoluments of an office increase during the term which the legislator was elected; the court explained its rationale in part by stating that this is not a situation which would lend itself to any ulterior scheme by a legislator to set up a high paying sinecure to take advantage of what the constitution was designed to prevent). See also Brown v. Strake, 706 S.W.2d 148 (Tex. App. 1986) (3% across-the-board adjustment in salary for a biennium does not constitute a pecuniary benefit, gain, or advantage as to be an emolument of office in the meaning of constitutional provision).

While there is a certain amount of intuitive appeal to the argument that small across-the-board raises should not be the type of increased compensation which would prevent a legislator from being appointed to another office, I believe such arguments are less availing here.⁷

⁵ Arguably, the prohibition would not be applied if the compensation for the office is increased by an entity other than the Legislative Assembly. See Letter from Chief Deputy Attorney General Gerald W. VandeWalle to Kenneth Raschke (May 9, 1977).

⁶ The prohibition is against appointment to an office. The North Dakota Supreme Court held that a prior version of N.D. Const. art. IV, § 6 did not apply to the appointment of a legislator as a receiver by a court because that position is not a public office. Baird v. Lefor, 201 N.W. 997 (N.D. 1924). See also Gottschalck v. Shepperd, 260 N.W. 573, 575 (N.D. 1935) ("A professor or teacher is not a public officer."). In the present two instances, it cannot be reasonably questioned that the positions are public offices within the scope of N.D. Const. art. IV, § 6.

⁷ While not having ruled on the precise issue, the North Dakota Supreme Court may have had an opportunity to address whether to adopt a *de minimis* or across-the-board

Most courts have read the terms of such constitutional provisions as being clear and unambiguous and not subject to exceptions for *de minimis* or across-the-board compensation increases. See, e.g., Warwick v. Chance, 548 P.2d at 391-92 ("The terms of art. II, sec. 5 of the Alaska Constitution are clear and unambiguous. . . . As applied to this case, the intent and purpose of the provision involved is as cogent today as it was in 1955, and we hold that the clear language of art. II, sec. 5 proscribes Mr. Warwick's appointment during the period of the term for which he was elected and one year thereafter to an office, the salary of which was increased by the legislature of which he was a member."); Opinion of the Justices, 202 N.E.2d 234 (Mass. 1964) (appointment of state legislator as motor vehicle registrar violated constitutional provision against appointment of legislator during term elected to an office for which the emoluments are increased where salary of registrar and 35 other positions administratively increased to upper ranges legislatively authorized; fact that raise later reduced back to original amount not deemed significant); State ex rel. Hawthorne v. Wiseheart, 28 So.2d 589 (Fla. 1946) (legislator ineligible for appointment as circuit judge or any other civil office created or the emoluments thereof increased during legislative term, and statute raising compensation of circuit judge with provision withholding increase from legislators during their term does not make them eligible for appointment); Miller v. Holm, 14 N.W.2d 99 (Minn. 1944) (state senator ineligible to file as candidate for lieutenant governor under constitutional provision prohibiting senators from holding state office, the emoluments of which are increased during session where senator was a member, and where bill was enacted raising legislative pay which triggered an automatic constitutional pay raise for lieutenant governor).

In N.D.A.G. 2003-L-50, in discussing the interpretation of constitutional provisions, I noted the following:

"When interpreting constitutional sections, we apply general principles of statutory construction. Our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement." North Dakota Comm'n on Medical Competency v. Racek, 527 N.W.2d 262, 266 (N.D. 1995) (citations omitted). In State of North Dakota ex rel. Link v. Olson, 286 N.W.2d 262 (N.D. 1979), the North Dakota Supreme Court

exception, but issued its ruling based on other arguments. Under a prior version of N.D. Const. art. IV, § 6, which concerned an increase in emoluments of office, the Supreme Court held that increases in the travel allowance for official business, furnishing a car for official functions, and payment of a federally mandated increase in Social Security taxes were not disqualifying because they did not benefit the officeholder as contemplated by the constitution or were mandated by federal, not state, law. State ex rel. Lyons v. Guy, 107 N.W.2d at 216-219.

quoted with approval the following language about construing constitutional provisions from Newman v. Hjelle, 133 N.W.2d 549, 556 (N.D. 1965):

The questions must be answered, if possible, from the language of the constitutional provision itself but, if the language is ambiguous or the answer doubtful, then the field of inquiry is widened and rules applicable to construction of statutes are to be resorted to. In fact, a wider field of inquiry for information is proper where needed in construing constitutional provisions than legislative enactments.

(Emphasis added.)

Consistent with these principles, I do not believe a current legislator could be appointed even if small across-the-board raises were given. While there are precedents from courts in other jurisdictions supporting the view that similar constitutional provisions do not prohibit such appointments, and there may be sound public policy reasons to circumvent the prohibition, I do not believe the pertinent provisions in N.D. Const. art. IV, § 6 are unclear or ambiguous or leave room for interpretation. There is no language in the constitutional provision which makes an exception for small⁸ or across-the-board increases. Also, current N.D. Const. art. IV, § 6 uses the more clear and precise term "compensation," rather than the more expansive and imprecise term "emoluments" used in other states and in prior versions of North Dakota's constitutional provision. The use of the word "emolument" may interject some uncertainty and room for interpretation that is not present in North Dakota's current constitutional provision.

In a strongly worded dissent in Shields v. Toronto, Chief Justice Henriod noted the lack of any explicit language in the Utah constitution providing for any exceptions and the difficulty with ascertaining how any exceptions would be determined, stating:

After this case, a little increase in the emoluments of office will not affect one's eligibility, but a big increase apparently would. The Constitution does not say this, but says just the opposite. Nowhere in that erstwhile divinely inspired document can one find any language that deifies a 5% increase but damns a 50% raise. To reason that just a little "across-the-board" raise is not actually a raise at all not only strains one's credulity, but suggests that a little pregnancy conveniently but temporarily may be acceptable.

⁸ The annual salary increases for the office of Supreme Court justice work out to \$3,965 beginning July 1, 2005, and \$4,123 beginning July 1, 2006; the increases for the State Tax Commissioner work out to \$2,953 and \$3,071. See House Bill 1015, §§ 14 and 24.

There is nothing in the Constitutional language that suggests any such arithmetic formula

. . . .

The Constitution does not exempt one where a 1% increase in emolument is involved, nor one with a 10% increase, [nor] a 100% increase, nor "an across-the-board" increase. It does not say it favors the "little" increase but not the "big" one. Yet this court says it does without resort to any [lexicographical] sense or meaning.

395 P.2d at 836. Likewise, the Brown v. Strake decision involves a Texas statute which took away any increase in compensation for a member of the Legislature elected to another office, obviating the constitutional issue in the view of the court, and in any event, the case was overruled *sub nom.*, Strake v. First Court of Appeals, 704 S.W.2d 746 (Tex. 1986). See Meyer v. Brown, 782 S.W.2d 315 (Tex. App. 1989). While some case law supports the view that small or across-the-board increases in compensation do not disqualify a legislator from appointment under N.D. Const. art. IV, § 6, the majority of state supreme courts that have ruled on this precise issue have not read such an exception into their states' constitutions, and the argument against creating an exception in the absence of constitutional language supporting an exception is stronger and more compelling.

Consequently, based on the foregoing and on a plain reading of N.D. Const. art. IV, § 6, it is my opinion that provision precludes appointing any current members of the Legislative Assembly to the Supreme Court Justice vacancy or the pending State Tax Commissioner vacancy since the 59th Legislative Assembly provided for statutory salary increases for those positions and the constitutional provision provides no exceptions.⁹

You may be asked whether current members of the Legislative Assembly could be appointed to the vacancies if they refused to accept the statutory salary increases provided for by the 59th Legislative Assembly for the vacant offices. A related issue was addressed in a previous opinion issued by this office. See N.D.A.G. 82-54 (as a matter of public policy, a public official who is a state or judicial officer and not currently a candidate for public office may not return or offer to return all or any part of the salary for that office). That portion of N.D.A.G. 82-54 has not been superseded or overruled and continues to be the opinion of this office. Thus, absent a statute permitting it, incumbent legislators may not lawfully refuse a salary increase provided for by law for another state office in order to make them eligible for appointment to that office.

⁹ Any question of a legislator's ineligibility to hold office because of the constitutional provision must be raised during the time the constitution prohibits the legislator's appointment or election. 67 C.J.S. Officers § 33 (2002).

LETTER OPINION 2005-L-15
May 12, 2005
Page 7

Sincerely,

Wayne Stenehjem
Attorney General

pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

SECTION 1. AMENDMENT. Section 6 of article IV of the Constitution of North Dakota is amended and reenacted as follows:

Section 6. While serving in the legislative assembly, no member may hold any full-time appointive state office established by this constitution or designated by law. During the term for which elected, no member of the legislative assembly may be appointed to any full-time office that has been created by the legislative assembly, nor to any full-time office for which the legislative assembly has increased the compensation in an amount greater than the general rate of increase provided to full-time state employees .

73057.0200

FIRST ENGROSSMENT

Sixtieth
Legislative Assembly
of North Dakota

ENGROSSED HOUSE CONCURRENT
RESOLUTION NO. 3016

Introduced by

Representatives DeKrey, Berg, Boucher

Senators Nething, O'Connell, Stenehjem

- 1 A concurrent resolution for the amendment of section 6 of article IV of the Constitution of North
2 Dakota, relating to the appointment of a member of the legislative assembly to a full-time
3 appointive state office.

4 **STATEMENT OF INTENT**

- 5 This measure removes the prohibition on appointing a member of the legislative assembly to an
6 office for which the compensation has been increased by the legislative assembly during that
7 member's term of office.

- 8 **BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF NORTH DAKOTA, THE**
9 **SENATE CONCURRING THEREIN:**

- 10 That the following proposed amendment to section 6 of article IV of the Constitution of
11 North Dakota is agreed to and must be submitted to the qualified electors of North Dakota at
12 the primary election to be held in 2008, in accordance with section 16 of article IV of the
13 Constitution of North Dakota.

- 14 **SECTION 1. AMENDMENT.** Section 6 of article IV of the Constitution of North Dakota
15 is amended and reenacted as follows:

- 16 **Section 6.** While serving in the legislative assembly, no member may hold any full-time
17 appointive state office established by this constitution or designated by law. During the term for
18 which elected, no member of the legislative assembly may be appointed to any full-time office
19 ~~which that has been created, or to any office for which the compensation has been increased,~~
20 by the legislative assembly during that term.

failed June 2008

35,888 yos 42%
48,644 no 58%

84,532

SECTION 1. AMENDMENT. Section 6 of article IV of the Constitution of North Dakota is amended and reenacted as follows:

Section 6. While serving in the legislative assembly, no member may hold any full-time appointive state office established by this constitution or designated by law. During the term for which elected, no member of the legislative assembly may be appointed to any full-time office that has been created by the legislative assembly. During the term for which elected, no member of the legislative assembly may be appointed to any full-time office for which the legislative assembly has increased the compensation in an amount greater than the general rate of increase provided to full-time state employees .