

**OPINION
71-111**

March 26, 1971 (OPINION)

Mr. Joseph McIntee

State's Attorney

McHenry County

RE: Counties - Officers - Vacancies

This is in response to your request for an opinion concerning the provisions of Section 44-02-04. The facts to be considered are as follows:

Mr. John Miller, one of the county commissioners, has been seriously ill since November of 1970. Since then he has been hospitalized at Fargo and at Bottineau where he is presently still hospitalized and still considered seriously ill. He has been unable to serve as a member of the board of county commissioners in McHenry County since his illness. You also state that some people from his district have called at your office to find out if the board of county commissioners can appoint someone temporarily to fill his position.

Section 44-02-04 as amended provides that a vacancy in any county office, other than that of county commissioner, shall be filled by the county commissioners except the office of state's attorney which became vacant as a result of removal proceedings, at which time the appointment is made with the advice and consent of the governor. This section continues by providing that the county commissioners may declare a county office to be vacant whenever the officeholder is unable to perform the duties of the office for six months or more.

Section 44-02-04 of the 1969 Supplement to the North Dakota Century Code provides as follows:

"VACANCY IN COUNTY OFFICE - APPOINTMENT. A vacancy in any county office, other than that of county commissioner, shall be filled by the board of county commissioners, with the exception that if a vacancy has occurred in the office of state's attorney by reason of his removal under section 44-11-01, the appointment shall be made by the board of county commissioners by and with the advice and consent of the governor. The board of county commissioners may declare a county office to be vacant whenever the officeholder is unable to perform the duties of the office for six months or more. However, if within one year the officeholder should become able to perform his duties the county commissioners may, for good cause shown, reinstate such officeholder."

The opening sentence in the above section specifically refers to offices other than that of county commissioner. The remainder of the section is in a sense qualified by the opening sentence and the language does not suggest otherwise.

Also, in examining the provisions of Section 44-02-05 we find that this section deals specifically with filling vacancies in the office of county commissioner. The officers authorized to fill the vacancy are not the same officers referred to in Section 44-02-04. We think it unlikely that the Legislature would provide two methods for filling a vacancy. In addition, if the offices of county commissioner are set up in districts, some officer representing the electorate of the district should have a voice in filling the vacancy for such district. The remaining county commissioners would in no sense be representing the district in which a vacancy occurs. We would also note that Section 44-02-05 does not contain any authority to fill a vacancy on a temporary basis or until the officeholder can resume the performance of his duties.

We are further impressed that Section 44-02-01 sets forth what constitutes a vacancy. Subsection 5 of this section seems to specifically rule out that sickness shall constitute a vacancy.

It is therefore our opinion that Section 44-02-04 does not apply to the office of county commissioner. If a vacancy were to occur as defined in Section 44-02-01 the same could be filled under the provisions of Section 44-02-05.

HELGI JOHANNESON

Attorney General