

LETTER OPINION
93-L-281

September 27, 1993

Mr. F. C. Rohrich
Emmons County State's Attorney
P.O. Box 657
Linton, ND 58552-0657

Dear Mr. Rohrich:

Thank you for your September 1, 1993, letter and your subsequent letter of September 9, 1993, requesting an opinion about the meaning of various provisions in N.D.C.C. ? 44-02-05 regarding the filling of a vacancy on the board of county commissioners, and the effect of taking the oath of office.

N.D.C.C. ? 44-02-05 provides for the manner of filling a vacancy on the board of county commissioners. You ask whether the statute requires a majority vote of the officers referred to in the statute, or, on the other hand, a majority vote of the officers voting. N.D.C.C. ? 44-02-05 states, in part:

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. If a majority of such officers fails to agree upon a person to fill such vacancy, the county treasurer shall be called in and shall act as an additional member of such board to fill the vacancy.

(Emphasis supplied.) This statute requires specific officers to meet and determine, by a majority vote "of such officers", who shall fill the vacancy. Given a plain reading of this specific statutory language, it is my opinion that the statute requires a majority vote of all of the officers listed in the statute. See N.D.C.C. ?? 1-02-02, 1-02-03. Thus, if there are four remaining members of the board of county commissioners, the statute would require agreement by four of the six officers (the four remaining county commissioners, the county judge, and the county auditor) on a person to fill the vacancy.

If a majority of the officers cannot agree, the county treasurer acts as an additional member of the board to fill the vacancy. The board, thus, would take action to make the appointment, with the county treasurer now acting as an additional member of the board. The county treasurer's act is sufficiently formal if the county treasurer determines and declares which of the two candidates is elected, rather than going through the formality of casting a ballot. Small v. Orne, 8 A. 152 (Me. 1887).

In the case at hand, the county treasurer chose to flip a coin to determine which candidate would receive her vote. The manner in which an elected official chooses to cast her vote may be a matter of concern to the electorate. However, there is no state law prohibiting an elected official from determining her vote by the flip of a coin. Therefore, it is my opinion that the manner in which the county treasurer voted was lawful.

The fact that the flipped coin rolled off the table and fell to the floor does not appear to be a problem in itself since it was verified by the official teller. However, if the appointing board had its own rule regarding this matter, compliance with such rule would be necessary. As I understand it, no such rule existed.

Finally, you ask about the effect of taking the oath of office. "A public office, being a trust . . . created for the benefit of the people, can be obtained only in the manner prescribed by law. . . ." 63A Am. Jur.2d Public Officers and Employees ? 87 (1984) (footnotes omitted). "It may be said that an appointment to office is made and is complete when the last act required of the person or body vested with the appointing power has been performed." Id. ? 106 (footnote omitted). Given the foregoing, it is my opinion that if a candidate is not lawfully appointed, the candidate's taking of the oath of office does not vest in the candidate a lawful right to hold the office.

I trust this discussion will be of assistance to you.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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