

**LETTER OPINION
2004-L-36**

May 26, 2004

The Honorable Francis J. Wald
State Representative
PO Box 926
Dickinson, ND 58602-0926

Dear Representative Wald:

Thank you for your letter asking whether the Southwest District Health Unit properly used public funds to purchase advertising relating to secondhand tobacco smoke while an initiated measure to restrict smoking in public places in Dickinson will be voted on at the June 8, 2004, election. For the reasons discussed below, it is my opinion that the expenditure of public funds by the Southwest District Health Unit concerning the health effects of secondhand tobacco smoke is authorized by law and is not an impermissible attempt to influence the pending election.

ANALYSIS

A district health unit is a political subdivision of the state. See N.D.A.G. 94-L-258. "Political subdivisions are creatures of state law and possess only those powers that are expressly granted by statute or that may be necessarily inferred from those expressly granted." Id. (Citations omitted.)

The advertisements placed by the Southwest District Health Unit are principally funded through two sources. One source of funding is the community health grant program which the Legislature created in 2001 for the purpose of reducing tobacco-related diseases. N.D.C.C. § 23-38-01(1), 2001 N.D. Sess. Laws ch. 250. Community programs are required to include plans to conduct educational programs at local levels and to promote government and voluntary health policies, specifically including clean indoor air. N.D.C.C. § 23-38-01. That section provides in part:

1. The state department of health shall establish a community health grant program. The primary purpose of the program is to prevent or reduce tobacco usage in the state by strengthening community-based public health programs and by providing

assistance to public health units and communities throughout the state. The program must build on and may not duplicate existing programs. Grants awarded under the program must be awarded on a noncompetitive basis using the per capita formula provided for in this subsection. The program must, to the extent funding is available, follow guidelines concerning tobacco prevention programs recommended by the centers for disease control and prevention. . . .

2. The state department of health, in establishing the community health grant program, shall build upon the state's existing tobacco control grant program activities and shall follow the centers for disease control and prevention's best practices for comprehensive tobacco control programs. The department shall encourage applicants . . . to include in their plans:
 - a. Community programs that:
 - (1) Engage youth in the development and implementation of interventions;
 - (2) Develop partnerships with local organizations;
 - (3) Conduct educational programs at local levels;
 - (4) Promote government and voluntary health policies, such as clean indoor air, youth access, and treatment coverage;
 - (5) Restrict minors' access to tobacco; and
 - (6) Deter smoking in public places.

(Emphasis added.)

Further, this law requires the State Department of Health to promote media advocacy and the need for smoke-free public buildings, and to involve local government in the administration and management of the program. N.D.C.C. § 23-38-02(3)(b), (c) , (e) & (f). Section 23-38-02, N.D.C.C., provides in part:

3. The state department of health, with the [community health grant program advisory] committee's involvement, shall provide assistance to:

- a. Evaluate programs;
- b. Promote media advocacy by working with statewide media associations;
- c. Implement smoke-free policies by involving antitobacco groups in promoting the need for smoke-free public buildings;
- d. Work to reduce minors' access to tobacco in all communities;
- e. Facilitate the coordination of program components with the local level;
- f. Involve state agencies, law enforcement, and local government in the administration and management of the program; and
- g. Assist the state in screening and implementing the grants.

(Emphasis added.)

The second source of funding is the federal Centers for Disease Control and Prevention, which likewise provides grant funds for public health education including tobacco related illnesses, tobacco cessation, and clean indoor air. Dept. of Health & Human Services, Centers for Disease Control and Prevention, Chronic Disease Prevention and Health Promotion Programs, Program Announcement 03022. See also U.S. HHS, CDC, Best Practices for Comprehensive Tobacco Control Programs (August 1999). Thus, the Southwest District Health Unit has specific legal authority to place the advertisements.

You point out that the timing of this particular campaign coincides with an initiated ordinance in the city of Dickinson calling for the prohibition of smoking in public places that will appear on the June 8, 2004, ballot. See Proposed Dickinson Ordinance No. 1286. While the North Dakota Supreme Court has not passed on this issue, courts in other jurisdictions have held that political subdivisions may provide the public with neutral factual information but may not, without express legislative authority, expend public funds for the purpose of influencing the result of an election issue. N.D.A.G. 2002-L-61. This office previously determined that a newspaper insert paid for by a county commission "went beyond a fair presentation of facts," and instead advocated the commission's position relative to a bond issue. Id.

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While this office does not generally attempt to resolve factual questions, in this instance you have supplied copies of the advertisements run by the Southwest District Health Unit in the Dickinson Press newspaper. The advertisements generally contain information and promote positions about the health effects of secondhand smoke that are consistent with scientific findings. One advertisement addresses secondhand smoke at the workplace. However, these ads do not address the election or mention proposed Dickinson Ordinance No. 1286. A member of my staff has determined that similar advertising campaigns are being run in other public health units or districts across the state, which indicates that the purpose of the advertising is not to influence an election only being held in Dickinson. Further, the Legislature has specifically authorized the funds to be used to educate and promote health policies, including clean indoor air. Accordingly, these advertisements, which are activities undertaken in the performance of a legal duty imposed by the Legislature cannot fairly be interpreted as an illegal attempt to influence the outcome of an election.

Sincerely,

Wayne Stenehjem
Attorney General

eee/vkk

cc: Dr. Terry Dwelle, State Health Officer
Tom Henning, Stark County State's Attorney

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 question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).