

**N.D.A.G. Letter to Gion (June 28, 2000)**

June 28, 2000

Mr. James D. Gion  
Assistant Grant County State's Attorney  
PO Box 196  
Carson, ND 58529-0196

Dear Mr. Gion:

Thank you for your May 5, 2000, letter asking who has the authority to settle litigation initially brought by former Grant County State's Attorney, Cynthia Feland.

You state the following in your letter:

I am an assistant state's attorney, under appointment from Ron Weikum who is the duly elected state's attorney for Grant County. Mr. Weikum's predecessor in office, Cynthia Feland, brought an action on behalf of Grant County against two (2) sitting county commissioners and two (2) former county commissioners. The action was based upon an allegation of the commissioners' making payments to themselves in excess of the salary cap. Because of a potential conflict of interest, Marilyn Foss was appointed as a special state's attorney for purposes of prosecuting this matter on behalf of Grant County.

We are now at a juncture in this matter where an offer has been made for settlement. The question that has arisen is to whom does Ms. Foss turn as her client. It appears that ethical considerations require that an attorney communicate any offer to their client and accept input as to the propriety of that settlement.

State law provides that the county state's attorney is the public prosecutor and 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). This action was commenced by the former Grant County State's Attorney to recover money the county commissioners allegedly paid themselves beyond the salary cap. In such a circumstance, it certainly would seem inappropriate for the county state's attorney to consult with the county commissioners in determining whether an offer of settlement is in the best interests of the county. The more appropriate act is for the county state's attorney to decide whether acceptance of the settlement offer is in the best interests of the county residents.

Marilyn Foss was appointed as a special state's attorney for purposes of prosecuting this matter on behalf of Grant County. She may have been appointed under any of the following statutes: N.D.C.C. §§ 11-16-02 (the state's attorney may appoint assistant state's attorneys and the state's attorney is responsible for all acts of such assistant and the work of an assistant state's attorney must be assigned by the state's attorney), 11-16-07 ("[t]he judge of the district court may appoint special counsel to assist the state's attorney in any important case"), or 11-16-08 ("[t]he board of county commissioners, in cases of public importance and with the advice and consent of the state's attorney, may employ additional counsel to assist the state's attorney"). Regardless of whether Marilyn Foss was appointed under N.D.C.C. §§ 11-16-02, 11-16-07 or 11-16-08, the law indicates that she would be an assistant to the county state's attorney. Thus, any decision by Marilyn Foss on a matter regarding this litigation must meet with the approval of Ron Weikum, the Grant County State's Attorney.

Because this litigation was instituted by the Grant County State's Attorney to recover money allegedly unlawfully paid by the county commissioner's to themselves, it is my opinion that the Grant County Board of Commissioners should not be consulted in determining whether the offer of settlement should be accepted. Because Marilyn Foss is an assistant to the Grant County State's Attorney, Ron Weikum, it is my opinion that whether to accept on behalf of the county any offer of settlement in this litigation rests with the Grant County State's Attorney, Ron Weikum.

Sincerely,

Heidi Heitkamp  
Attorney General

las/vkk