

Date Issued: January 29, 1985 (AGO 85-6)

Requested by: Owen L. Anderson, Chairman, North Dakota Judicial
Nominating Committee
Owen K. Mehrer, Stark County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a county commission may elect to fill a vacancy in the position of county judge by proceeding in accordance with N.D.C.C. section 44-02-04 after the judicial nominating committee, at the commission's request, has submitted nominees to the commission pursuant to N.D.C.C. section 27-26-03.

II.

Whether a county commission, acting under N.D.C.C. section 27-26-04(1)(b), and finding the second list submitted unacceptable, proceed to appoint pursuant to N.D.C.C. section 44-02-04, thereby considering candidates not recommended by the judicial nominating committee.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a county commission may not elect to fill a vacancy in the position of county judge by proceeding in accordance with N.D.C.C. section 44-02-04 after the judicial nominating committee, at the commission's request, has submitted nominees to the commission pursuant to N.D.C.C. section 27-26-03.

II.

It is my further opinion that a county commission, acting under N.D.C.C. section 27-26-04(1)(b), and finding the second list submitted unacceptable, may not proceed to appoint pursuant to N.D.C.C. section 44-02-04 thereby considering candidates not recommended by the judicial nominating committee.

- ANALYSES -

I.

There are two procedures which may be implemented by a board of county commissioners to fill a vacancy in the office of county judge. N.D.C.C. section 27-07.1-03 provides as follows:

27-07.1-03. VACANCIES. Any vacancy in the office of county judge shall be filled by the board of county commissioners pursuant to chapter 27-26, unless the board, by resolution, determines to fill the vacancy in accordance with section 44-02-04.

One procedure to fill a vacancy in the office of county judge is to

proceed under the authority of N.D.C.C. section 44-02-04. This statute gives the board of county commissioners the general authority to fill a vacancy in any county office including that of county judge. However, the authority to fill a vacancy in the office of county judge pursuant to N.D.C.C. section 44-02-04 may only be exercised upon the passage of a resolution to that effect by the board of county commissioners. N.D.C.C. section 27-07.1-03.

The only other procedure to fill a vacancy in the office county judge is to proceed under the authority N.D.C.C. chapter 27-26. Within sixty days after the receipt of written notice from a county commission that a vacancy in the office of judge of the county exists, the judicial nominating committee shall submit to the commission a list of not fewer than two nor more than seven nominees for appointment. N.D.C.C. section 27-26-03. Within thirty days of the receipt of the list of nominees, the county commission shall do any of the following (emphasis supplied):

- a. Fill the vacancy by appointment from the list of nominees submitted by the committee. The appointment shall continue only until the next general election when the office shall be filled by election for the remainder of the term.
- b. Return the list of nominees and direct the committee to reconvene.
- c. Call a special election to fill the vacancy for the remainder of the term. If a special election is called within sixty days of the time of the next general election, the special election shall be held at the same time as the general election.

According to N.D.C.C. section 27-26-04, after the judicial nominating committee has submitted nominees to the county commission for its review, the county commission is limited to three options. The power of the county commission to fill the vacancy pursuant to N.D.C.C. section 44-02-04 is not one of the options. Therefore, the board of county commissioners may not appoint an individual to fill the vacancy in the office of county judge pursuant to N.D.C.C. section 44-02-04 after receipt of the list of nominees from the judicial nominating committee.

II.

It is clear from a reading of N.D.C.C. section 27-26-04 that once the judicial nominating committee has submitted a list of nominees to the county commission for its review, the county commission is limited to three options. In the event that the county commission finds the original list of nominees unacceptable and does not fill the vacancy from the list submitted, the county commission may exercise one of two remaining options. They may return the list of nominees to the committee and direct it to reconvene or they may call for a special election to fill the vacancy. In the event that the county commission finds the second list submitted unacceptable, the county commission is still limited to the two options listed above. There is no limitation on the number of times a county commission may return the list of nominees, direct the committee to reconvene, and

have the committee submit a new list of nominees. However, regardless of the number of times the county commission requests the judicial nominating committee to reconvene, the county commission is still precluded from appointing an individual to fill the vacancy in the office of county judge pursuant to N.D.C.C. section 44-02-04.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. section 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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