

LETTER OPINION
99-L-1

January 4, 1999

Mr. Lynn E. Erickson
Cavalier County State's Attorney
901 3rd Street
Langdon, ND 58249

Dear Mr. Erickson:

Thank you for your letter requesting my opinion on whether the Cavalier County Board of County Commissioners has the power to require the Cavalier County State's Attorney to maintain the state's attorney's office in the county courthouse.

A county possesses only those powers expressly granted to it by the Legislature or those necessarily implied from the powers expressly granted. See Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924); County of Stutsman v. State Historical Society, 371 N.W.2d 321, 329-330 (N.D. 1985). Thus, the Cavalier County Board of County Commissioners may only require that the county state's attorney's office be located in the county courthouse if that authority is granted by statute or is implied from the powers expressly granted.

There are two statutes that potentially provide this authority. N.D.C.C. § 11-11-14 gives the board of county commissioners' express powers. However, nothing in N.D.C.C. § 11-11-14 gives the board of county commissioners the authority to require the state's attorney's office be in a particular location.

N.D.C.C. § 11-10-20 gives the board of county commissioners the responsibility for providing offices in the courthouse for several county officials, including the state's attorney, unless there is no room in the courthouse. If there is no room in the courthouse, the board of county commissioners must obtain suitable office space in another building in the county seat. N.D.C.C. § 11-10-20. However, nothing in N.D.C.C. § 11-10-20 gives the board of county commissioners either the express or implied authority to require the state's attorney to use the office the board of county commissioners provides.

The North Dakota Supreme Court interpreted similar language in State v. Tracy, 158 N.W. 1069 (N.D. 1916). In that case, the defendant challenged a district court's taking of testimony in a location other than the courtroom provided by the county. Id. at 1071. In ruling

Mr. Lynn E. Erickson
January 4, 1999
Page 2

against the defendant, the Court stated that "[w]hile it is contemplated that the district court shall be holden [sic] in the courtroom provided for that purpose, still we are aware of no provision of statute requiring this to be done." Id.

This office has also addressed N.D.C.C. § 11-10-20 on several occasions. In a 1996 opinion to Representative William Gorder, this office addressed who had the power to determine the location of a job development authority (JDA) office, the board of county commissioners or the JDA itself. 1996 N.D. Op. Att'y Gen. L-205 (Nov. 7 letter to William Gorder). The opinion first stated that N.D.C.C. § 11-10-20 requires a county to provide office space to a county JDA. The opinion went on to conclude that the board of county commissioners had the primary authority to determine the location of the office it would provide the JDA. However, that opinion did not address whether the board of county commissioners had the power to require the county JDA to actually occupy the office the county provided. Id.

A 1966 advisory letter by Special Assistant Attorney General Richard Wall considered whether a state's attorney must maintain an office in the courthouse. Letter from Special Assistant Attorney General Richard Wall to Carl Heinrich (Dec. 19, 1966). The letter concluded there is no law requiring the state's attorney to maintain an office in the county courthouse. The letter went on to state that a county is not required to lease office space outside the courthouse if courthouse facilities are available. Id.

In a 1973 advisory letter, First Assistant Attorney General Paul Sand also considered whether a state's attorney's office must be in the courthouse. Letter from First Assistant Attorney General Paul Sand to James Purdy (April 27, 1973). Mr. Sand concluded that while there was no requirement the office be in the courthouse, a county would not be required to pay for office space occupied by a state's attorney outside the courthouse if courthouse facilities are available. Id.

Without citing any authority, the letter also stated that the county could require the state's attorney's office to be located in the courthouse. Id. However, I have found no authority granting the board of county commissioners either the express or implied power to require a state's attorney's office to be located in the courthouse.

Mr. Lynn E. Erickson
January 4, 1999
Page 3

Further, the realities and economics of one attorney acting as part-time state's attorney as well as having a separate private practice¹ argue against requiring a state's attorney to maintain an office in the courthouse. Accordingly, it is my opinion that a board of county commissioners does not have the power to require a state's attorney to maintain an office in the county courthouse. However, as stated by this office in the past, if the county provides an office in the county courthouse for a state's attorney, the county is not required to reimburse the state's attorney for rent for a different office.

Sincerely,

Heidi Heitkamp
Attorney General

sam\vjk

¹ This situation only applies in counties with a population below thirty-five thousand. In counties with a population greater than thirty-five thousand, the state's attorney is prohibited from engaging in private practice. N.D.C.C. § 11-16-05(5). This prohibition also applies in smaller counties that have passed a resolution with such a restriction. Id.