

LETTER OPINION
2000-L-142

September 1, 2000

Mr. James D. Gion
Grant County Assistant State's Attorney
PO Box 196
Carson, ND 58529

Dear Jim:

Thank you for your letter asking about the term of a county state's attorney who is appointed rather than elected.

N.D.C.C. § 11-10-02.3 provides a procedure to change the office of state's attorney from elected to appointed:

Upon the submission to the board of county commissioners of a petition signed by ten percent or more of the total number of qualified electors of the county voting for governor at the most recent gubernatorial election or upon resolution of the board of county commissioners, the county auditor shall place the question of appointing the state's attorney on the ballot at the next regular election. If a majority of the qualified electors of the county voting on the question approves the change from elective to appointive, the change is effective at the end of the term of office of the state's attorney holding office at the time of the election.

The term of a county elective office is four years. N.D. Const. art. VII, § 8. Neither the state constitution nor state law specifies the term for an appointed county state's attorney.

When a person or board is given the power of appointment and no term of office is specified by law, "the power of arbitrary removal is vested in the person or board vested with the appointing power, as incidental to the power of appointment, unless the law places a limitation on such power." State ex rel. Moore v. Archibald, 66 N.W. 234, 241 (N.D. 1896). "[I]n the absence of any statutory or constitutional provision to the contrary, [a person not holding office for a fixed term is] subject to removal without cause and without notice, by order of the appointing power." State ex rel. Johnson v. Myers, 19 N.W.2d 745, 751 (N.D. 1945). Thus, it is my opinion that a county state's attorney who is appointed pursuant to N.D.C.C. § 11-10-02.3, rather than elected, may be removed at the will of the county commission.

Mr. James Gion
September 1, 2000
Page 2

However, if the board of county commissioners agrees that the appointment will be for a specified term, for example two years, such appointment may give the state's attorney a property or liberty interest in the position unless the county commission specifies that the county state's attorney serving for a specified term still may be removed at the will of the county commission. See State ex rel. Kositzky v. Prater, 189 N.W. 334 (N.D. 1922) (when a board appoints an officer for a two-year term and subject to the immediate control of the board, the board has a right to remove the officer prior to the expiration of the two-year term); 1997 N.D. Op. Att'y Gen. L-135 (Aug. 8 to Ben Tollefson) (a board's right to remove an appointed officer is limited if the officer has a property or liberty interest in the position); 1990 N.D. Op. Att'y Gen. 102, 104 (Oct. 23 to Sarah Vogel) (the power of removal of an appointed officer is limited if the officer's position is classified). Whether an appointed officer has a protected property or liberty interest in continued employment is a question of fact. 1997 N.D. Op. Att'y Gen. L-135, L-136 (Aug. 8 to Ben Tollefson).

Sincerely,

Heidi Heitkamp
Attorney General

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