

**LETTER OPINION
2002-L-67**

November 27, 2002

Mr. Jerry Renner
Kidder County State's Attorney
PO Box 229
Steele, ND 58482-0229

Dear Mr. Renner:

Thank you for your letter regarding the appointment of a state's attorney in Kidder County after your term of office ends on January 6, 2003. You indicated you did not seek re-election and will not continue as state's attorney. You also stated that the individual elected to the position in the November general election is a resident of another county and has notified the Kidder County auditor that he will not assume the position at the expiration of your term.

Your first question is whether a contract or agreement may be made with the state's attorney in a neighboring county to perform the duties of the Kidder County State's Attorney. In essence you are asking under what circumstances a state's attorney may be appointed.

Since you intend to complete your term as state's attorney, there is no vacancy in the office of Kidder County State's Attorney at this time.¹ Based upon the stated intentions of the person elected to serve as Kidder County State's Attorney, however, a vacancy will occur in the office at the expiration of your term (January 6, 2003).² When a vacancy occurs in a county office, the board of county commissioners must fill the office by appointment. N.D.C.C. § 44-02-04. Any person appointed to the office must qualify

¹ The regular term of a state's attorney will commence on the first Monday in January after the officer's election. N.D.C.C. § 11-10-05. In this instance, the new term will begin on January 6, 2003.

² A vacancy occurs if the officeholder fails to qualify as provided by law. Failing to qualify may include: 1) not taking the designated oath of office prescribed by law; 2) if a person ceases to be a resident of the county in which the duties of the office are to be discharged; or 3) if a person ceases to possess any of the qualifications of office prescribed by law. N.D.C.C. § 44-02-01(6), (7) and (9).

“within the time and in the manner required of a person elected to such office for a full term.” N.D.C.C. § 44-02-09. Thus, upon completion of your term as state’s attorney and the failure of your successor to qualify for office, the Kidder County Commission must appoint the new state’s attorney. However, the person appointed must meet the qualifications for that office as required by law. N.D.C.C. § 44-02-09.

Generally, an elected county official must be a qualified elector in the county in which that person is to serve. N.D.C.C. § 11-10-04(3). An exception to this requirement is when two or more counties agree that one person may serve as the state’s attorney of more than one county. N.D.C.C. § 11-10-04(2). Even in this situation, the state’s attorney must be a qualified elector in one of the counties in which the person is elected. Id. An individual qualifies “in the manner required of a person elected to such office” if the individual is a qualified elector in one of the counties in which the person is elected. Therefore, it is my opinion that N.D.C.C. §11-10-04(2) permits the Kidder County Commission and another board of county commissioners to agree that a duly elected and qualified state’s attorney of another county could serve as a state’s attorney in Kidder County.³ As such, the Kidder County Commission has the authority when a vacancy occurs to appoint an elected state’s attorney from a different county, provided both counties agree.

Your second question is whether Kidder County may appoint or hire a non-Kidder County resident attorney from another county to fill the position of Kidder County State’s Attorney when that person will not establish residence in Kidder County. Unless a person meets the statutory exceptions to the basic requirements previously discussed, the person to be appointed to fill the anticipated vacancy must be a qualified elector in Kidder County. Chapter 11-10, N.D.C.C., does not provide a procedure to appoint a person who is not an elected state’s attorney in a different county or who is not a Kidder County resident.

In the event the Kidder County Commission cannot find a state’s attorney to serve as the Kidder County State’s Attorney or in the event an agreement cannot be reached with the board of county commissioners in another county, Kidder County may have trouble filling the anticipated vacancy. Since it is imperative the county have someone to conduct prosecutions of offenses occurring within the county and to provide legal services to the county commission, I would suggest an alternative option for you and the commission to consider.

³ When 2001 N.D. Op. Att’y Gen. L-33 was issued, this result was not possible because the North Dakota Constitution required elected county officials to be a resident in the jurisdiction in which they were to serve at the time of the election. N.D. Const. art. VII, § 8. The constitutional provision was amended at the June 2002 primary election to remove this requirement except as to sheriffs.

Section 11-16-02, N.D.C.C. authorizes a state's attorney to appoint an assistant state's attorney. Upon filing the oath of office, an assistant state's attorney has the same powers as and may perform any and all duties required of the state's attorney. Since the assistant state's attorney is not an elected county officer, no residency or qualified elector status is required for that person to perform all of the duties of a state's attorney. State v. Rodman, 221 N.W. 25 (N.D. 1928). The county commissioners may establish the compensation for an assistant state's attorney. N.D.C.C. § 11-10-11. The law does not make the continued employment of an assistant state's attorney dependent upon your continued presence as state's attorney, provided the county commission has approved the appointment by establishing compensation for the assistant state's attorney. This arrangement will allow for the provision of legal services in the event the county commission is unable to fill the vacancy caused by your successor failing to qualify for office.

If you and the county commissioners are interested in pursuing this option, I suggest two items be addressed with any potential candidates. First, the person seeking the position of assistant state's attorney should be advised that the state's attorney position might not be filled in the near future. Second, the assistant state's attorney should be bonded. Presently, a state's attorney must be bonded in the amount of \$3,000 before assuming the duties of the office. N.D.C.C. § 11-10-06. The assistant state's attorney, as a deputy county official, may also be bonded. N.D.C.C. § 11-10-12. Since the assistant state's attorney may be performing the duties of a state's attorney, especially while the position remains vacant, it is my opinion that the assistant state's attorney should be bonded in the same amount and in the same manner as a state's attorney.

Sincerely,

Wayne Stenehjem
Attorney General

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