

N.D.A.G. Letter to Hagen (April 1, 1992)

April 1, 1992

Honorable Craig Hagen
Commissioner of Labor
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Commissioner Hagen:

Thank you for your February 13, 1992, letter concerning whether North Dakota's minimum wage and work condition rules issued under North Dakota Century Code (N.D.C.C.) ch. 34-06 apply to political subdivisions in North Dakota. You further question whether 1974 N.D. Op. Att'y Gen. 391 is still valid.

N.D.C.C. ch. 34-06 allows the Commissioner of Labor to issue minimum wage and work condition orders adopted as rules. Those rules apply to occupations performed by employees of certain employers. N.D.C.C. § 34-06-01(3) defines an employer as follows:

"Employer" includes any individual, partnership, association, corporation, or any person or group of persons acting in the interest of an employer in relation to an employee.

In 1991 N.D. Op. Att'y Gen. 85, I opined that minimum wage and work condition rules under N.D.C.C. ch. 34-06 do not apply to state employees.

My opinion was based upon the fact that the Legislature had enacted a minimum wage and various other statutes indicating an intent to control state employee wages and work conditions. Further, statutes are deemed not to divest preexisting rights of the sovereign without express words to that effect. Neither of these factors relate to political subdivisions.

In 1974 N.D. Op. Att'y Gen. 391, it was determined that minimum wage and work condition orders did apply to employees of school districts. School districts are political subdivisions of the state of North Dakota.

1974 N.D. Op. Att'y Gen. 391 was based on the determination that a school district is a "person or group of persons acting in the interest of an employer in relation to an employee."

The word "person", except when used by way of contrast, includes not only a human being, but a body politic or corporate.

N.D.C.C. § 1-01-28. A body politic is a word used to describe a political subdivision such as a city, county, or school district. Black's Law Dictionary, 5th ed. (1979).

It is well recognized that the state is a sovereign entity and exercises different characteristics and powers than its political subdivisions. In Kitto v. Minot Park District, 224 N.W.2d 795 (N.D. 1974), it was noted that it was consistent with our constitutional framework to recognize that there are characteristics of sovereignty attached to the operation of state government but not to the various other independent governmental bodies.

The attributes which are generally regarded as distinctive of a political subdivision are that it exists for the purpose of discharging some function of local government, that it has a prescribed area, and that it possesses authority for subordinate self-government through officers selected by it. Thus, the distinction between a political subdivision and an agency of the state, even though the former may perform a limited function of the state, is readily apparent.

Kucera v. City of Wheeling, 170 S.E.2d 217, 220 (W. Va. 1969).

Therefore, because political subdivisions have different attributes than the sovereign state of North Dakota, the criteria used in 1991 Op. Att'y Gen. 85 do not apply to political subdivisions. Furthermore, because political subdivisions fall within the definition of "employer" in N.D.C.C. §§ 34-06-01(3), they are not exempt from the minimum wage and work condition rules issued pursuant to N.D.C.C. ch. 34-06. Therefore, 1974 N.D. Op. Att'y Gen. 391 is still valid.

You should be cautioned that some cities and counties in North Dakota have adopted home rule charters under N.D.C.C. chs. 40-05.1 and 11-09.1, respectively. If a city or county has adopted a home rule charter which allows that entity to adopt an ordinance on subjects that are covered by the minimum wage and work condition rules, and the city or county has actually adopted an ordinance on that subject that does conflict with the minimum wage and work condition rules, the home rule ordinance supersedes the state law and rule on that subject. Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980).

Finally, you should note that the Fair Labor Standards Act applies to employees of political subdivisions of a state. 29 U.S.C.A. § 203(e)(2)(c) (1991).

I trust this opinion resolves your question.

Sincerely,

Nicholas J. Spaeth

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