LETTER OPINION
93-L-333

November 16, 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 October 8, 1993, letter requesting my opinion on whether the Board of County Commissioners may adopt binding employment policies for all county employees, including those working under other elected county officials. The question has arisen in the context of the county commission's reconsideration of whether to adopt policies intended to provide at-will employment status for county employees or to adopt policies intended to offer some measure of job security.

Although certain elected county officials have the authority to appoint deputies, clerks, and assistants, the salaries of those employees, with certain exceptions, are set by resolution of the Board of County Commissioners and paid for by county funds. See N.D.C.C. ? 11-10-11. In Scofield v. Wilcox, 156 N.W. 918, 919 (N.D. 1916), the court determined that deputy sheriffs were not employees of the sheriff, but rather were public employees of the county or state since their salaries were fixed by law and since they were paid out of public funds and not by the sheriff.

Likewise, in the present situation, the salaries of deputies, clerks, and assistants of the county auditor, treasurer, sheriff, register of deeds, county judge, and state's attorney are fixed by resolution of the Board of County Commissioners and paid with public funds and not by the individual county officers. N.D.C.C. ? 11-10-11. Consequently, such persons are employees of the county and not of the individual elected county officers. See Scofield, 156 N.W. at 919.

Public employers may be bound by the terms of an employment manual

or policy which they hold out and under which the parties voluntarily operate. Hammond v. North Dakota StatePersonnel Board, 345 N.W.2d 359 (N.D. 1984). See also Schmidt v. Ramsey County, 488 N.W.2d 411, 413 (N.D. App. 1992) ("The employer must be held accountable under those policies in its employment relationships, and the provisions in the manual provide the standard by which an employee's termination must be reviewed."); and Conway v. Board of County Commissioners of Grand Forks County, 349 N.W.2d 398, 400 (N.D. 1984) ("It is undisputed that the 1979 resolution [to provide compensatory time to deputy sheriffs] is a valid action of the Board which is the result of contract negotiations between the Board and the county deputy sheriffs. As such, it constitutes a duly promulgated and binding element of the county's contractual employment relationship with Conway for which the Board must be held accountable.").

Thus, to the extent a Board of County Commissioners has promulgated an employment policy for county employees, it has "incurred a legal duty to honor that commitment as an integral part of its employment relationship" even for deputies, clerks, and assistants of elected county officials. Conway, 349 N.W.2d at 400.

Although, as you note in your letter, this office has consistently determined that the elected county officials mentioned in N.D.C.C. ? 11-10-11 have the authority to hire and fire deputies and assistants, these officials have never been determined to have an unfettered right to hire and fire. Even in 1982 N.D. Op. Att'y Gen. 108 to which you refer, Attorney General Robert O. Wefald opined that while a county sheriff could discharge a deputy without county commission approval, it would have to be for "just cause" and that "federal case law would apply."[1]

In a December 5, 1986, letter to Dunn County State's Attorney Joseph H. Kubik, while affirming the proposition that county officials listed in N.D.C.C. ? 11-10-11 have the authority to hire and fire deputies, former Attorney General Nicholas J. Spaeth also noted:

[1]As indicated in my letter of September 10, 1993, to you, a cause requirement for termination of employment would have to arise from some independent source such as a rule, understanding, law, or contractual provision contained in an employment manual or policy which would create a property right in continued employment. Hennum v. City of Medina, 402 N.W.2d 327 (N.D. 1987). Absent such source of constraint on the discretion of a public employer to discipline or terminate its employees, the general rule in North Dakota presumes employment at will. See N.D.C.C. ? 34-03-01.

"With respect to the dismissal of county officers, such action must occur in compliance with applicable county policies, state and federal employment discrimination laws, and case law addressing due process concerns in terminating public employment."

In a January 7, 1991, letter to Mountrail County State's Attorney Wade G. Enget, Attorney General Spaeth also opined that a county commission has the authority under N.D.C.C. ? 11-11-11 to supervise the conduct of county officers who may be terminating employees to ensure that such terminations are lawfully implemented.

Courts have also recognized that a county official who has the authority to hire and fire may not necessarily be the official responsible for establishing county employment policy. See e.g., Pembaur v. City of Cincinnati, 475 U.S. 469, 483 n.12 (1986).

In view of the foregoing, it is my opinion that deputies, clerks, and assistants of elected officials are county employees. It is my further opinion that the Board of County Commissioners has the authority to establish employment policies for all employees of the county, including deputies, clerks, and assistants appointed by other elected county officials such as the county auditor, treasurer, sheriff, register of deeds, county judge, and state's attorney. Consequently, a Board of County Commissioners, by establishing employment policies for all county employees, could, for example, impose a requirement that such employees may only be terminated for cause or offer other job protection features that would constrain, to some degree, the other county elected officials' discretion in discharging their deputies, clerks, and assistants.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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