

**FORMAL OPINION
2002-F-09**

DATE ISSUED: September 24, 2002

REQUESTED BY: Richard Riha, Burleigh County State's Attorney

QUESTIONS PRESENTED

I.

Whether contributions by the Burleigh County Commission to the Bismarck-Mandan Symphony Orchestra to aid in the cost of a Fourth of July celebration on the State Capitol grounds since 1997 were proper.

II.

If the donations made from 1997 through 2002 were improper, what is the remedy?

ATTORNEY GENERAL'S OPINIONS

I.

It is my opinion that a county without home rule authority may not donate money to a nonprofit organization in order to defray costs of a Fourth of July celebration.

II.

It is my opinion that a state's attorney has the discretion to recover any money paid without authority of law, under N.D.C.C. § 11-16-01(13), by any remedy deemed reasonable, including initiating an action against the individual county commissioners.

ANALYSES

I.

On July 1, 2002, the Burleigh County Commission donated \$5,000 to the Bismarck-Mandan Symphony Orchestra to defray the cost of the Symphony's annual Fourth of

July celebration located on the State Capitol grounds. According to the requestor, similar donations were made from 1997 through 2001.

The use of public funds is restricted by Article X, section 18 of the North Dakota Constitution, which provides:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor

The North Dakota Supreme Court has determined Article X, section 18 does not prohibit a state or political subdivision from loaning or giving its credit or making donations in connection with the state or political subdivisions' operation of any authorized industry, enterprise, or business. Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964). Rather, what it does prohibit is for the state or political subdivision to "otherwise" loan or give its credit or make donations. Id.

Article VII, section 2 of the North Dakota Constitution provides:

The legislative assembly shall provide by law for the establishment and the government of all political subdivisions. Each political subdivision shall have and exercise such powers as provided by law.

Thus, any authority for a county to make donations or to distribute money pursuant to an authorized industry, enterprise, or business, must be derived from a state law passed by the North Dakota Legislature. 2000 N.D. Op. Att'y Gen. L-153 (a county may not make a donation to the Devils Lake Improvement Association without specific statutory authority or a statute from which that authority can be necessarily implied); see also Letter from Attorney General Nicholas Spaeth to Charles Isakson (Sept. 29, 1992) (a political subdivision may not make a donation to a private local hospital without specific statutory authority or a statute from which that authority can be necessarily implied). Statutory authority is necessary because the North Dakota Supreme Court has never found Article X, section 18 of the North Dakota Constitution to be a self-executing grant of authority. See 2000 N.D. Op. Att'y Gen. F-19.

There are various state laws that authorize counties to provide money to associations or organizations for certain purposes. For example, a county is authorized to grant money to aid a county fair association. N.D.C.C. §4-02-26. A county may contract with a nonprofit corporation to establish or maintain programs for senior citizens. N.D.C.C. §11-11-58. A county may also expend funds to participate in an organization of counties. N.D.C.C. §11-11-14(15).

There is a statute that implies that cities and fair associations may have a public display of fireworks. See N.D.C.C. § 23-15-03. There are also statutes that authorize a city to expend funds for a centennial celebration and the state to expend funds for a bicentennial celebration. See N.D.C.C. §§ 40-05-21 and 54-11-01.1. However, I am unable to find a statute that would permit a county to make a donation to a nonprofit organization for the purpose of defraying the costs of a Fourth of July celebration.

The inclusion of fire safety in a motion regarding the celebration does not give the Burleigh County Commission the authority to make the donation. The authority for the donation must be derived from a state statute that specifically authorizes such a donation or from which donation could be necessarily implied. This conclusion is consistent with a major treatise on municipal corporations, which includes counties:

Without express authority, a municipal corporation may not appropriate the public revenue for celebrations, entertainments, sports and games, etc. Such power cannot be implied. It was held early that a town cannot appropriate money for a Fourth of July celebration; the approval of the court was withheld, notwithstanding it was supported by uniform practice and custom. The same rule has been followed in other states.

15 Eugene McQuillin, The Law of Municipal Corporations, § 39.22 (3d ed. rev. 1991 (footnotes omitted)).

In conclusion, there is no statutory authority that allows Burleigh County, a non-home rule county, to donate money to a nonprofit organization for a Fourth of July celebration.¹ Therefore, it is my opinion that the donations made from 1997 through 2002 violated Article X, section 18 of the North Dakota Constitution.

II.

A county state's attorney has the authority to seek recovery of the improperly donated money. State law provides that a county state's attorney shall:

[i]nstitute an action in the name of the county to recover any money paid upon the order of the board of county commissioners without authority of law as salary, fee, or for any other purpose

N.D.C.C. § 11-16-01(13). The North Dakota Supreme Court has stated that:

¹ This opinion does not address whether a county with home rule authority could make such a donation.

[A] state's attorney's exercise of discretion must consider the situation not only from the eyes of the complainant, but must also consider the requirement of probable cause and the reasonable probability of obtaining a conviction by a jury of citizens from the community.

Olsen v. Koppy, 593 N.W.2d 762, 767 (N.D. 1999) (citations omitted).

The Burleigh County State's Attorney had advised the Commission that, in his opinion, the donation would be improper unless it was made pursuant to an authorized industry, enterprise, or business of the county. In a letter to my office from the Commission's chairman, it was stated that the Commissioners thought they were following the advice of their attorney by passing resolutions making the Fourth of July an official celebration of the county, thereby making the donation pursuant to an authorized enterprise of the county. The minutes from the July 1, 2002 meeting indicate that this was the case, as the Commission made both a resolution and a motion in an attempt to make the Fourth of July an authorized enterprise of the county. As this opinion indicates, the enterprise needs to be authorized by state law, not by the county commission.

It does not appear that the Burleigh County Commissioners personally benefited from the donation. This factor may be considered by the state's attorney when determining whether or not an action should be instituted to recover the funds. If it is determined that an action should be instituted it would be reasonable to name in the action only those commissioners who voted for the donation.

EFFECT

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.²

Wayne Stenehjem
Attorney General

Assisted by: Mary Kae Kelsch
Assistant Attorney General

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² See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).