

**VOLUME NO.36****Opinion No. 85**

**COUNTY COMMISSIONERS — Appointments — Acting County Attorneys COUNTY ATTORNEYS — Suspension — Appointment of Replacement Sections 94-7-401 and 16-1126 Revised Codes of Montana 1947.**

**HELD: The board of county commissioners is authorized and empowered to appoint an acting county attorney to replace, for the period of the suspension, a county attorney who has been suspended pursuant to section 94-7-401(4).**

June 8, 1976

Mr. John W. Moreland, Chairman  
Rosebud County Board of Commissioners  
Forsyth, Montana 59327

Dear Mr. Moreland:

You have requested by opinion on the following question:

What procedure must be followed in replacing a county attorney who has been suspended from office pursuant to section 94-7-401(4) Revised Codes of Montana, 1947?

Section 94-7-401(4) provides that a county attorney who has been charged with Official Misconduct may be suspended from office without pay pending final judgment. It further provides that, if acquitted, the county attorney shall be reinstated; or, if convicted, he shall permanently forfeit the office. Neither section 94-7-401 nor any other current statute expressly sets forth a procedure for filling the office during a suspension.

Section 16-1126 authorizes and empowers the board of county commissioners to employ and designate an "Acting County Attorney" whenever a "vacancy" occurs in the office of county attorney. But suspension from office pending removal proceedings does not constitute a "vacancy" as defined in the Code at section 59-602.

Nevertheless, Corpus Juris Secundum states that:

. . . power to fill vacancies in office has been held to authorize the appointment of an attorney to fill a temporary vacancy caused by the

absence of the prosecuting attorney, notwithstanding the constitution makes the office of prosecuting attorney an elective one. 27 C.J.S., District and Prosecuting Attorneys, §3.

Corpus Juris Secundum cites the following cases for the above-quoted proposition: **Clay County v. McGregor**, 171 Ind. 634, 87 N.E. 1 (1908); **Keithler v. State**, 18 Miss. 192.

Prior to the enactment of section 94-7-401, Chapter 50 of Title 94 provided for the removal of officers. Although that Chapter did not provide for suspension while the charge was pending, it did provide for suspension pending appeal. Section 94-5514 provided in pertinent part as follows:

...but if the appeal be from a judgment of removal, the defendant is suspended from his office pending such appeal, during which time the office must be filled as in the case of vacancy.

This I consider to be evidence that the legislature intended the power to fill a vacancy to include the power to fill the office during a period of suspension.

On the basis on the authority cited above, I am of the opinion that the board of county commissioner's authority and power to appoint an acting county attorney to fill a vacancy also authorizes and empowers the board of county commissioners to appoint an acting county attorney to fill the office during the period of suspension. The procedure set forth in Section 16-1126 should be followed in appointing the acting county attorney and the appointee should be compensated as provided in that section.

**THEREFORE, IT IS MY OPINION:**

The board of county commissioners is authorized and empowered to appoint an acting county attorney to replace, for the period of the suspension, a county attorney who has been suspended pursuant to Section 94-7-401(4).

Very truly yours,  
**ROBERT L. WOODAHL**  
Attorney General