

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

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January 6, 2022

The Honorable William M. Gardner
Secretary of State
107 North Main Street
Concord, NH 03301

Re: Deputy Secretary of State Assuming the Office of Secretary of State

Dear Secretary Gardner:

You have inquired as to the legal status of a deputy secretary of state who assumes the office of secretary of state pursuant to the constitutionally defined process. In short, the deputy becomes acting secretary, assumes all powers and duties of the office of secretary of state, and as such operates in a manner indistinguishable from a secretary appointed/elected by the legislature. The acting secretary holds all powers and duties of the office until his or her election by the legislature or the election of a new secretary.

Part II, Articles 67 through 69 of the New Hampshire State Constitution describe the election of the secretary of state and the constitutional establishment of the office of deputy secretary of state. Article 67 states that the secretary of state "shall be chosen by joint ballot of the Senators and Representatives assembled in one room." Article 68, which concerns state records, provides that the secretary, or deputy secretary, shall keep state records as well as attend, in person as required, meetings of the Governor and Council, Senate, and Representatives. Article 69 mandates that the secretary of state shall at all times have an appointed deputy secretary of state, whom the secretary of state appoints, and that, in the case of death, removal, or inability of the secretary of state, the deputy "shall exercise all the duties of the office of Secretary of this State, until another shall be appointed."

RSA 5:1, which was amended in 1950, 1976, 1989, and 1994, statutorily defines the selection of the secretary of state and an orderly transition upon the election of a new secretary of state. "The secretary of state shall be chosen biennially in the manner directed in the constitution and in accordance with RSA 14:2-b and shall hold office until a successor is elected and assumes the duties of the office."

RSA 5:1. RSA 5:17 requires that the deputy secretary “shall exercise the duties of the office of secretary of state while the latter is absent, or unable from any cause to act.” RSA 5:17

Through opinions, the Attorney General has long held that the combined operation of these constitutional provisions results in the deputy secretary of state becoming the acting secretary of state with all powers and obligations attendant to the office whenever the legislature-appointed/elected secretary of state is deceased, removed, absent, or unable to act. *See* February 8, 1960, opinion of Attorney General Louis C. Wyman to Robert L. Stark, Deputy Secretary of State, and August 17, 1976, opinion of Deputy Attorney General Thomas D. Rath (writing on behalf of Attorney General David Souter) to Frank E. Adams, Deputy Secretary of State.

Importantly, the deputy, in becoming acting secretary, assumes *all powers and duties* of the office of secretary of state, and, as such, operates in a manner indistinguishable from a secretary appointed/elected by the legislature consistent with Article 67 and RSA 14:2-b. The acting secretary holds all powers and duties of the office, including the obligation to appoint a new deputy secretary, until his or her election by the legislature or the election of a new secretary. As described by Attorney General Wyman, “Since by constitutional provision [the acting secretary is] required to exercise all of the duties of the office of Secretary of State, one of these duties is to appoint a Deputy.” The assumption of all duties and powers by the deputy secretary as he or she ascends to be acting secretary is confirmed in the 1976 Rath/Souter opinion—the acting secretary possesses all constitutional powers under Part II as well as statutory authority.

From the operational perspective and exercise of constitutional and statutory duties and powers, there is no legal difference between an *acting* secretary of state and an *appointed/elected* secretary of state. However, there is no *acting* deputy secretary of state, as the holder of the secretary of state’s office—whether appointed or acting—holds the full power of the office and, therefore, is obligated to appoint a deputy. A deputy appointed by an acting secretary of state would himself or herself become an acting secretary of state were the acting secretary absent, removed, or deceased.

Having the deputy secretary of state take the oath of office, in accordance with Part II, Article 84, as the “acting secretary of state,” swearing and affirming to impartially discharge and perform all of the duties incumbent on him or her as acting secretary of state, would clearly show that the deputy secretary of state is accepting the new office and is prepared to perform all of the duties of that office.

Sincerely,



John M. Formella
Attorney General