

**LETTER OPINION
2006-L-38**

December 21, 2006

Mr. Paul C. Murphy
Griggs County State's Attorney
PO Box 541
Cooperstown, ND 58425-0541

Dear Mr. Murphy:

Thank you for your letter requesting my opinion on the status of the office of state's attorney for Griggs County following the December 31, 2006, expiration of the joint powers agreement between Griggs and Foster Counties. You specifically ask about your ability as the state's attorney of an adjoining county to continue to serve as state's attorney in Griggs County, in which you are not a resident, following the December 31, 2006, expiration of the joint powers agreement. As further explained below, it is my opinion that absent approval by the two counties under N.D.C.C. § 11-10-04(2) for you to serve, the office of state's attorney in Griggs County would be vacant, in which case the Griggs County Commission would be free to appoint an attorney who is a qualified elector as state's attorney until the next general election.

ANALYSIS

According to information and documents supplied by Griggs County officials, you were appointed as state's attorney for that county in 2003 and a contract was signed. This was followed by the execution of a joint powers agreement (JPA) by Foster and Griggs Counties in October of 2004.¹ The JPA provides, in part, that "[t]he Foster County State's Attorney position will remain an elective position. To fill the vacancy of the State's Attorney Office in Griggs County, the Griggs County Commission will appoint the Foster County State's Attorney as its' [sic] State's Attorney."² The JPA also recited that it is effective until October 1, 2006, "at which time it will be reevaluated and/or may be terminated by any one of the Counties involved. If one County terminates this JPA at that time, it shall become null and void."³ At a special meeting of the Griggs County Commission on September 28, 2006, the commission approved continuing your appointment as state's attorney through

¹ The JPA recites that it was adopted under N.D.C.C. ch. 11-10.3. It is unclear whether the JPA superseded or supplemented the 2003 contract. Nevertheless, the JPA was the most recent manifestation of the intent of the parties.

² Joint Powers Agreement, Foster & Griggs Counties (Oct. 2004).

³ Id.

December 31, 2006. Since this is the last official action concerning the JPA, it will expire on December 31, 2006.⁴

Your name appeared on the June 2006 primary ballot and the November general election ballot for Griggs County state's attorney, and you received the highest number of votes for that position in the general election.⁵ Also appearing on the primary election ballot was the question of whether the Griggs County Commission should appoint the state's attorney; the measure was defeated.⁶ It is not clear from the information provided how and under what authority the ballot measure was placed on the primary election ballot.⁷ The vote would be advisory unless the JPA or any of its provisions were placed on the ballot as a result of a referral or initiative or unless the question was submitted to the voters under N.D.C.C. § 11-10-02.3.

According to your letter, you are not a resident of Griggs County.⁸ Generally, a "candidate for election to a county office must be, at the time of election, a qualified elector in the jurisdiction in which the candidate is to serve."⁹ Notwithstanding this requirement, "upon approval of the board of county commissioners of each affected county, a person may serve as an elected officer of more than one county and must be a qualified elector of one

⁴ E-mail from Griggs County Auditor to Office of Attorney General (Dec. 4, 2006).

⁵ Memo from Board of County Commissioners and County Auditor [Griggs County] to Paul Murphy, State's Attorney (Nov. 30, 2006).

⁶ Id.

⁷ Section 11-10.3-01, N.D.C.C., provides that a JPA to combine county elective offices is subject to referral by electors of the county. A proposal to combine such offices can also be accomplished by initiative petition of the electors of each affected county. If by initiative, the measure must be submitted at a primary general election not less than 60 days nor more than two years as specified in the initiative petition after the petition is approved. N.D.C.C. § 11-10.3-01(2), (3), and (4). If a JPA is properly referred, it is suspended and, unless terminated by the county commission, must be placed on the ballot at the next regular election. If properly and timely brought before the electors, the question of combining county elective offices through a joint powers agreement is subject to the will of the electorate. If merely placed on the ballot as a straw vote or plebiscite to provide the county commissions with the views of the electorate, such votes are generally not considered binding, but are advisory only. See N.D.A.G. 96-L-192; N.D.A.G. Letter to Sloby (Sept. 23, 1987) (county commission may seek a non-binding advisory opinion of its constituents in implementing a specific statutory authority given to the board by law).

⁸ See also Memo from Board of County Commissioners and County Auditor [Griggs County] to Paul Murphy, State's Attorney (Nov. 30, 2006).

⁹ N.D.C.C. § 11-10-04(3).

of the counties in which the person is elected.”¹⁰ It appears from the information provided that there was no approval from the Griggs County Commission for you to serve as an elected state’s attorney for that county.¹¹ It is still, however, theoretically possible for both counties to give their approval under N.D.C.C. § 11-10-04(2) since you were elected state’s attorney in both counties, as long as you are an elector in one of the counties and the county commissioners in each of the counties approve the arrangement.¹²

If the affected counties do not grant the approval under N.D.C.C. § 11-10-04(2) there will be a vacancy in the office of Griggs County state’s attorney.¹³ A vacancy in any county office may be filled by the board of county commissioners under N.D.C.C. § 44-02-04. An appointment to fill a vacancy under N.D.C.C. ch. 44-02 must be made in writing and continues in force until the first general election that occurs at least 60 days after the vacancy, and the vacancy will be filled by election and thereafter until the appointee’s successor by election is qualified.¹⁴ Thus, an attorney appointed under N.D.C.C. ch. 44-02 would serve until the next general election in November of 2008, at which time the position would be on the ballot to be filled by election.¹⁵ Any attorney appointed to the vacant state’s attorney position would either have to be a qualified elector of Griggs County or would have to come within one of the recognized exceptions to the qualified elector requirements.¹⁶

Realistically, Griggs County’s options for filling the state’s attorney’s position at this late date are probably limited to either having the two counties approve your serving as state’s attorney for both counties under N.D.C.C. § 11-10-04(2) or appointing a duly qualified attorney to fill the vacancy after December 31, 2006, under N.D.C.C. ch. 44-02. The only person who may serve as an elected state’s attorney for Griggs County for the period of time after December 31, 2006, would be the high vote getter in the November 2006 general election (but only if approval of the two affected counties is obtained under N.D.C.C. § 11-10-04(2)). A runner-up is not entitled to assume elective office even if the high vote getter is ineligible or not qualified to serve.¹⁷

¹⁰ N.D.C.C. § 11-10-04(2).

¹¹ Memo from Board of County Commissioners and County Auditor [Griggs County] to Paul Murphy, State’s Attorney (Nov. 30, 2006); e-mail from Griggs County Auditor to Office of Attorney General (Dec. 4, 2006).

¹² See N.D.A.G. 2002-L-68.

¹³ See N.D.A.G. 2002-L-67; N.D.C.C. § 44-02-01(6), (7), and (9).

¹⁴ N.D.C.C. § 44-02-08.

¹⁵ *Id.*

¹⁶ See N.D.C.C. § 11-10-04(2) and (3). See also N.D.A.G. 98-F-31.

¹⁷ See *Woll v. Jensen*, 162 N.W. 403 (N.D. 1917) (“minority vote for a qualified candidate does not entitle such candidate to the office, even though the candidate receiving the

LETTER OPINION 2006-L-38
December 21, 2006
Page 4

Based on the foregoing, it is my opinion that absent approval by the two counties under N.D.C.C. § 11-10-04(2) for you to serve, the office of state's attorney in Griggs County would be vacant, in which case the Griggs County Commission would be free to appoint another qualified attorney as state's attorney until the next general election.

Sincerely,

Wayne Stenehjem
Attorney General

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.¹⁸

highest number of votes was disqualified to hold the office and such fact was known to the voters at the time of the election"); see also N.D.A.G. Letter to Splitt (Sept. 14, 1978).

¹⁸ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).