

N.D.A.G. Letter to Rodakowski (Dec. 24, 1986)

December 24, 1986

Mr. Casimer Rodakowski, Chairman
Mr. Philip Malkowski, Member
Mr. Jerry Redmond, Member
Billings County Board of County Commissioners
Billings County Courthouse
Medora, ND 58645

Dear Commissioners:

Thank you for your letter of November 24, 1986, requesting the assistance of this office in handling the apparent vacancy which will occur in the Office of the Billings County State's Attorney.

According to your letter, the newly-elected Billings County State's Attorney has indicated he will not be qualifying or assuming the position for which he was elected. The defeated candidate for Billings County State's Attorney apparently has informed the board that he is the only one eligible to be appointed to fill this vacancy. The questions are whether the board of county commissioners is required to appoint this individual to fill the vacancy in the state's attorney's office and what involvement by this office is present in the vacancy filling process.

N.D.C.C. §44-02-04 provides the procedure whereby a vacancy in a county office, other than that of the county commissioner, is filled. The relevant portion of the statute is stated as follows:

A vacancy in any county office, other than that of county commissioner, must be filled by the board of county commissioners. . . .

One may conclude that the statutory requirement that a vacancy must be filled by the board of county commissioners provides a mandatory requirement upon the board to fill such vacancies without regard to the ramifications or consequences of a particular appointment. However, the statute does not provide such a mandate.

The statute provides that the power to fill a vacancy lies with the board of county commissioners as opposed to any other entity or individual. In a letter dated July 19, 1966, this office advised the Pembina County State's Attorney that the impact of this statute was to place the appointment process in filling a vacancy in the office of state's attorney with the board of county commissioners as opposed to the Governor, the previous office-holder, or any other state or public official.

An example of an instance where the Legislature commanded an appointment be made by the board of county commissioners is found in the very next statute in N.D.C.C. Ch. 44-02. N.D.C.C. §44-02-05 states, in part, as follows:

When a vacancy occurs in the board of county commissioners, the remaining members of the board, with the county judge, and auditor, immediately shall appoint some suitable person to fill such vacancy from the district in which such vacancy occurred.

The commandment found in N.D.C.C. §44-02-05 as to the appointment process and the time within which such appointment must occur by the county commissioners is missing from N.D.C.C. §44-02-04. In comparing the statutory words used by the Legislature in both of these statutes, it is my conclusion that N.D.C.C. §44-02-04 authorizes the board of county commissioners, as opposed to any public entity or official, to fill vacancies occurring in those county offices other than the office of county commissioner.

I realize that a contrary argument can be made insofar as N.D.C.C. §44-02-04 appears to mandate vacancies to be filled by the board of county commissioners whenever they do occur. Even if this were the appropriate conclusion to be made, it cannot be applied mandatorily in all cases without regard to possible ramifications or consequences.

It is well settled that statutory language cannot be interpreted so as to reach absurd or unjust results. In Interest of B. L., 301 N.W.2d 387 (N.D. 1981); State v. Mees, 272 N.W.2d 61 (N.D. 1978). An example of an absurd and unjust result would be the appointment of an unqualified elector to fill the vacancy in the office of state's attorney.

N.D.C.C. §11-10-04 requires county officers, both chosen and appointed, to be qualified electors in the county in which they shall serve. A person who is not a qualified elector of a county and is yet appointed as state's attorney of that county following a vacancy existing in that office will find his title to the office declared void and null. People ex. rel. Bird v. Galbraith, 127 N.W. 771 (Mich. 1910); see also Jenness v. Clark, 129 N.W. 357 (N.D. 1910). Obviously, a board of county commissioners would not want to appoint an unqualified elector to fill the vacancy in a county office and risk the possibility of having that appointment declared null and void. Yet, this may be the result should N.D.C.C. §44-02-04 be interpreted to mandate such an appointment where there is only one possible candidate to be considered by the board.

The statutory requirement of county residency is not the only statute or concern which must be addressed by the board of county commissioners in making an appointment to fill a vacancy pursuant to N.D.C.C. §44-02-04. Although probably not applicable to this factual situation, the statute as to public employment and appointment preference given to veterans (N.D.C.C. Ch. 37-19.1) must be generally considered as well as the statute prohibiting nepotism by county officials (N.D.C.C. §11-10-25).

I realize that words such as shall or must are ordinarily examples of mandatory statutes imposing a positive duty to act when the condition calling for the exercise of the power is present. State v. Barr, 103 N.W. 637 (N.D. 1905). However, our supreme court has found

the need to interpret "shall" and "must" to actually mean "may" when necessary to give effect to the Legislature's intent. Solen Public School District No. 3 v. Heisler, 381 N.W.2d 201 (N.D. 1986); In Interest of Nyflot, 340 N.W.2d 178 (N.D. 1983). The Legislature surely did not intend by the enactment of N.D.C.C. §44-02-04 to require appointments to be made in filling vacancies where such appointments may be struck down as null and void as a result of the appointee's failure to satisfy relevant statutory requirements.

Although the matter of one's general qualifications to carry out an office is not specifically addressed as an issue which should be considered in an appointment process to fill a vacancy, I believe that the appointing authority has the ability to consider this issue. I do not know if this issue is present in the factual situation outlined in your letter. However, this is a subject which merits a general discussion.

As a public office is a public trust, persons to be appointed to such an office, even where it is to fill a vacancy, must be selected in terms of their qualifications and with a view towards the service of the public's welfare. 63 Am. Jur.2d Municipal Officers and Employees, §100 (1984). The appointment of a public officer involves the exercise of discretion which the courts will not control or invade unless the discretion is exercised arbitrarily. Id. at §§95,150. Thus, the board of county commissioners may exercise discretion in making an appointment pursuant to N.D.C.C. §44-02-04 as to the qualifications of a potential candidate for the office in carrying out the duties in that office.

In summary, a vacancy in the office of the county state's attorney is filled pursuant to N.D.C.C. §44-02-04. That statute places the authority to fill the vacancy with the board of county commissioners, but does not require such an appointment be made automatically, blindly, or without regard to ramifications or consequences which may occur as a result of the appointment of a particular individual. Instead, the board of county commissioners has the authority to review the qualifications of those who are interested in being appointed to fill the vacancy and the impact of various statutes affecting county officers and their ability to hold office. Where there appears to be only one potential candidate who can be appointed to fill a vacancy in a county office, it is my opinion that N.D.C.C. §44-02-04 does not mandate the board of county commissioners to automatically appoint that individual to fill the vacancy as a matter of law and without regard to the ramifications or consequences of such an appointment.

Finally, your letter inquires as to the involvement of this office in the vacancy filling process. The Attorney General has no role to play in the filling of a vacancy in the office of state's attorney. We have no authority to fill such a vacancy and, to my knowledge, have never exercised any such authority.

I am aware of past experiences of this office where it has been impossible to fill a vacancy due to the lack of an attorney who is a qualified elector of a particular county. In such instances, this office has been approached by a board of county commissioners and has been requested to issue an appointment to a particular individual as a special assistant attorney general (not as a state's attorney) to carry out the duties of the state's attorney's

office until such time as an appointment can be made to fill the vacancy or until the office is filled pursuant to an election.

I am not aware of such a request being made to this office where an individual apparently is able to be appointed to fill a vacancy in the state's attorney's office but the county commission does not desire to make such an appointment. Such a request would be reviewed carefully by this office before a response was issued. However, given my discussion and opinion in the earlier portion of this letter as to the discretion enjoyed by the board of county commissioners in making appointments to fill vacancies in county offices, I know of no legal prohibition from such an appointment being made in such a unique factual situation. Naturally, this decision is to be made solely by the board of county commissioners.

Sincerely,

Nicholas J. Spaeth

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