

N.D.A.G. Letter to Sinner (Jan. 21, 1991)

January 21, 1991

Honorable George A. Sinner
Governor
State Capitol
Bismarck, ND 58505

Dear Governor Sinner:

Thank you for your January 9, 1991, letter concerning the legality of a North Dakota board or commission applying for a commercial credit card for the payment of travel, lodging, and meal expenses while on public business.

N.D.C.C. § 44-08-03 provides:

No elective or appointive officer, employee, representative, or agent of this state, or of any of its subdivisions, agencies, bureaus, boards, or commissions, shall willfully make claim upon, or willfully receive, any public funds for traveling expenses, while engaged upon public business, in an amount in excess of that allowed by law for such travel. . . ."

To carry into effect the basic requirement of N.D.C.C. § 44-08-03, the Legislative Assembly has enacted N.D.C.C. §§ 44-08-04, 44-08-04.2, 44-08-04.4, and 44-08-05.1. These sections provide a mechanism for the making of claims by public officials and employees for travel expenses, the limitations on those claims, and the approval thereof. N.D.C.C. § 44-08-04 deals with reimbursement for travel expenses on a quarter basis, and requires approval of the claim before payment. That section further provides that the payment of travel expenses is an "allowance" at certain specified rates. These quarterly rates are expressed in terms of dollar amounts which may not be exceeded and which also have certain hours of travel within which the officer or employee must be in travel status in order to be entitled to reimbursement.

N.D.C.C. § 44-08-04 further provides that claims for lodging expenses require a lodging receipt to qualify for payment. That section also allows the Office of Management and Budget to disapprove any claim for reimbursement it determines to be in error, unlawful, or not within the limits of legislative appropriations.

Apparently for the purpose of avoiding substantial outlays by public officers or employees, the Legislature has more recently adopted procedures permitting the receipt of travel advances or the prepayment of certain travel expenses by state officers and employees. Travel advances are permitted under N.D.C.C. § 44-08-04.2 if the employee is planned to be in travel status for more than five days per month, and the funds advanced may not exceed 80% of the estimated expenses for that travel period. The Legislature has also

permitted the prepayment of travel expenses, including airline tickets and registration fees, if those expenses must be incurred more than five weeks in advance of the actual traveling by the officer or employee. N.D.C.C. § 44-08-04.4.

N.D.C.C. § 44-08-05.1 provides for the system of vouchering and approval of travel expenses and the requirement for public officers entitled to approve those expenses to ascertain before making that approval that the expenditure for travel was lawful and for an official purpose, and that the travel actually occurred and the sums being claimed are actually due the individual seeking reimbursement.

Against this legislative background we must consider that our Supreme Court has stated that it is well-settled that public officials have only such authority as is expressly given them by the constitution and statutes together with those powers and duties which are necessarily implied from the express grant of authority. American Federation of State, County, and Municipal Employees v. Olson, 338 N.W.2d 97, 100 (N.D. 1983). The AFSCME case dealt with the authority of the state highway commissioner to collectively bargain with state employees, and determined that the highway commissioner had no such authority. The court in AFSCME noted that if it had implied such authority that it would be without the benefit of the guidelines and safeguards that had been expressed in another statute specifically authorizing other employers to collectively bargain.

From the specific statutes enacted by our Legislative Assembly as noted above, read in light of the proscriptions of the AFSCME case, it seems apparent that the use of a commercial credit card by public officials to pay for travel expenses would circumvent the legislative requirements for travel expense reimbursement.

The use of a commercial credit card would make the state liable for costs incurred by the employee before the limitations and review and approval procedures contemplated by the Legislative Assembly could be undertaken. Although it might be said that review was still possible, it does not appear to be within the intent of the Legislature that the State of North Dakota be placed in the position of obtaining reimbursement from its employees for incurring unauthorized expenses, but is rather to be in the position of paying, after the fact, for the lawful expenses incurred by employees who are traveling to conduct state business. The use of a commercial credit card would make travel reimbursement something other than the "allowance" contemplated by N.D.C.C. § 44-08-04 and would avoid the approval process contemplated by that section and by N.D.C.C. § 44-08-05.1. Furthermore, N.D.C.C. §§ 44-08-04.2 and 44-08-04.4 have been enacted with an apparent purpose of avoiding excessive expenditures by officers and employees which cannot be reimbursed within a reasonable time under the usual procedures. Finally, N.D.C.C. § 44-08-05.1(2) provides that the public officer authorized to approve vouchers for travel expense is to determine that the travel actually occurred and that the sums claimed for travel are actually due the individual seeking reimbursement. Given this legislative background, it is apparent that if the authority to use a commercial credit card for travel expense purposes was implied, it would be an implication that would be without the benefit of the guidelines and safeguards provided by N.D.C.C. ch. 44-08, contrary to the holding in the AFSCME case. It is therefore my opinion that under the present

statutory scheme state boards or commissions do not possess the legal authority for applying for a commercial credit card for use in paying travel, lodging, and meal expenses.

Sincerely,

Nicholas J. Spaeth

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