

STATE OF NORTH DAKOTA
ATTORNEY GENERAL'S OPINION 2000-F-18

Date Issued: December 15, 2000

Requested by: Representative Eliot Glassheim

- QUESTIONS PRESENTED -

I.

Whether a home rule city that has enacted ordinances providing for a civil service system must follow the requirements of N.D.C.C. ch. 40-44 when it removes employees or positions from the protection of the civil service system.

II.

Whether the Grand Forks home rule charter contains the necessary language to authorize the Grand Forks City Council to remove employees or positions from the protection of the civil service system.

III.

Whether the Grand Forks City Council may eliminate the city's civil service system by its own action.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a home rule city may enact its own civil service system by ordinance that differs from that provided by N.D.C.C. ch. 40-44, and is therefore not required to follow the mandates of N.D.C.C. ch. 40-44.

II.

Since Grand Forks specifically included the power to provide for its own employment matters in its home rule charter, it is my opinion the charter contains the necessary language to enable the Grand Forks City Council to remove employees or positions from the protection of the civil service system.

III.

Subject to the voters' power of referendum and initiative, it is my opinion the Grand Forks City Council has the power to eliminate the city's civil service system by its own action.

- ANALYSES -

I.

N.D.C.C. ch. 40-44 contains the provisions for civil service systems in cities. That chapter contains a number of requirements for the adoption, maintenance, and potential abandonment of a civil service system. N.D.C.C. ch. 40-44.

While a city generally must comply with the mandates of state statute, home rule cities are allowed a certain amount of discretion in exercising powers in a manner different from those specifically provided by statute. N.D.C.C. § 40-05.1-05. See also, e.g., 1998 N.D. Op. Att'y Gen. L-117 (Aug. 25 to Robert Peterson) (a home rule city may have broader investment discretion than a non-home rule city).

A home rule political subdivision may exercise powers not allowed under state law if: (1) the Legislature granted it that power; (2) the political subdivision included that power in its home rule charter; (3) the political subdivision properly implemented the power through an ordinance; and (4) the power concerns only local, rather than statewide, matters.

1998 N.D. Op. Att'y Gen. L-117, L-118 (Aug. 25 to Robert Peterson). The four requirements indicated above that must be met before a home rule city may exercise powers not allowed under state law will be discussed in the following paragraphs.

The first requirement is resolved by N.D.C.C. § 40-05.1-06(4). That section states that a home rule city has the power to "provide for city officers, agencies, and employees, their selection, terms, powers, duties, qualifications, and compensation." N.D.C.C. § 40-05.1-06(4). Thus, the Legislature has granted a home rule city the unqualified power to make decisions regarding its employees.

The second and third requirements would be resolved by reviewing the home rule city's home rule charter and ordinances. The city's home rule charter must include the power provided in N.D.C.C. § 40-05.1-06(4). If that power is provided in the charter, the city may by ordinance further define how that power is utilized, including the implementation of a civil service system. If the power is provided in the charter and is implemented through an ordinance, the city will have satisfied the second and third requirements.

The final requirement, that the power concerns only local, rather than statewide, matters, is the important issue for purposes of this

opinion. This office has not had the occasion to specifically address whether a home rule city may enact a civil service system that differs from that provided by N.D.C.C. ch. 40-44. However, this office has repeatedly opined that if a city has adopted the appropriate language in its charter and has implemented the power through an appropriate ordinance, the city's ordinances related to the city's employees supersede state law. Letter from Attorney General Robert Wefald to Jay Fiedler (June 3, 1983); Letter from Attorney General Nicholas Spaeth to Craig Hagen (Aug. 3, 1992); 1995 N.D. Op. Att'y Gen. L-79 (March 24 to Dan Wogsland). The North Dakota Supreme Court has also stated that a home rule city has the authority to make its own employment decisions. Firefighters Local 642 v. City of Fargo, 321 N.W.2d 473, 475 (N.D. 1982) (citing N.D.C.C. § 40-05.1-06(4)).

Thus, this office and the North Dakota Supreme Court have held that issues relating to a city's employees concern local, rather than statewide, matters. Thus, it is my opinion that a home rule city may enact its own civil service system that differs from that provided by N.D.C.C. ch. 40-44, and is therefore not required to follow the mandates of N.D.C.C. ch. 40-44.

A city's discretion in this regard is not completely unlimited, however. If a public employee has a protected property or liberty interest in his or her employment, a political subdivision may not deprive the employee of that interest without due process of law. See Rudnick v. City of Jamestown, 463 N.W.2d 632, 637 (N.D. 1990); 1993 N.D. Op. Att'y Gen. L-333 (Nov. 16 to John Greenwood). Thus, while a city may create its own civil service system, including how positions or employees are removed from the protection of that system, the city may not remove employees or positions without due process of law if the affected employees have protected property or liberty interests in that employment.

II.

Article III, section d of the Grand Forks home rule charter states that Grand Forks has the power "[t]o provide for city officers, agencies and employees, their selection, terms, powers, qualifications, and compensation." That provision is substantially similar to the powers allowed by N.D.C.C. § 40-05.1-06(4) relating to authority over a city's officers, agencies and employees. Since Grand Forks specifically included that power in its home rule charter, it is my opinion the charter contains the necessary language to enable the Grand Forks City Council to remove employees or positions from the protection of the civil service system. However, as stated in section I of this opinion, that power is tempered by the necessity of complying with due process considerations if the affected employee has a protected property or liberty interest in the person's employment.

III.

Article VII of the Grand Forks home rule charter states as follows:

The [City Council] shall have plenary power to enact and make all proper and necessary ordinances, resolutions and orders to carry out and give effect to the express and implied powers granted in this charter to the end that a complete, harmonious and effective municipal government may be initiated, installed, operated and maintained in the city, and thereby protect and safeguard the rights, interests, safety, morality, health and welfare of the city and its inhabitants.

The only qualification to this power is in Article IV of the Grand Forks home rule charter which gives the Grand Forks voters the power of referendum and initiative.

The Grand Forks civil service system is provided for in chapter VI of the Grand Forks City Code. Since it is provided for in the City Code, which is Grand Forks' collection of ordinances enacted pursuant to its home rule authority, the City Council has the authority to alter its provisions. Accordingly, subject to the voters' power of referendum and initiative, it is my opinion the Grand Forks City Council has the power to eliminate the city's civil service system by its own action. Again, as discussed above, this power may be limited by due process considerations.

- 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.

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