

LETTER OPINION
93-L-261

September 10, 1993

John E. Greenwood
Stutsman County State's Attorney
Stutsman County Courthouse
511 2nd Avenue SE
Jamestown, ND 58401

Dear Mr. Greenwood:

Thank you for your August 12, 1993, letter requesting my opinion on the authority of county officials to hire and terminate employees and the effect of the two county manuals you provided on that authority. As you note in your letter, N.D.C.C. ? 11-10-11 grants authority to the county auditor, treasurer, sheriff, register of deeds, county judge, clerk of district court, and state's attorney to "appoint such deputies, clerks, and assistants, in accordance with the budget" N.D.C.C. ? 11-10-11. Although not specifically provided by that statute, this office has long held that implicit in the power to appoint or hire is the power to fire. See e.g., 1982 N.D. Op. Att'y Gen. 108 (since the sheriff has the authority to hire or appoint a deputy it follows that the sheriff has the authority to dismiss such deputy).

Of course, the authority to terminate a public employee may be constrained by constitutional due process considerations if the employee has a recognized property or liberty interest. See Letter from Attorney General Nicholas Spaeth to Wade Enget (Jan. 7, 1991). Although the general rule in North Dakota is that employment is "at will," N.D.C.C. ? 34-03-01, if a public employee is found to have a constitutionally protected interest in employment, such as a property interest, certain procedural due process protections would have to be utilized in connection with terminating such employee. *Hennum v. City of Medina*, 402 N.W.2d 327, 335 (N.D. 1987).

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) the U.S. Supreme Court noted the following:

Property interests, of course, are not created by the

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Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

In Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985), the Court further noted that if a property interest is found to exist the "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" before the termination takes place. Id. at 546. This must be followed by the opportunity for a full post-termination hearing. Id. at 546-548.

Whether the constitutional protections apply to the termination of a county employee depends on whether such a property interest exists.

It would be necessary to examine employment contracts, if any, and employee handbooks or manuals, together with any other relevant written employment policies or procedures utilized by the county. A determination would then have to be made as to whether such materials may create a property interest requiring procedural due process protections prior to termination of any such employee.

Some common areas where federal courts have routinely determined that a public employee has a property interest in continued employment are where such employment can only be terminated "for cause" or where such employment is for a term of years not yet run. E.g., Arnett v. Kennedy, 416 U.S. 134, 151-52 (1974) (where a federal employee can only be discharged for cause the employee had a property interest entitled to constitutional protection); Kennedy v. Robb, 547 F.2d 408, 411-413 (8th Cir. 1976) (where public employee can only be dismissed for cause employee had property interest entitling him to procedural due process); Drake v. Scott, 823 F.2d 239, 241-42 (8th Cir. 1987), cert. denied, 484 U.S. 965 (1987) (state employee may have property interest in contract for term of years not yet run based on state law.)

As the Supreme Court noted in Roth, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577.

Procedural requirements contained in an employer's policies and

procedures ordinarily do not transform a unilateral expectation into a constitutionally protected property interest. "A constitutionally protected interest has been created only if the procedural requirements are intended to be a 'significant substantive restriction' on the . . . decision making." Goodisman v. Lytle, 724 F.2d 818, 820 (9th Cir. 1984).

Policies and procedures in and of themselves may not be sufficient to create a property interest requiring procedural protections before termination of employment. The court in Brewer v. Parkman, 918 F.2d 1336, 1339 (8th Cir. 1990) noted that "[t]he existence of a grievance procedure does not itself create a property interest in continued employment. The grievance procedure must create an expectancy of continued employment, not merely an expectancy of review of termination." (Citations omitted). However, the court noted that

[i]n the instant case, unlike the situations we were presented with in Stow and Hogue, the Policies and Procedures sufficiently constrain the county's discretion in terminating an employee. Moreover, unlike the regulation involved in Drake, which merely stated that employment was contingent on satisfactory performance, Article VII, Section A, of the Policies and Procedures involved in the instant case states that 'the tenure of an employee with permanent status shall continue during good behavior and the satisfactory performance of his duties.' We construe that provision as creating an express agreement that county employees will not be terminated except for cause as listed in Section C of Article VII of the Policies and Procedures. Brewer had an expectation of continued employment as Deputy Sheriff and, therefore, a property interest protected by the fourteenth amendment. Due process requires that an employee who has a property interest in continued employment be given a hearing prior to his termination.

Id. at 1339-1340.

Consequently, any manual, handbook, or policies and procedures would have to be carefully reviewed in making a determination as to whether a county employee may have a constitutionally protected property interest in employment.

Even if a county's employee handbook or written policies do not create a constitutionally protected property interest, they may nonetheless be binding as a part of the relationship between the county and its employees. In Hammond v. North Dakota State Personnel Board, 345 N.W.2d 359, 361 (N.D. 1984), the court determined that state personnel policy provisions were binding as part of the employment relationship between the state agency and its

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employee since the agency "promulgated the Manual provisions as its personnel policy and procedure, [and] must be held accountable under those provisions in its employment relationship" with the employee.

You enclosed two documents with your letter, Stutsman County Non-Social Service Employee Policy Manual dated January 1, 1992, (Employee Policy Manual) and Policy and Procedures, dated March 1993 (Policy and Procedures Manual).

The Employee Policy Manual contains a number of disclaimers reciting that it is not a contract of employment and that county employment is at will. The Employee Policy Manual also contains an acknowledgement form signed by each employee also reciting that employment is at will and that the handbook is not a contract of employment. This employee acknowledgement form continues to be used and executed as a separate document.

The Policy and Procedures Manual contains no such disclaimers. Further, the Policy and Procedures Manual describes mandatory procedures when a county department head is considering discharge, suspension without pay, or disciplinary demotion. It sets out a pretermination procedure to be followed and utilizes a "cause" standard in making termination decisions. You asked what effect the two manuals have on the power of county officials to terminate employees.

It is evident that if the Employee Policy Manual was the only manual adopted by the county, county non-social services employees would most likely be considered by the courts to be at will employees, despite certain provisions in the policy manual weighing against such a conclusion, namely, those regarding the "introductory period." While an employee manual may appear to create a contract or other right, a clear and conspicuous disclaimer may defeat a claim to a contract and preserve the presumption of at will employment. See, e.g., Bailey v. Perkins Restaurants, Inc., 398 N.W.2d 120 (N.D. 1986); Bykonen v. United Hospital, 479 N.W.2d 140 (N.D. 1992).

The January 1, 1992, Employee Policy Manual contains several disclaimers. The problem arises because the county commission adopted the Policy and Procedures Manual in March 1993 which does not contain any disclaimers and which does contain mandatory procedures to be followed by county department heads in terminating employees for cause. The present situation is somewhat similar to that presented in the cases of Sadler v. Basin Electric Power Cooperative, 409 N.W.2d 87 (N.D. 1987) and Schmidt v. Ramsey County, 488 N.W.2d 411 (N.D. Ct. App. 1992). In Sadler, a series of employee handbooks were issued over the years which differed in respect to the grounds for terminating employees. As a result, the

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court noted that it was "unable to ascertain the parties' intentions from the employee handbooks alone." 409 N.W.2d at 89. Accordingly, there were unresolved questions about whether changes in the employee handbooks were intended to apply to existing employees as well as questions as to the meaning of a certain handbook term. The court determined that these were factual questions to be determined by the finder of fact. Id. Likewise, in Schmidt v. Ramsey County, the court noted apparent internal inconsistencies with the county's employment manual, and determined that the employee manual was ambiguous. Whether the employee had employment rights under the manual was a factual determination to be resolved by the finder of fact. 488 N.W.2d at 414-15.

Similarly, in the situation you present, I am unable to determine the intent of the parties. Whether county employees in this instance have contract or other rights under the Policy and Procedures Manual adopted in March 1993 is a question of fact upon which I cannot offer an opinion. Because the Policy and Procedures Manual mandates the use of certain specific pretermination procedures, ties termination decisions to a cause standard, and contains no disclaimer, a rational argument could be made that the provisions contained therein would, in fact, create employment rights. However, it is my understanding that Stutsman County has not repudiated the January 1, 1992, Employee Policy Manual and that the county continues to use the acknowledgement form which disclaims any employment contract between an employee and the county, and which recites the at will status of county employees. A patent ambiguity exists since "rational arguments can be made for different positions" about the meaning of the employment manuals. Schmidt v. Ramsey County, 488 N.W.2d at 414.

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I believe the most prudent course of action for the county would be to reconsider both manuals. A clear policy determination should be made as to whether the county intends to preserve the presumption of at will employment or to grant employees specific employment rights.

An employment or policy and procedure manual should then be drafted to clearly express the county's intent. In the absence of such a clarification, it ultimately would be up to a trier of fact to determine the intention of the parties and to resolve any ambiguities.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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