

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 125

COUNTY ATTORNEYS - Appointment of county attorney, procedure, eligibility;
COUNTY GOVERNMENT - Appointment of county attorney, procedure, eligibility;
COUNTY OFFICERS AND EMPLOYEES - Appointment of county attorney, procedure, eligibility;
PUBLIC OFFICERS - Appointment of county attorney, procedure, eligibility;
RESIDENCE - Change of;
MONTANA CODE ANNOTATED - Sections 7-4-2201, 7-4-2206, 7-4-2701, 7-4-2702, 13-1-111;
MONTANA CONSTITUTION - Article IV, sections 2, 4;
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 22 (1979).

HELD: 1. If no licensed attorney in Musselshell County wishes to be appointed county attorney, the board of county commissioners should proceed to fill the vacancy under section 7-4-2702, MCA, as though there were no licensed attorneys in the county.

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2. If one or more licensed attorneys are residents of the county and wish to be appointed, but the county commissioners do not want to appoint one of them, the county commissioners may recruit and appoint an out-of-county attorney only if the attorney will be a county resident and meet other eligibility requirements by the time of appointment.

23 November 1988

Richard E. Walker, Chairman
Musselshell County Commissioners
Musselshell County Courthouse
Roundup MT 59072

Dear Mr. Walker:

You have requested my opinion on the following questions:

1. What is the procedure for filling a vacancy in the position of county attorney if no licensed attorneys in the county wish to be appointed?
2. What if more than one resident licensed attorney wishes to be appointed?
3. If one licensed attorney is a resident of the county and wishes to be appointed, but the county commissioners do not want to appoint him, may they appoint an out-of-county attorney who is willing to move into the county?

You have informed me that the Musselshell County Attorney has resigned effective November 10, 1988. I also understand Musselshell County has a population of less than 30,000 people. Therefore, the qualifications for county attorneys in certain counties provided in section 7-4-2701, do not apply to a county attorney serving Musselshell County.

There are, however, several provisions which do affect a licensed attorney's eligibility to be appointed Musselshell County Attorney. The office of county attorney is a public office. § 13-1-101(15), MCA. Article IV, section 4 of the Montana Constitution provides that any qualified elector is eligible to hold

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public office, subject to additional qualifications provided by the Legislature. Pursuant to Article IV, section 2 of the Montana Constitution and section 13-1-111, MCA, a qualified elector must be: registered to vote as required by law, at least 18 years of age, a resident of the state of Montana and of the county in which he offers to vote for at least 30 days, and a citizen of the United States. A felon may not be an elector while he is serving his sentence in a penal institution, nor may a person adjudicated to be of unsound mind unless he has been restored to capacity as provided by law. Mont. Const. Art. IV. § 2; § 13-1-111(2), (3), MCA.

Section 7-4-2201, MCA, which sets forth general qualifications for county office, restates certain qualifications required of any elector and adds that no person is eligible to hold a county office who at the time of his election is not "an elector of the county in which the duties of the office are to be exercised or for which he is elected." Section 7-4-2206, MCA, permits the county commissioners to appoint a person to fill any vacancy in a county office, except that of a county commissioner. However, it makes no mention of any requirement that the appointee meet the qualification requirement of elected county officers set forth in section 7-4-2201, MCA, i.e., that an appointed county officer be an elector of the county in which the duties of the office are to be exercised. See also § 7-4-2203, MCA (specifically applying to "elected or appointed"). I therefore conclude that the person appointed to be county attorney must be a qualified elector of this state, but he need not be an elector of the county where he is to serve prior to appointment. Cf. 38 Op. Att'y Gen. No. 22 at 76 (1979) (issue of whether appointed county attorney must be qualified elector of county at time of appointment discussed but not resolved).

The specific statutory provision concerning filling a vacancy in the office of county attorney, § 7-4-2702, MCA, provides:

- (1) Whenever a vacancy in the office of county attorney shall arise in any county and there is no licensed attorney residing in said county who is eligible to be appointed to fill said vacancy, the board of county commissioners is authorized and has the power to employ special counsel from without the county, who shall be designated and officially known as the "acting county attorney" and who during said employment shall be vested with

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all the powers and shall perform all the duties of the county attorney, including the filing of all complaints, informations, and/or other proceedings for and in which the county or state may be a party and the prosecution and defense of the same to the same extent and with the same force and effect as if he were the regular qualified county attorney. Said attorney shall be paid a monthly compensation not to exceed the monthly salary of the county attorney. Whenever any such attorney is employed, the county clerk of said county shall certify to the attorney general the name of such acting county attorney and the fact of his employment.

(2) Whenever any licensed attorney shall establish residence in said county and become eligible to hold the office of county attorney, it shall be the duty of the board to appoint such attorney to fill said vacancy, and the employment of said special attorney shall thereupon cease.

Thus, a licensed attorney who is a resident of Musselshell County and a qualified elector as set forth in Article IV, section 2 of the Montana Constitution and section 13-1-111, MCA, is eligible to be appointed county attorney.

In answer to your first question, if none of the eligible licensed attorneys residing in the county wish to be appointed, they cannot be forced to serve. In that case, the board of county commissioners should proceed under section 7-4-2702, MCA, as though there are no licensed attorneys in the county.

Your second and third questions concern a choice to be made by the board of county commissioners as to which eligible attorney to appoint. The power to appoint to office carries with it discretion in the exercise of the power, and a valid appointment requires a choice by the appointing power of the person appointed. Horvath v. Mayor of City of Anaconda, 112 Mont. 266, 273, 116 P.2d 874, 878 (1941). The statutes provide no specific procedure for choosing which applicant to appoint; therefore, the board must provide a fair method of evaluating the eligible applicants before making a choice.

If there are eligible licensed attorneys residing in the county, the board may choose to appoint one of them. The issue is more complicated in a situation where the

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board of county commissioners does not wish to appoint any of the interested licensed attorneys residing in the county, but would rather recruit an out-of-county attorney who is willing to reside in Musselshell County. In my opinion, the board must appoint an eligible licensed attorney residing in the county unless an out-of-county attorney whom the board prefers to appoint will be able to satisfy the residency and eligibility requirements by the time of his appointment. In a similar situation in 38 Op. Att'y Gen. No. 22 at 76 (1979), I noted that the attorney under consideration had declared his intention to reside on a permanent basis in the appointing county and was actively seeking a permanent residence in the appointing county. He was also closing out his personal and business offices in the other county while simultaneously establishing a new residence in the appointing county. I held that those actions demonstrated a change in residence and an intent to permanently reside in the appointing county. If a licensed attorney under consideration becomes a resident of Musselshell County by the date of appointment, he will be eligible for appointment. If not, an eligible licensed attorney residing in the county must be appointed. § 7-4-2702, MCA.

THEREFORE, IT IS MY OPINION:

1. If no licensed attorney in Musselshell County wishes to be appointed county attorney, the board of county commissioners should proceed to fill the vacancy under section 7-4-2702, MCA, as though there were no licensed attorneys in the county.
2. If one or more licensed attorneys are residents of the county and wish to be appointed, but the county commissioners do not want to appoint one of them, the county commissioners may recruit and appoint an out-of-county attorney only if the attorney will be a county resident and meet other eligibility requirements by the time of appointment.

Very truly yours,

MIKE GREELY
Attorney General