

N.D.A.G. Letter to Seaworth (Aug. 18, 1986)

August 18, 1986

Mr. Hugh P. Seaworth
Bismarck City Attorney
221 North Fifth Street
P.O. Box 5503
Bismarck, ND 58502

RE: City/County Contracting of Police Powers

Dear Mr. Seaworth:

Thank you for your letter dated July 17, 1986. You have advised this office that a formal opinion would not be necessary to respond to the questions presented in your letter to me.

You have inquired as to whether or not the adoption of N.D. Const. Art. VII, § 8, now authorizes the delegation of duties of a sheriff to a city's chief of police pursuant to a joint powers agreement when a county has not adopted an alternative form of government authorized by North Dakota state law.

You have referred to a July 18, 1978, letter by Attorney General Allen I. Olson which discussed a similar inquiry. That letter concluded that N.D. Const. Art. X, § 173, which specifically listed the sheriff as a constitutional officer of the county, did not permit the sheriff to be divested of any authority or duties pursuant to a joint powers agreement between a city and county.

With the adoption of N.D. Const. VII, § 8, on June 8, 1982, the sheriff, as well as other county officers, are not specifically named in that provision. N.D. Const. VII, § 8, provides:

Each county shall provide for law enforcement, administrative and fiscal services, recording and registration services, educational services, and any other governmental services or functions as may be provided by law. Any elective county office shall be for a term of four years.

Although N.D. Const. Art. X, § 173, is no longer in effect, the adoption of N.D. Const. Art. VII, § 8, does not provide authority to divest a sheriff of statutory-mandated duties and responsibilities by use of a joint powers agreement absent adoption of an alternative form of government by a county such as set forth in N.D.C.C. Ch. 11-09.

N.D.C.C. § 11-15-03 sets forth the duties of a sheriff which includes general law enforcement responsibilities. Absent the adoption of an alternative plan of government, a sheriff will continue to possess these duties and law enforcement authority.

The letter by Attorney General Olson dated July 18, 1978, also discussed additional problems concerning the assumption of county-wide law enforcement duties by a city police department pursuant to a joint powers agreement. As you know, a sheriff has county-wide peace officer authority. Such is not the case with city law enforcement officers. Unless a city police officer is in "hot pursuit," the city police officer can perform the duties and exercise the powers of peace officers only within the city limits and for a distance of one and one-half miles in all directions outside the city limits. N.D.C.C. § 40-20-07. Because of this limited jurisdictional authority, it would be necessary for city police officers to be deputized by the county sheriff to possess countywide law enforcement authority.

N.D.C.C. § 11-15-02 authorizes a sheriff to appoint special deputies. However, that section grants the sheriff the "sole power of appointing special deputies" and the sheriff may remove such special deputies at his pleasure. If the sheriff refused to appoint one or more city police officers as special deputies, such police officers would not possess authority to exercise their duties as a peace officer on a county-wide basis.

In addition, in 1982 N.D. Op. Att'y. Gen. 108, dated May 5, 1982, to Jay Brovold, Billings County State's Attorney, this office determined that a county sheriff has the authority to hire or discharge a deputy, for just cause, without the approval of the board of county commissioners and the board of county commissioners did not possess the power to refuse promotions and accompanying salary raises in the sheriff's department once those positions and salaries have been provided for in a departmental budget approved by such board. As you can see, the sheriff possesses considerable authority over his deputies and, especially, special deputies appointed by him.

Based upon the circumstances set forth in your letter, it is doubtful that the statutory-mandated duties and authority of a sheriff could be divested by a joint powers agreement between a city and county. Any exercise of peace officer functions beyond one and one-half miles of a city's limits by city police officers would require such police officers to be appointed as sheriff's deputies. Based upon such appointment, such city police officers would be under the supervision and control of the sheriff. This supervision and control would be necessary since such special deputies would be compensated from county funds and the county or sheriff presumably could be held liable for the actions of such deputies or special deputies.

Although difficulties exist when a joint powers agreement would require county-wide law enforcement functions to be performed by a city police department, I do not see the same problems should a city contract with a county for law enforcement services. N.D.C.C. § 54-40-08(1) authorizes a political subdivision to enter into an agreement to carry out any function or duty which may be authorized by law or assigned to a city. In addition, N.D. Const. VII, § 10, permits a political subdivision to transfer to the county in which it is located any of its powers or functions as provided by law. That constitutional provision provides:

Agreements, including those for cooperative or joint administration of any powers or functions, may be made by any political subdivision with any other political subdivision, with the state, or with the United States, unless otherwise provided by law or home rule charter. A political subdivision may by mutual agreement transfer to the county in which it is located any of its powers or functions as provided by law or home rule charter, and may in like manner revoke the transfer.

Should a joint powers agreement be entered into between the city and county, I am in full agreement with Attorney General Olson in his July 18, 1978, letter that this agreement must be carefully drafted to meet all contingencies concerning the powers, duties, and corresponding liability of the contracting political subdivisions.

I trust that this letter has adequately responded to your inquiry.

Sincerely,

Nicholas J. Spaeth

dfm
Enclosure