

**LETTER OPINION
2006-L-04**

February 1, 2006

Mr. Howard D. Swanson
Nelson County Special Assistant State's Attorney
PO Box 12909
Grand Forks, ND 58208-2909

Dear Mr. Swanson:

Thank you for your letter asking whether the veterans' preference provisions of N.D.C.C. § 37-19.1-02 apply to the temporary vacancy appointment of a state's attorney under N.D.C.C. § 44-02-04. You also asked whether the county commission could leave the position vacant given that there will be an election in June 2006 or whether it could hold a special election to fill the position. For the reasons stated below, it is my opinion that the veterans' preference provisions of N.D.C.C. § 37-19.1-02 do not apply to the temporary vacancy appointment of a state's attorney under N.D.C.C. § 44-02-04; the county commission may not leave the position vacant until the election; and there is no provision in N.D.C.C. ch. 44-02 authorizing the commission to hold a special election to fill the vacancy.

ANALYSIS

Section 37-19.1-02(1), N.D.C.C., provides in relevant part that veterans "are entitled to preference, over all other applicants, in appointment or employment by governmental agencies." However, under N.D.C.C. § 37-19.1-02(5), veterans' preference does not apply to the appointment of "the chief deputy or private secretary of an elected or appointed official." Chapter 37-19.1, N.D.C.C., was patterned after Minnesota law;¹ therefore, in the absence of North Dakota precedents, case law from Minnesota is helpful in interpreting the North Dakota statute.² Case law from Minnesota indicates that if the chief deputy or private secretary of an official is not subject to veterans' preference, the position appointing a chief deputy or private secretary is also outside the scope of the provision.³

¹ See N.D.A.G. 95-L-53.

² Id.

³ See State ex rel. Sprague v. Heise, 67 N.W.2d 907, 911 (Minn. 1954); see also Holmes v. Bd. of Com'rs of Wabasha County, 402 N.W.2d 642, 644 (Minn. App. 1987) (veterans' preference law expressly excluding chief deputy of elected official or department head construed to also exclude department head from law).

Section 37-19.1-02(5), N.D.C.C., does not exclude only those public officials that expressly have the authority to hire a chief deputy or private secretary.⁴ Rather, the statute implicitly recognizes that certain elected and appointed “officials” are not subject to the constraints imposed by the veterans’ preference law at all.

The term “official” has been defined as “[o]ne who holds or is invested with a public office.”⁵ A “public office” has been defined as a “position whose occupant has legal authority to exercise a government’s sovereign powers for a fixed period.”⁶ The powers and duties of a state’s attorney are outlined in N.D.C.C. ch. 11-16. The state’s attorney is the public prosecutor within the county and in fulfilling the quasi-judicial functions of the office quite clearly exercises the state’s sovereign powers. Thus, the state’s attorney is an “official” not subject to the veterans’ preference law.

Construing the provisions found in N.D.C.C. ch. 37-19.1 together and in a reasonable manner, I am convinced that the Legislature did not intend to give preference to veterans when a county commission temporarily fills a vacant state’s attorney position and appoints someone under N.D.C.C. § 44-02-04. As a result, the Nelson County Commission may appoint a qualified individual as Nelson County state’s attorney without regard to whether any applicant would qualify as a veteran under N.D.C.C. § 37-19.1-02.

You also ask whether the county commission must appoint someone to the state’s attorney position or whether the commission can leave the position vacant given the deadlines candidates have for filing for the 2006 election. The law does not state when an appointment to a vacant state’s attorney position must be made. However, as you note, there are deadlines in N.D.C.C. title 16.1 specifying when certain election requirements must be accomplished.⁷ The pertinent election deadlines for county office are set out in the 2006 North Dakota election calendar prepared by the Secretary of State⁸ and for 2006 include: June primary election, June 13, 2006; last day to file nominating petition, 4:00 p.m., Monday, April 17, 2006; earliest day to begin circulating petitions, Saturday, January 14, 2006.⁹ Thus, if the person appointed to the vacant state’s attorney position, or anyone else, wishes to become a candidate for the office

⁴ Cf. N.D.C.C. § 11-16-02 (authority of state’s attorney to appoint assistant state’s attorneys).

⁵ Black’s Law Dictionary 1114 (7th ed. 1999).

⁶ Black’s Law Dictionary 1245 (7th ed. 1999).

⁷ See, e.g., N.D.C.C. §§ 16.1-11-01 (primary election must be held on second Tuesday of June of every general election year); 16.1-11-11 (candidate for county office must submit nominating petitions before 4:00 p.m. of the 60th day before any primary election); 16.1-11-15 (nominating petitions may not be circulated or signed more than 90 days prior to time petition must be filed).

⁸ See www.nd.gov/sos/electvote.

⁹ Id.

and qualify for the June 2006 primary, that person could begin circulating petitions now and would have to file the nominating petitions by 4:00 p.m., Monday, April 17, 2006.¹⁰ The commission cannot, however, leave the position vacant. Section 44-02-04, N.D.C.C., mandates that the county commission fill the vacancy.¹¹ The election deadlines, in this case, do not excuse or negate the duty to fill vacancies by appointment. There is sufficient time to make the appointment and for the appointee or other interested candidate to meet all the election deadlines.

Finally, you also ask whether the county commission may call for a special election to fill the remaining term of the vacant state's attorney position. Chapter 44-02, N.D.C.C., makes no provision for calling a special election to fill the remaining term of a vacant state's attorney position; it only allows for filling vacancies by appointment.

Sincerely,

Wayne Stenehjem
Attorney General

tca/jjf/pg

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.¹²

¹⁰ Signatures on nominating petitions for a county office must number not less than 2% and not more than 5% of the total vote cast for the office at the most recent general election at which the office was voted upon. N.D.C.C. § 16.1-11-11(2)(c)(1). According to the Secretary of State's elections officer, that translates to a signature requirement of between 29 to 70 signatures for the nominating petitions for the state's attorney office. The elections officer also indicated that the Nelson County auditor estimated it would typically take about a week to ten days to gather that number of signatures in Nelson County for a county office.

¹¹ See N.D.A.G. 2002-L-67; N.D.C.C. § 44-02-04 (a vacancy in a county office "must be filled by the board of county commissioners"); see also Federal Land Bank of St. Paul v. Waltz, 423 N.W.2d 799, 802 (N.D. 1988) ("The word 'must' as ordinarily used indicates a mandatory and not merely a directory or nonmandatory duty.").

¹² See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).