

OPINION
61-52

July 11, 1961 (OPINION)

COUNTIES

RE: County Officers - Official Census

This is in reply to your letter in which you ask for an opinion on the following situation:

In the event the office of the County Judge becomes vacant by the resignation of the incumbent official will the Board of County Commissioners of Kidder County be authorized to fill the vacancy by appointment or will the office merge with that of the Register of Deeds? According to the last official census the population of Kidder County is less than six thousand.

On April 22, 1960, this office in an opinion discussed the provisions of section 11-1002 of the North Dakota Revised Code of 1943, together with the constitutional provisions of section 173. This opinion, after reviewing the authority on the subject, concluded that the office of county judge is to be filled by an election in accordance with the population as determined and existing at the time of the election.

The office of county judge was filled by an election in November, 1960. At the time of the election the official federal census of 1960 had not yet been completed, nor the results thereof published.

The opinion then concluded that until the results of the 1960 census were officially determined and released, the 1950 census would be used in determining whether or not the office of register of deeds would be combined with that of the county judge in instances where the population of the county is less than six thousand. At that time we took notice of section 1-0147 which provides that:

The term 'population' shall mean the number of inhabitants as determined by the last preceding state or federal census."

Subsequent thereto we dealt with another related question. On October 13, 1960, in an opinion addressed to Harold Anderson it was concluded that in the absence of any other showing, the federal census as taken for the year 1960 would become official on December 1, 1960, the date when such report is by law required to be made to the President of the United States.

The election in November was on the basis of the 1950 census. From other sources we learn that the population of Kidder County was above six thousand. Consequently the election held in November of 1960 was for the purpose of filling the offices of county judge, register of deeds, and clerk of the district court in addition to other offices which are not material to the question here, for a period of two years.

In the case of Watkins v. Venable, 39 S.E. 147, the court held that election to an office.

. . . is determined by the last general census preceding the election, and, when elected, they hold their offices until the end of the term, without regard to any changes that may take place in the population of the county during their term of office. . . ."

A somewhat similar result was reached in *State ex rel Graybill v. Whitmore*, 9 N.W. 93, and *State ex rel Newman v. Stauffer*, 8 N.W. 432. From this we must conclude that the county judge was elected in November of 1960 to serve a two-year term, beginning January, 1961.

Thus, if the present judge were to resign, such office would become vacant as provided for in section 44-02-01 of the North Dakota Century Code and may be filled by the county commissioners as provided for in section 44-02-04 of the North Dakota Century Code.

The appointment by the county commissioners would be for the unexpired term for which the present county judge was elected. The appointment ordinarily would be until the appointee's successor is elected and qualified, but this apparently has no application in the instant matter for the reason that the population of Kidder County is now less than six thousand, which would combine the offices of county judge with the register of deeds in the next election (1962).

We would like to make this observation, that in the 1960 election the electors of Kidder County did not elect a register of deeds who was also to serve as county judge but elected separate persons to fill the two offices.

It is, therefore, our opinion that the offices of county judge and register of deeds would not merge at this time. It is our further opinion that the county commissioners are authorized to appoint some competent person to fill the vacancy should the present county judge resign from office.

LESLIE R. BURGUM
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