

OPINION
78-25

December 22, 1978 (OPINION)

Mr. A. S. Benson
Bottineau County State's Attorney
Benson and Schnell
Benson Building
616 Main Street
Bottineau, ND 58318

Dear Mr. Benson:

This is in response to your letter of December 1, 1978 wherein you ask our opinion on certain matters concerning the salary of the Bottineau County Superintendent of Schools. You state that in 1968 Bottineau County entered into a written agreement with Rolette County providing for a common county superintendent of schools, pursuant to North Dakota Century Code Section 15-22-25. You set forth the following facts and questions in your letter:

* * *

The population of Bottineau County is app. 9,500, and Rolette County as app. 12,000 people. For some years, the County Superintendent has been receiving about the same salary and benefits as other County officials. The salary has been set by the Board of County Commissioners in both Counties, and has not been fixed by joining the population of both Counties. The reason for this has been that the the position has been a part-time job of each County, see Chapter 11-10-10 of the N.D.C.C., Subsection IV: "Any County official performing duties on less than a full-time basis, may be paid a reduced salary, set by the Board of County Commissioners."

* * *

I would like to request an opinion to the following questions:

- (1) Do the Board of County Commissioners have a discretionary right to set the salary of the County Superintendent, who serves two Counties, without taking into consideration the combined population of both Counties, where the duties are on a part-time basis in each County. If the salary may be set without combing the total population, must that salary meet the higher salary of the County officials in either County, or may the salary be the lower salary of the two Counties. The reason I asked this is that Rolette County pays app. \$12,600.00 in salaries and Bottineau County app. \$12,300.00, but Bottineau County furnishes fringe benefits, which are not considered part of the salary, but considered in the setting of salaries, all within the law.
- (2) The second question is the one that may mileage be paid for, which is not actually traveled (see Section 11-10-15 and 11-10-16 N.D.C.C.), taking into consideration there

could have been confusion, as the plan originally called for mileage from Bottineau to Rolla. Our present Superintendent lives in Bottineau, which is the "home base", so to speak, and my feeling is that he should be paid for mileage when he opens the office here and on those days that he travels to Rolla. Perhaps I am misconstruing or erroneously evaluating, but it seems to me that it could not be considered mileage back and forth to work, where there is a joint plan or a "home base".

Along with your letter you enclose a copy of the "Joint Plan of Rolette and Bottineau Counties for Common Superintendent of Schools" and a copy of the travel voucher used in connection with reimbursement of the county superintendent for travel expenses.

We are enclosing for your use a copy of a previous letter from our office on this subject to Mr. John B. Hart, Rolette County State's Attorney, dated April 9, 1968, apparently written in response to questions concerning the original joint plan between the two counties. In that letter we concluded that Sections 11-10-10 and 15-22-25 must be construed together and that the limitations or formulas set forth in Section 11-10-10 must be complied with in any event. We also stated on page 3 of that letter that the maximum amount which may be paid for the position of county superintendent was that dollar figure representing the combined total salaries for each county when figured separately, and that the minimum that could be offered was that amount resulting from a combining of the two counties populations. While the formula contained in Section 11-10-10(2) has been amended since 1968, we still believe the approach taken in our 1968 letter to be correct and appropriate under this section. We incidentally draw your attention to the fact that as we stated in 1968, and also under the current law, calculating any salary to be paid by each county separately and then combining those two salaries results not in a minimum total salary to be paid to the superintendent, as you seem to imply in your letter, but in the maximum amount payable under the law. We also believe that a consistent construction of Section 15-22-25 and the limitation upon payment for part-time duties contained in 11-10-10(4) would require the position to be paid as less than full-time if each county's salary is to be calculated independently and then added together. Contrarily, if the county populations are to be combined to determine the salary, we believe a proper construction then requires the position to be considered full-time. In no event, however, should the two sections of law be read to provide for the payment of a full-time position by each county entering into an agreement pursuant to Section 15-22-25.

In regard to your second question concerning payment for mileage not actually traveled, you draw our attention to Sections 11-10-15 and 11-10-16. While these sections may be relevant, we believe that this question is more properly determined by reference to Section 15-22-05, as that section is more particular in its application and would thus control a statute of general application such as Section 11-10-15. N.D.C.C. 1-02-07.

Section 15-22-05 provides:

15-22-05. MILEAGE AND TRAVEL EXPENSE - AMOUNT - HOW PAID. A county superintendent of schools, and his duly appointed deputy, shall receive ten cents per mile for travel by motor vehicle for trips necessarily made within his county in the performance of his duty. For any other travel authorized by law, he shall receive for each mile actually and necessarily traveled in the performance of his duties, the following amounts: when travel is by motor vehicle, the sum of ten cents per mile; when travel is by rail or other common carrier, the amount actually and necessarily expended therefor. Before any allowance for mileage or travel expenses may be paid by the county, the county superintendent or deputy, as the case may be, shall file with the county auditor an itemized statement verified by his affidavit showing the mileage traveled, the manner of travel, the day or days upon which the traveling was done, and the purpose or purposes and destinations of such travel. The statement and affidavit shall be submitted to the board of county commissioners, and the claim shall be approved by the board before it shall be allowed or paid.

This section clearly provides for payment only for those miles "actually and necessarily traveled". There is then, no provision for payment for miles not actually traveled. We also note that both criminal and civil penalties attach for any person either making a claim for mileage not actually traveled or for paying such a claim. N.D.C.C. 44-08-03, 44-08-05, and 44-08-05.1. While you have not directly raised any question in your letter concerning this matter, you also do discuss your feelings concerning the payment of mileage to a superintendent who lives in Bottineau and travels to work and "opens the office" also in Bottineau. Again construing the applicable sections together, we do not believe that mileage proposed to be paid to a superintendent for mileage incurred in the opening of an office located within the same city in which such superintendent resides, is to be considered the type of "trip" contemplated by the Legislative Assembly under Section 15-22-05. Were the case otherwise, we see no reason why other county officials living and working in Bottineau should not be paid for their mileage incurred in driving to work as well. We do believe that mileage to Rolette, on the other hand, for the purposes of conducting official business of the superintendent's office, is the type of "any other travel authorized by law" for which mileage may be paid under Section 15-22-05.

While, as we say, the results reached above are a consistent interpretation of a reading of the relevant law, the intentions of the Legislative Assembly in this regard are by no means clear. The manner in which Sections 15-22-25, 11-10-10 and 15-22-05 are to be applied is therefor appropriate for clarification by the Legislative Assembly.

We trust that the foregoing discussion adequately answers your inquiry.

Sincerely,

ALLEN I. OLSON

Attorney General