

**N.D.A.G. Letter to Wild (Feb. 2, 1987)**

February 2, 1987

Mr. Steven J. Wild  
Bowman County State's Attorney  
P. O. Box 260  
Bowman, ND 58623

Dear Mr. Wild:

Thank you for your letter of December 23, 1986, concerning the authority of a board of county commissioners to determine the qualifications of a person who has been elected to a county office.

After reading your letter and learning of the additional facts presented to one of my staff attorneys, it would appear that someone has been elected to the office of Slope County State's Attorney and has entered upon the duties of such office within the time fixed by law. However, some persons, including members of the board of county commissioners, have apparently questioned the qualifications of the elected state's attorney to hold that office. The question presented is whether the board of county commissioners may determine whether an elected county official meets the qualifications needed to assume the office. If the board determines that the person elected to the office does not possess the required qualifications to hold that office, the question is then whether the board may then declare the office vacant.

An argument may be made that the board of county commissioner's authority to fill vacancies in county offices (N.D.C.C. § 44-02-04) coupled with the occurrence of a vacancy where an officeholder fails to qualify as provided by law (N.D.C.C. § 44-02-01(6)) implies a power within the board to act as a quasi-judicial body in determining whether an elected officeholder qualifies for that office. In those situations where the undisputed facts show that a vacancy does exist (e.g. due to a death, resignation, or failure to discharge the duties of the office), I see no reason why a board may not consider the office vacant and proceed to fill that vacancy without an intervening court order declaring the vacancy.

However, where there are disputed facts as to the eligibility of an elected office holder to assume that office, such a dispute must be resolved by the courts as opposed to the board of county commissioners. I am unaware of any authority provided to the board of county commissioners to issue findings of fact and conclusions of law in response to disputed facts as to a person's qualifications to assume the office to which the person was elected. Instead, it would be the duty and province of the court to determine those disputed questions of fact, as to one's eligibility to be assume an office. Dietz v. City of Medora, 333 N.W.2d 702 (N.D. 1983). Any county resident, including the board of county commissioners, may initiate such an action contesting the qualifications of an office holder.

In summary, where facts are in dispute and are not clear as to whether an office holder is able to qualify for his office and to assume his responsibilities, such disputes may not be resolved by the board of county commissioners. Instead, such questions of fact can only be resolved through an appropriate legal action.

Sincerely,

Nicholas J. Spaeth

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