

December 22, 1977

Mr. Thomas B. Jelliff
Grand Forks County State's Attorney
P.O. Box 607
Grand Forks, North Dakota 58201

Dear Mr. Jelliff:

This is in reply to your letter of December 7, 1977, relative to the appointment to fill a vacancy in the office of county judge in 1976. You state the following facts:

"At some time in November of 1975, Judge Smith, then County Judge, tendered his letter of intention to resign the position of County Judge effective January 3, 1977, as he would be sworn in that date as District Judge.

"The Commissioners through the local Bar Association put out a call for applicants for the position of County Judge that would be open on that date and on December 14, 1976, held personal interviews with five candidates who had submitted their applications to the Commissioners.

"At the conclusion of said personal interviews, the Commissioners by paper ballot voted three times in a process of elimination election until the final vote arrived at Frank Kosanda. The Commissioners then called for a unanimous voice vote on the selection of Frank Kosanda as County Judge. (The minutes as written by the County Auditor reflect that the unanimous ballot was cast.)

"On January 4, 1977, Judge Smith's resignation was accepted by the Board on motion and on January 6, 1977, the Board by motion set the Salary of Frank Kosanda as County Judge at \$16,000.00. Ralph Schrader, a member of the Board on December 14, 1976, who participated in the voting had not run for office, and James Earl elected in November of 1976 replaced Mr. Schrader on the new Board which met in January. Mr. Earl participated in the motion to set the salary of Frank Kosanda as County Judge at the above quoted figure.

"My question . . . is, if the ballot process was an elimination process, and with the unanimous ballot for Kosanda as County Judge, are any curative acts by the present Board necessary and if so, what may be recommended by our office."

You are familiar with the opinion issued by this office on November 15, 1977, relative to the appointment to fill the vacancy in the office of Grand Forks County Auditor. In that

opinion we concluded the use of a secret ballot by the county commissioners for the purpose of selecting a person to fill a vacancy in a county office was not permitted by statute.

There may be a distinction between the facts in that issue and the facts as outlined in your letter concerning the office of county judge. In the first instance the previous opinion referred to the office of county auditor which had just become vacant. We are now being asked to give an opinion on a procedure that took place a year ago. Secondly, in the case of the county auditor the final ballot to select the person to fill the vacancy was a secret ballot. In this instance the final ballot to select the candidate for the office of county judge was a voice vote although a secret ballot was used to eliminate other candidates for the position. Thirdly the composition of the board of county commissioners at this time is not entirely the same as the composition of the board a year ago when the appointment to fill the vacancy in the office of county judge took place.

In order that there be no confusion with regard to our position, however, we again reiterate that we do not approve the use of secret ballots, unless authorized by statute, for any purpose, including the elimination of candidates for appointment to a vacancy even though the final motion to appoint is made by voice Vote.

This office cannot conclude that the person appointed to the office of county judge has not, in fact, been holding the office for the past year. While we recognize there are distinctions between the situation described in your letter and that considered in our previous opinion, we nevertheless also believe that a question as to the propriety of the action by the board of county commissioners in 1976 still exists. However, because of the passage of time we have no particular remedy to resolve that issue. Should some person with standing question the authority at the person in office to hold that office, we assume the issue could be determined by the courts.

Sincerely,

Gerald W. VandeWalle
Chief Deputy Attorney General

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