

**LETTER OPINION
2005-L-08**

February 17, 2005

The Honorable Larry J. Robinson
State Senator
3584 Sheyenne Circle
Valley City, ND 58072-9545

Ms. Robin Huseby
Barnes County State's Attorney
230 4th St NW
Valley City, ND 58072

Dear Senator Robinson and Ms. Huseby:

Thank you for asking whether the structure of and appointments to a joint city-county board of health are determined by the governing bodies of the city and county or by the board itself. It is my opinion that the governing bodies of the city and the county, and not the board, have the authority to structure and determine the manner in which appointments are made to a joint city-county board of health, subject to certain statutory requirements.

ANALYSIS

In 1978 the Board of County Commissioners and the City Commission of Valley City, created a city-county board of health (Board).¹ Recently, two members of the Board resigned. At the time of these resignations, the Board's membership was comprised of six persons. It is my understanding that as a result of the recent vacancies, the county would like to reduce the size of the Board to five members while the Board would like to increase its size to seven members.

Boards of health are established pursuant to N.D.C.C. ch. 23-35. Section 23-35-03(2), N.D.C.C., states, in part "[a] city's or county's governing body may establish a public

¹ While a copy of the original agreement between the city and county establishing the city-county board of health was requested by this office, the document could not be located. It is believed that the Board was established through a cooperative agreement pursuant to N.D.C.C. ch. 23-14. This chapter has since been repealed. See 1999 N.D. Sess. Laws ch. 242, § 7.

health unit by creating and appointing a board of health” (emphasis added). The board must contain at least five members, may not be composed of all male or all female members, and, if the county contains at least one city with a population of over fifteen thousand, some appointments must correlate to the disbursement of population within the county. See N.D.C.C. §§ 23-35-03(2)(b) and 23-35-03(3).

A governing body may form a multicounty or a city-county health district by adopting a resolution. N.D.C.C. § 23-35-04(1). A “governing body” is the applicable “city commission, city council, board of county commissioners, or joint board of county commissioners.” N.D.C.C. § 23-35-01(3); Letter from Assistant Attorney General Michael Mullen to Barnes County State’s Attorney Robin Huseby (Nov. 29, 2004). “[L]ocal boards of health are creatures of the Legislature and have only those powers expressly or impliedly granted to them.” N.D.A.G. 97-F-05. Section 23-35-08, N.D.C.C., sets out the powers and duties for a board of health. Nowhere in this section is the board of health given the power to expand, reduce or otherwise control its membership. Because the Board was created by the Valley City and Barnes County Commissions, these two governing bodies are jointly responsible for its structure and changes to it.

You also asked which entity, the city or county that appointed a member to the Board, or the Board itself, has the authority to appoint a new member to fill a vacancy. When the governing bodies of a city and a county form a city-county health district, the governing bodies of the city and county are jointly responsible for determining not only the number of members to serve on the Board, but how members of the board will be appointed. N.D.C.C. § 23-35-03(2) (a city’s or county’s governing board may establish a public health unit by creating and appointing a board of health). Once they have done so, N.D.C.C. § 23-35-03(3) governs how vacancies are to be filled. That section provides “[i]f a vacancy occurs, the appointing government authority shall appoint a member for the remainder of the unexpired term.” A recent letter from this office previously addressed this issue and provides:

It appears fairly clear from the context of subsection (3) of N.D.C.C. § 23-35-03 that the "government authority" . . . that is responsible for filling a vacancy on the board of health refers to the "governing body" (board of county commissioners or city commission) that initially appointed the member of the board who has resigned, moved, or died. This construction of the term "government authority" is further supported by the first sentence of N.D.C.C. § 23-35-03(2), which provides: "A city's or county's governing body [i.e., city commission or board of county commissioners] may establish a public health unit by creating and appointing a board of health..."

LETTER OPINION 2005-L-08
February 17, 2005
Page 3

Letter from Assistant Attorney General Michael Mullen to Barnes County State's Attorney Robin Huseby (Nov. 29, 2004).

In conclusion, it is my opinion that if a member of the Board appointed by the city leaves office and creates a vacancy, the city commission of Valley City is the government authority that must appoint an individual to fill this vacancy. Id. Likewise, if a member who was appointed by the county resigns, the Barnes County board of county commissioners must appoint an individual to fill this vacancy on the Board. Id.²

Sincerely,

Wayne Stenehjem
Attorney General

mjm/jwm

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

² According to documents and information provided by the state's attorney to a member of my staff, although the Valley City-Barnes County Health District appears to have been established by joint agreement between the governing bodies of Valley City and Barnes County, a resolution to ratify this action was not made by the Barnes County Board of County Commissioners until December 1984, and no records regarding a resolution of the City Commission of Valley City have been provided to our office. Therefore, although the 1984 resolution indicates that the Barnes County Board of County Commissioners has appointed all of the members of the Board, it may be advisable for the governing bodies of both county and the city to enter into a new agreement addressing both the number and manner in which the members will be appointed.