

**LETTER OPINION
2001-L-33**

August 30, 2001

Mr. Ronald Weikum
Grant County State's Attorney
PO Box 196
Carson, ND 58529-0196

RE: Appointment of State's Attorney

Dear Mr. Weikum:

Thank you for your letter inquiring whether the Grant County Commissioners may appoint, as state's attorney, an attorney licensed in the state of North Dakota, but who is not a resident of Grant County.

You state that you intend to resign as state's attorney but that you are the only licensed attorney residing in Grant County. You also state that Grant County does not have a home-rule charter nor has it combined with another county for elective offices under N.D.C.C. ch. 11-10.3.

You make reference to 1998 N.D. Op. Att'y Gen. F-31 concerning the appointment of a state's attorney and N.D.C.C. § 11-10-04, referred to in that opinion. N.D.C.C. § 11-10-04 was amended during the 2001 legislative session, and provides:

Officer must be qualified elector - Exceptions.

1. Except as otherwise specifically provided by the laws of this state, a county officer must be a qualified elector in the county in which the person is appointed, and a county commissioner must be a qualified elector in the district from which the commissioner is chosen.
2. Notwithstanding subsection 3, upon approval of the board of county commissioners of each affected county, a person may serve as an elected officer of more than one county and must be a qualified elector of one of the counties in which the person is elected.

3. A candidate for election to a county office must be, at the time of election, a qualified elector in the jurisdiction in which the candidate is to serve.
4. Two or more counties may appoint one person to fill the same office in each county and the person filling the office must be a qualified elector of one of the counties.
5.
 - a. The boards of county commissioners of two or more counties may agree by resolution to elect a multicounty jurisdiction state's attorney pursuant to chapter 11-10.3. An agreement made between two or more counties according to this subsection must specify procedures for filing for office, the use of a single canvassing board, the sharing of election personnel, the printing of election materials, the publishing of legal notices, and the apportioning of election expenses. A candidate for election to the office of multicounty jurisdiction state's attorney must be qualified elector of the multicounty jurisdiction at the time of the election; or
 - b. The boards of county commissioners of two or more counties may agree by resolution to allow any candidate for the office of state's attorney to petition for office in each county, and to serve if elected, if the candidate is a qualified elector of one of the counties at the time of the election. To be elected to serve a county in which the candidate is not a resident, the candidate must receive the highest number of votes for the office in that county. Each county shall certify the results and issue certificates of election pursuant to chapter 16.1-15.

Although, on its face, this section appears to provide county commissioners with more options regarding the appointment of a state's attorney, an amendment to Article VII, § 8 of the North Dakota Constitution in 1998 has a significant impact upon this and other sections of law relating to elected county officials. This section in the North Dakota Constitution reads as follows:

Each county shall provide for law enforcement, administrative and fiscal services, recording and registration services, educational services, and any other governmental services or functions as may be provided by law. Any elective office provided for by the counties shall be for a term of four years. Elective officers shall be elected by the electors in the jurisdiction in which

the elected officer is to serve. A candidate for election must be a resident in the jurisdiction in which they are to serve at the time of the election. The office of sheriff shall be elected.

Article VII, § 8, N.D. Constitution.

As a result of the approval of this initiated constitutional measure, all candidates for county elections “must be a resident in the jurisdiction in which they are to serve at the time of the election.”¹

Legislative enactments are subordinate to constitutional requirements. The North Dakota Constitution is an instrument of limitations of authority to enact legislation and the state Constitution will limit the powers of the North Dakota Legislature. State v. Ertelt, 548 N.W.2d 775 (N.D. 1996).

Although N.D.C.C. § 11-10-04 purports to provide an option to a county commission when appointing a state’s attorney to fill a vacancy in the elective office (see 1998 N.D. Op. Att’y Gen. F-31), the amendment to North Dakota Constitution Article VII, § 8 limits the available options. Subsections 2, 4 and 5(b) of N.D.C.C. § 11-10-04 attempt to permit the appointment of a nonresident to fill a vacancy in the elective office of state’s attorney. Those subsections, however, are in direct opposition to the express residency requirements of North Dakota Constitution Article VII, § 8.

Section 11-10-04 does include one provision that seems to provide a method for addressing the dilemma faced by Grant County. We start with the premise that by enacting a statute, it is presumed that the Legislative Assembly intended compliance with the Constitution of this state. N.D.C.C. § 1-02-38. In addition, statutes will be construed to avoid constitutional conflicts, if possible. If a statute may be construed in two ways, one that renders it of doubtful constitutionality and one that does not, a construction will be adopted that avoids constitutional conflict. Ash v. Traynor, 579 N.W.2d 180 (N.D. 1998).

Section 11-10-04(5)(a) permits the election of a state’s attorney with “multicounty jurisdiction” pursuant to an agreement between county commissioners of two or more counties in accordance with N.D.C.C. ch. 11-10.3. See also N.D. Const. art. VII, § 10. A

¹ The Fifty-Seventh Legislative Assembly passed Senate Concurrent Resolution 4052 which, if passed by the people at the 2002 primary election, would make significant amendments to North Dakota Constitution Article VII, § 8. It would amend the above-quoted sentence to read: “A candidate for election for sheriff must be a resident in the jurisdiction in which the candidate is to serve at the time of the election.” Id.

state's attorney with multicounty jurisdiction must be a qualified elector of the multicounty jurisdiction at the time of the election. N.D.C.C. § 11-10-04(5)(a).

When an agreement under chapter 11-10.3 has been made by the affected county commissioners by resolution, a multicounty jurisdiction state's attorney's office is created. The state's attorney elected as a result of, and subsequent to, this agreement serves a "jurisdiction" consisting of more than one county. Section 11-10-04(5)(a) requires the candidate for election to the office of multicounty jurisdiction state's attorney to be a qualified elector of the multicounty jurisdiction at the time of the election. This requirement is met, however, since the state's attorney must be a resident of one of the counties that is a party to the multicounty jurisdiction agreement. The state's attorney will also comply with the residency requirement set forth in the Constitution.

The 1998 Attorney General's opinion (1998 N.D. Op. Att'y Gen. F-31) has been significantly affected by the requirements of North Dakota Constitution Article VII, §8. Based upon the current requirements of North Dakota Constitution Article VII, §8, the county commission has one option if it wants to appoint a nonresident state's attorney to fill a vacancy in the elective office:

The county must enter into an agreement with one or more counties pursuant to N.D.C.C. ch. 11-10.3, enabling the election, or appointment in the case of a vacancy, of a state's attorney to the office of multicounty jurisdiction state's attorney pursuant to N.D.C.C. § 11-10-04(5)(a). The state's attorney appointee must be a resident of the multicounty jurisdiction.

Although North Dakota Constitution Article VII, § 8 and N.D.C.C. § 11-10-04(5)(a) make reference to the residence of the state's attorney "at the time of election," to qualify for office, the state's attorney appointed to fill a vacancy in an elective office must meet the requirements of the elected office that the appointee desires to assume. This issue was addressed in 1998 N.D. Op. Att'y Gen. F-31. Vacant elected county offices must be filled by appointment as provided by law. A vacancy in any county office, other than that of a county commissioner, must be filled by the board of county commissioners. N.D.C.C. § 44-02-04.

Section 44-02-09 requires any person appointed to office in accordance with N.D.C.C. ch. 44-02 to qualify within the time and in the manner required of a person elected or appointed to such office for a full term. To "qualify" for the office of state's attorney, the appointee must be a resident in the jurisdiction in which that person is to serve. N.D.C.C. § 11-10-04. If that person was not a resident of the jurisdiction at the time of the election, the appointee would not be qualified to run, or be elected to, the office of state's attorney.

North Dakota Constitution Article VII, §8.² Also, continued residency in the county is required or a vacancy would exist. N.D.C.C. § 44-02-01(7).

If Grant County's state's attorney were appointed rather than elected by one of the following means, a non-resident could be appointed as state's attorney:

1. Change the form of government to the county consolidated office form of government or the short form of county managership pursuant to N.D.C.C. chs. 11-08 or 11-09, thereby authorizing the appointment of a state's attorney from an adjoining county; or
2. Become a home rule county under N.D.C.C. ch. 11-09.1 and get voter approval to make the state's attorney an appointed official (see N.D.C.C. §§ 11-09.1-05(3) and 11-10-02.3), thereby allowing the home rule county to establish its own qualification requirements for its appointed state's attorney (see N.D.C.C. § 11-09.1-05(3)).

Assuming that Grant County has not adopted an alternative form of county government and is not a home rule county allowing for the appointment, rather than election, of a state's attorney, a nonresident could not be appointed by the board of county commissioners to fill a vacancy in the elective office of state's attorney unless that person is a resident, or qualified elector, of another county which was party to an agreement with Grant County under N.D.C.C. ch. 11-10.3 to create the office of multicounty jurisdiction state's attorney in accordance with N.D.C.C. § 11-10-04(5)(a). Absent this multicounty agreement, a nonresident could not be appointed by a board of county commissioners to fill a vacancy in the elective office of state's attorney because that person could not "qualify" for such office.

Sincerely,

Wayne Stenehjem
Attorney General

rpb/vkk

² This would change if Senate Concurrent Resolution 4052 is passed by the people in June 2002. See note 1 above.