LETTER OPINION
2002-L-22

April 10, 2002

Mr. Garylle B. Stewart
Fargo City Attorney
PO Box 1897
Fargo, ND 58107-1897

Dear Mr. Stewart:

Thank you for your opinion request regarding whether North Dakota or Minnesota law applies to the operation of a joint dispatch center in Moorhead, Minnesota, under a joint powers agreement. Fargo, North Dakota; Moorhead, Minnesota; Cass County, North Dakota; and Clay County, Minnesota are parties to the joint powers agreement. The agreement establishes a joint board to operate the joint dispatch center.

You specifically ask whether the joint board may decide which state's law applies or whether that decision should be made by the political subdivisions. There is a particular concern about which state's employment law would apply to personnel of the joint board. There is also concern whether the law of the state where the center is located applies and what would happen if the center relocates to another state or is split between sites in both states.

Which state's law would apply to the joint dispatch center would depend on the facts involved in a specific dispute. The following describes the analysis the North Dakota Supreme Court uses to determine, in a given conflict of laws situation, what law applies. I believe the analysis demonstrates why I am unable to give you a definite answer.

The North Dakota Supreme Court has adopted "the significant contacts" test to determine which state's law applies in a certain dispute.[1] Plante v. Columbia Paints, 494 N.W.2d 140, 141 (N.D. 1992); Issendorf v. Olson, 194 N.W.2d 750 (N.D. 1972). In applying the significant contacts approach, courts must carefully consider each new fact situation. Daley v. American States Preferred Ins. Co., 587 N.W.2d 159, 164 (N.D. 1998). While

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[1] Minnesota has also adopted the significant contacts test for choice-of-law analysis. Nodak Mutual Ins. Co. v. American Family Mutual Ins. Co., 604 N.W.2d 91, 94 (Minn. 2000).

prior opinions may be helpful to a court's deliberations, the court is obligated to be true to the method rather than seek factual analogies between cases and import wholesale the choice of law analysis contained in them. Id. The rationale underlying the significant contacts test was explained by the North Dakota Supreme Court as follows:

> Justice, fairness and the best practical result may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties[,] has the greatest concern with the specific issue raised in the litigation. The merit of such a rule is that it gives to the place having the most interest in the problem paramount control over the legal issues arising out of a particular factual context and thereby allows the forum to apply the policy of the jurisdiction most intimately concerned with the outcome of [the] particular litigation.

Daley 587 N.W.2d at 161 (quoting Babcock v. Jackson, 191 N.E. 2d 279, 283 (N.Y. 1963)). "[T]he significant contacts test authorizes a court 'to look at all of the significant factors which might logically influence it in deciding which law to apply, and to choose the law of the state that has the greatest contacts with the case.'" Daley, 587 N.W.2d at 161 (quoting Gregory E. Smith, Choice of Law in the United States, 38 Hastings L.J. 1041, 1047 (1987)). The significant contacts test requires a two-pronged analysis. Id. at 162. Once the court determines all of the relevant contacts which might influence the decision of which law to apply, the court applies five choice - influencing factors to determine which jurisdiction has the more significant interest with the issues in the case. Id. The five choice-influencing considerations are : (1) predictability of results or legal consequences, (2) maintaining interstate order which involves respect for another state's law, (3) simplification of the judicial task relating to application of one state's law or another's, (4) advancement of the forum's governmental interests in adjudicating the factual dispute, and (5) application of the better rule of law, that is, the state's law that makes better socio-economic sense. Daley at 159-166.

The "significant contacts" analysis applies in cases where the parties have not contractually agreed to apply one state's law. As a general rule, parties to a contract may agree to be bound by the law of a particular state. American Hardware Mut. Ins. Co. v. Dairyland Ins. Co., 304 N.W.2d 687, 689 fn.1 (N.D. 1981). While there are no North Dakota Supreme Court cases finding exceptions to this general rule, the Restatement (Second) of Conflict of Laws § 187 (1971) provides that courts will apply the law chosen by the parties unless doing so would be contrary to a fundamental policy of the state which would otherwise be the state of the applicable law in the absence of an effective choice of law by the parties, provided that that state has a materially greater interest than the chosen state in the determination of a particular issue. See, for example, Forney Industries, Inc. v. Andre, 246 F.Supp. 333, 334 (D.N.D. 1965) in which the United States District Court for the district of North Dakota declined to apply Colorado law as agreed in an employment contract concerning a noncompete provision because of North Dakota's

public policy against such provisions. See also, State ex rel. Meierhenry v. Spiegel, Inc., 277 N.W.2d 298, 299 (S.D. 1979), app. dismissed, Spiegel, Inc. v. South Dakota, 444 U.S. 804 (1979) (a contract provision to apply the law of a particular state is subject to limitation and invalidation by the overriding public policy of the forum state). As these exceptions indicate, a determination as to whether a contract provision choosing which state's law will apply is enforceable will depend on the particular situation at hand and will not foreclose a significant contacts choice of law analysis.

Choice of law analysis to determine which state's law applies in a given situation does not usually occur until there is a dispute. Generally, an entity doing business in a state is governed by the laws of that state. See N.D.C.C. § 54-01-18. However, in your situation, with political subdivisions in two states operating a dispatch center in one state, determining the applicable law in the event of a dispute will be uncertain even if the four contracting parties agree among themselves what law they wish to apply.

You stated in your letter that the joint board intends to hire the dispatch center employees. This office has previously recognized the limitations joint entities established in a joint powers agreement have, especially regarding employment issues. Not long after N.D.C.C. ch. 54-40.3 became effective, the Attorney General issued an opinion concerning its use regarding school districts. In that opinion, the Attorney General stated:

> Even though several school districts may agree to jointly operate some of their powers, and create a separate entity to carry out those powers, the joint powers agreement cannot alter the required legal relationships between the member districts and entities that are not a part of the agreement. . . .
>
> Ultimately, a joint powers agreement under N.D.C.C. ch. 54-40.3 does not allow for the identity of the member school districts to be lost.

1994 N.D. Op. Att'y Gen. F-08 at p. F-37.

Although N.D.C.C. § 54-40.3-01(1) authorizes creation of an entity to administer the terms of the agreement, it does not make the administrative entity thus created a political subdivision itself or any other unit of government. The authority and status of a separate entity created by a political subdivision entering into a joint powers agreement was the subject of an Attorney General's opinion under law existing prior to N.D.C.C. ch. 54-40.3. In a 1992 opinion dealing with a joint powers agreement between a city park district and a state agency, the Attorney General stated:

> Although a park district or a state agency may form an entity to manage the joint use of a building under N.D.C.C. § 54-40-08(2), I advise the parties to

> the Agreement to forego creation of the Fitness Center entity. I make this suggestion because of the questionable status of employees of such an entity. Fitness Center employees would not be eligible for bonding under the state bonding fund. N.D.C.C. §§ 26.1-21-01(4), (5); 26.1-21-02. With respect to liability claims they would not be entitled to a defense by the state, N.D.C.C. § 26.1-21-10.1, or to a defense and indemnification as an employee of a political subdivision. N.D.C.C. §§ 32-12.1-02(3), (5); 32-12.1-04. Fitness Center employees would not qualify for pension and group insurance benefits available to park district and Developmental Center employees. N.D.C.C. §§ 40-49-21, 54-52-01(7), 54-42-02, 54-52-02.1, 54-52.1-01(4), 54-52.1-02, and 54-52.1-03.1. I suggest the Agreement be revised so that the Fitness Center functions are performed by employees of the Park District.

Letter from Attorney General Nicholas Spaeth to DeNae Kautzmann (July 13, 1992).

Although some of the statutory citations in the 1992 letter have changed or are not applicable to the parties to the joint powers agreement at issue here, the fact that the administrative entity created by the agreement is not itself a unit of local government creates the same problems concerning retirement, health insurance, bonding, worker's compensation, and unemployment compensation. From an employment standpoint, there may also be substantial differences between the labor relations statutes of the two states that could cause controversy between current employees in either state if the joint board decides to apply one state's laws to all employees.

Consequently, I advise the parties to the joint powers agreement in question to amend their agreement to provide that the joint board is a supervising entity only, not an employer, and that the employees of the four participating entities continue to be employees of those entities and only supervised by the joint board. If staffing changes are needed, the joint board could notify the participating entities which in turn could agree on which of the participating entities should undertake those changes.

Sincerely,

Wayne Stenehjem
Attorney General

tam/vkk
cc: Kenneth E. Raschke, Jr., Assistant Attorney General, Minnesota