

**OPINION
76-96**

August 23, 1976 (OPINION)

Mr. LeRoy Anseth
State's Attorney
Williams County
P.O. Box 476
Williston, ND 58801

Dear Mr. Anseth:

This is in reply to your letter of August 16, 1976, relative to a vacancy in county office. You state the following facts and questions:

The Sheriff of Williams County resigned from his office on July 30, 1976. According to North Dakota Statutes, the position under Section 44-02-02 shall be filled by the Board of County Commissioners.

Under Section 44-02-08, the vacancy continues in force until the first general election. Thereafter, the vacancy shall be filled by election.

It is my understanding that whoever is appointed Sheriff of Williams County by law would have to stand for general election in November.

Looking at Section 16-08-07, the filling of the vacancies existing on the no-party ballot; we have a definition of vacancy which only refers to candidates nominated at the primary ballot. In this case on the primary ballot, there is no spot on the ballot for the office of Sheriff.

I have come to the conclusion after reviewing the code, that the Legislature did not make any provisions whereby the auditor can place any person's name on the ballot for the next general election for the office of Sheriff.

I, therefore, would request an opinion as to whether or not the appointee of the County Commissioners would serve out the remaining term of the Sheriff and if this is not your opinion, would you then inform us of how the auditor should accept names to be printed on the general ballot in November and, further, whether or not one needs a majority vote to win the office at the general election.

Section 44-02-04 of the N.D.C.C., as amended, provides in part:

A vacancy in any county office . . . shall be filled by the board of county commissioners . . .

The office of sheriff is, of course, a county office.

Section 44-02-08 of the N.D.C.C., as amended by the 1975 Legislature,

provides:

APPOINTMENT TO BE MADE IN WRITING - TERM. - Any appointment to fill a vacancy under the provisions of this chapter shall be made in writing, and, except as otherwise expressly provided by law, shall continue in force until the first general election thereafter, when the vacancy will be filled by election, and thereafter until the appointee's successor by election is qualified.

Prior to the 1975 amendment, section 44-02-08 of the N.D.C.C. provided that the appointment to fill the vacancy "shall continue in force until the expiration of the term in which the vacancy occurs, and until the appointee's successor is elected and qualified."

At the time section 44-02-08 of the N.D.C.C. was enacted the term of county office was two years and there would have been no opportunity to fill any vacancy in the office. That was changed as a result of the amendment of Section 173 of the North Dakota Constitution to provide four-year term of office for county officials in 1962. Thus, as a result of the amendment of section 44-02-08 by the 1975 Legislature providing that an appointee to fill a vacancy should hold office only until the next general election rather than for the remainder of the unexpired term, we are, for the first time, faced with the question of filling the unexpired term of a county officer by election.

Had there been sufficient time for the unexpired term of the office of county sheriff to be placed on the primary ballot, we believe same would have been proper. This is traditionally what has happened with appointees to fill vacancies in the office of Supreme Court Justice pursuant to section 98 of the North Dakota Constitution which provides that the Governor shall appoint a person to fill a vacancy in such office "which appointment shall continue until the first general election thereafter, when said vacancy shall be filled by election." In this instance, the resignation was not in sufficient time to permit the office to be placed on the primary election ballot and we must therefore determine whether and under what circumstances the unexpired term may be placed on the general election ballot.

We believe section 44-02-08, as amended by the 1975 Legislature, is plain on its face. It provides that unexpired terms are to be filled at the next general election. In this instance that election is November 2, 1976. There is ample time to place the office on the ballot. The statute does not require that the unexpired term appear on the primary election ballot in order to be placed on the election ballot. We therefore conclude that the unexpired term of office of county sheriff of Williams County must appear on the general election ballot for the November, 1976, General Election. While not at issue in this instance, we would note that a vacancy could occur before the general election but so short a time prior thereto that the unexpired term could not appear on the ballot because the ballots had already been printed, etc., and our conclusion in this instance is not to be considered as applicable to those situations should they arise in the future.

While we can conclude that the unexpired term must be filled at the

November, 1976, General Election with relative ease in view of the wording of section 44-02-08, the problem of candidates' names being placed on the ballot is considerably more complicated. The problem is a position on the no-party ballot. See Chapter 16-08 of the N.D.C.C. Other than the primary election, the only other method provided by the statutes of having a name placed on the ballot for office is pursuant to chapter 16-03 governing individual nominations. However, section 16-03-01 of the N.D.C.C. provides:

INDIVIDUAL NOMINATIONS MAY BE MADE. - Nominations of candidates, for an office to be filled at a general or special election except an office appearing on the no-party ballot may be made as provided in this chapter and the names of such candidates shall be placed on the ballot in a single column for independent candidates. (Emphasis supplied.)

It is obvious from the wording of this statute that the provisions for individual nominations do not apply to no-party offices. The reason for such exclusion is understandable since no-party offices are all independent and all candidates appear in only one column on the ballot in any event. If a candidate for election to office for a regular term on the no-party ballot could have his name placed on the general election ballot without going through the primary election process, the primary election would most probably be bypassed by all candidates for no-party office since only the two candidates receiving the largest number of votes at the primary are eligible to have their names printed on the general election ballot. If candidates for no-party office could bypass the primary process and have their names placed on the general election ballot pursuant to chapter 16-03, governing individual nominations, the candidates would most probably bypass the primary to assure their names would appear on the general election ballot.

This office recognized the fact that it was not possible for a candidate for a no-party office to petition to have his name placed on the general election ballot pursuant to chapter 16-03. In an opinion issued by this office on September 25, 1972, to William J. Kriedemann, Golden Valley County Auditor, we reached this conclusion. In that instance, the counties had been required to redistrict for the election of county commissioners so that the districts would be nearly equal in population. If the counties did not so redistrict, the office of county commissioner was to be filled by election at large. The names of the candidates for county commissioner in Golden Valley County appeared on the primary election ballot at large. However, between the primary and the general election, a redistricting plan was completed and the question presented was whether the candidates for election to county commissioner, by district, should appear on the general election ballot and, if so, how. We concluded that section 11-07-05 of the N.D.C.C., requiring the first redistricting to be completed by December 31, 1971, or requiring election of the commissioners at large, contemplated that the primary process must be used to fill the positions and since the office did not appear on the primary election ballot by district, it could not appear on the general election ballot by district but must appear on the general election ballot at large. In this instance, we have no indication that the primary process must be used to fill an unexpired term in a county office.

We further noted in that opinion that section 16-08-07 of the N.D.C.C. which applies to the filling of vacancies existing on the no-party ballot does not apply in these instances because of the definition of vacancy contained therein. You have noted the same conclusion in your letter. Thus, section 16-08-07 provides in part:

A vacancy in the no-party ballot shall be deemed to exist when a candidate nominated at the primary election shall die, resign, or otherwise become disqualified to have his name printed on the ballot at the general election.

Since there was no candidate nominated at the primary election in this instance, there can be no vacancy by virtue of the definition of a vacancy in section 16-08-07 and thus the provisions for filling a vacancy on the ballot contained therein do not apply.

The 1972 opinion also recognized that in the absence of placing names on the ballot by the petition route, write-in votes may be used. Because of the reasons discussed above and other reasons stated in the opinion, we concluded that process was not applicable in that instance. However, in this instance, those reasons are not present.

In an October 15, 1970, opinion to Richard B. Thomas, Ward County State's Attorney, The question involved a situation wherein a county commissioner had died after the primary election but before the general election. The term did not expire at the end of that year. Section 44-02-05 provided that an appointee to fill such vacancy should hold office until his successor is elected at the next general election. Pursuant to that provision, the office was placed on the ballot for the general election in 1970 although no candidates could have their names printed on the ballot. Thus, only write-in votes could be used to fill the office.

We believe the same rationale is applicable in this instance and we thus conclude that the unexpired term of office of county sheriff of Williams County must appear on the November, 1976, General Election Ballot but that there is presently no method whereby candidates for that office may have their names printed on the general election ballot. As a result the office will be filled by a write-in vote.

In the October, 1970, opinion referred to above, we further concluded that while section 16-13-28 of the N.D.C.C. provides that the county auditor shall make out a certificate of election to each of the persons having the highest number of votes for county offices, insofar as no-party offices are concerned, section 16-08-05 required a certain number of votes to be elected. Section 16-08-05 provides in part that no person whose name was not placed on the primary election ballot shall be elected to a no-party office as a write-in candidate unless such person receives a number of votes equal to or more than the number of signatures which would have been required to have his name placed on the primary election ballot.

We indicated the legislative purpose in amending section 16-08-05, as stated above, was to eliminate the situation where a person receiving one vote could be elected to an office where no names appeared on the ballot but resort to write-in votes is used. Such conclusion was

based on the report of the legislative Council which made a study of the laws and recommended the above quoted language. We concluded that the above quoted language of section 16-08-05 was applicable in that instance and we conclude it is also applicable to the present situation.

Section 16-04-04 of the N.D.C.C., as amended, provides that a petition to have a candidate's name placed on the ballot for county office must contain the names of not less than two percent of the total vote cast for said office at the most recent general election at which such office was voted upon if the office is under no-party designation. We do not know what the total vote cast for sheriff of Williams County was in the 1974 General Election. However, any of the write-in candidates for the unexpired term at the 1976 General Election would have to have two percent of that vote in order to be declared elected. Assuming one or more of the write-in candidates received the required number of votes, that person receiving the highest number of votes would be elected to fill the unexpired term of sheriff pursuant to section 16-13-28 of the N.D.C.C.

Because of the lack of any method whereby candidates for the unexpired term may have their names placed on the ballots, we are not particularly pleased with the above result, i.e., it would appear that if unexpired terms are to be filled at a general election when it has not been possible because of the timing of the vacancy in such office to have it placed on the Primary Election Ballot, some method should be devised by the Legislature which would permit candidates to petition to have their names placed on the general election ballot. However, the above conclusions appear to us to be the only method presently provided by the statutes of implementing the legislative intent in amending section 44-02-08. We might speculate that the Legislature did not consider the fact that it might not always be possible to have a primary election run off when requiring that vacancies be filled at the next general election. So that the Legislature will be made aware of the problems involved in this matter, we are taking the liberty of forwarding a copy of this opinion to the Legislative Council.

In summary, we agree with your conclusion that the Legislature did not make any provisions whereby the auditor can place any person's name on the ballot for the next general election for the unexpired term of the office of county sheriff. We further conclude that despite the fact no candidate's name may be placed on the ballot for such office at the November, 1976, General Election, the office itself will appear on such ballot and will be filled by write-in votes. Finally, we conclude that in order for a write-in candidate to be elected to the unexpired term of office of county sheriff of Williams County, he must receive the highest number of votes cast and must also receive at least two percent of the votes cast for the office of county sheriff at the 1974 General Election.

Sincerely,

ALLEN I. OLSON

Attorney General