

**LETTER OPINION
2005-L-36**

October 21, 2005

Mr. Richard J. Riha
Burleigh County State's Attorney
514 E Thayer Ave
Bismarck, ND 58501

Dear Mr. Riha:

Thank you for asking my opinion on three issues involving correctional facility administration. It is my opinion the board of county commissioners has the authority to decide whether to join with other counties or cities to form a regional correctional facility. It is my further opinion that Burleigh County cannot appoint someone other than the Burleigh County Sheriff as the Burleigh County jail administrator. It is my further opinion that the salary negotiated between the parties for all of the sheriff's duties may not be reduced during the sheriff's term of office.

ANALYSIS

Section 11-10-20, N.D.C.C., requires a board of county commissioners to "provide a courtroom and jail." In lieu of establishing its own correctional facility, the governing body of a county is authorized to contract for correctional facility services with another city or county or to jointly establish and maintain a correctional facility with other counties or cities.¹ A county may also contract with a privately operated correctional facility for correctional facility services.² Thus, to answer one of your questions, it is my opinion the board of county commissioners, not the sheriff, has the authority to make the decision on whether to join with other counties or cities to form a regional correctional facility.

The individual "serving as the chief executive officer of a correctional facility" is called that facility's "administrator."³ Section 12-44.1-01(1), N.D.C.C., lists "the sheriff, chief of police, administrator, superintendent, director, or other individual" as potential "administrators" of correctional facilities. This office has previously opined that this provision, along with

¹ N.D.C.C. § 12-44.1-02.

² Id.

³ N.D.C.C. § 12-44.1-01(1).

N.D.C.C. §§ 12-44.1-04 and 11-10-11, “clearly indicates that the Board of County Commissioners has the authority to appoint someone other than the sheriff to the position of jail administrator.”⁴

You question whether that opinion remains accurate, and whether the county may appoint someone other than the sheriff to act as the county’s jail administrator. At the time that opinion was issued, N.D.C.C. § 12-44.1-04 stated that the “governing body of each jail shall” specify the jail administrator.⁵ But that authority has been removed, and “governing body” was changed to “administrator” in 1997.⁶ As a result of that change, the statute now requires the following: “The administrator of each correctional facility shall . . . specify an administrator to whom all correctional facility staff are responsible.”⁷ What the Legislative Assembly’s intent was in changing the statute to require the administrator, rather than the governing body, to “specify an administrator” is unclear, and the legislative history does not provide any guidance. Whatever that intent, the Legislative Assembly did change the statute, and did so in a manner that no longer appears to support the conclusion in N.D.A.G. Letter to Odegard (May 9, 1983).

Section 11-10-11, N.D.C.C., has also changed. At the time the opinion was issued, it stated that the board of county commissioners had the responsibility to determine the number of sheriff deputies.⁸ That responsibility is no longer in N.D.C.C. § 11-10-11, and would therefore rest with the county sheriff. Accordingly, pertinent portions of two of the three statutes relied on in that opinion have changed.

Another problem with relying on that opinion is that it did not acknowledge the fact that N.D.C.C. § 11-15-03(6) specifically requires a county sheriff to “[t]ake charge of and keep the county jail and the prisoners therein.”⁹ The failure to analyze that specific statutory duty in an opinion addressing that very duty renders the opinion’s conclusion questionable. It is therefore necessary to consider the statutory requirement in N.D.C.C. § 11-15-03(6) and the current form of the statutes cited to support the opinion in N.D.A.G. Letter to Odegard (May 9, 1983).

As stated above, neither N.D.C.C. § 12-44.1-04 nor N.D.C.C. § 11-10-11 provide support any longer for the conclusion that boards of county commissioners have the authority to appoint someone other than the sheriff as the administrator of a county correctional facility. But the definition of “administrator” in N.D.C.C. § 12-44.1-01(1) is still similar to the

⁴ N.D.A.G. Letter to Odegard (May 9, 1983).

⁵ N.D.A.G. Letter to Odegard (May 9, 1983).

⁶ 1997 N.D. Sess. Laws ch. 113, § 4.

⁷ N.D.C.C. § 12-44.1-04(3).

⁸ N.D.A.G. Letter to Odegard (May 9, 1983).

⁹ See Id.

definition of “jail administrator” cited in N.D.A.G. Letter to Odegard (May 9, 1983). The current definition is as follows: “‘Administrator’ means the sheriff, chief of police, administrator, superintendent, director, or other individual serving as the chief executive officer of a correctional facility.”¹⁰ As quoted in N.D.A.G. Letter to Odegard (May 9, 1983), “jail administrator” at that time meant “the sheriff, chief of police, administrator, superintendent, director, or other individual serving as the chief executive officer of a jail, regional corrections center, or juvenile detention center.”

Although the statutes are similar, the question remains whether the current definition of “administrator” is sufficient to justify the conclusion that a board of county commissioners has the authority to appoint someone other than the sheriff as administrator of a county correctional facility given a sheriff’s statutory duty to “[t]ake charge of and keep the county jail and the prisoners therein.”¹¹ That duty has remained the same since at least 1943.¹² In order to conclude that the definition of “administrator” removes that duty and reassigns it to the board of county commissioners, we would have to conclude that the Legislative Assembly, by enacting N.D.C.C. § 12-44.1-01(1), impliedly repealed the sheriff’s duty from N.D.C.C. § 11-15-03(6). Implied repeals are not favored, however.¹³ The conflict between the two provisions must be irreconcilable to overcome the presumption against implied repeals.¹⁴

The conflict between the N.D.C.C. § 11-15-03(6) sheriff’s duty and the definition of “administrator” in N.D.C.C. § 12-44.1-01(1) is not irreconcilable. By merely reciting the titles of individuals who may be administrators, N.D.C.C. § 12-44.1-01(1) does not give any governing body the authority to unilaterally determine who to appoint as administrator. That is especially true now that N.D.C.C. § 12-44.1-04 no longer states that the governing body specifies who the administrator is. Instead, the definition of “administrator” in N.D.C.C. § 12-44.1-01(1) merely lists the titles of persons who may be in charge of any kind of correctional facility, including a jail, regional corrections center, or juvenile detention center. Because N.D.C.C. § 11-15-03(6) requires a sheriff to “[t]ake charge of and keep the county jail,” the administrator of a county jail for purposes of chapter 12-44.1 would be the sheriff. Accordingly, it is my opinion that Burleigh County cannot appoint someone other than the sheriff as the Burleigh County jail administrator. To the extent the N.D.A.G. Letter to Odegard (May 9, 1983) suggests otherwise, it is hereby overruled.

¹⁰ N.D.C.C. § 12-44.1-01(1).

¹¹ N.D.C.C. § 11-15-03(6).

¹² See N.D.R.C. § 11-1503(6) (1943).

¹³ Grand Forks v. Bd. of County Commissioners of Grand Forks, 284 N.W.2d 420, 422 (N.D. 1979).

¹⁴ Id.

In the materials you submitted to this office, you indicated that, in 1995, Burleigh County had separated the county jail administrator duty from the sheriff's duties pursuant to N.D.C.C. ch. 11-10.2, which allows a county to designate an office appointive rather than elective. Chapter 11-10.2 no longer applies to the office of sheriff.¹⁵ The Legislative Assembly made that change in 1999¹⁶ after the citizens of North Dakota amended article VII, section 8 of the North Dakota Constitution to require that the office of sheriff be elective.¹⁷ Although the office of sheriff was not exempted from N.D.C.C. ch. 11-10.2 in 1995, in a discussion with one of my staff you indicated that Burleigh County did not follow the procedures in N.D.C.C. ch. 11-10.1 to properly reassign that duty. Accordingly, chapter 11-10.2 is inapposite to Burleigh County's situation.

Even after its ineffective attempt to reassign the sheriff's jail administrator duties, however, Burleigh County continued to "appoint" the sheriff as its jail administrator. As a result of that "appointment," Burleigh County paid additional compensation to the sheriff, over and above the sheriff's salary, to handle the jail administrator duties. You question whether it was permissible to "pay additional compensation to the sheriff for duties that the sheriff already is required by statute to perform."

Section 11-10-10(5) provides the minimum salary that can be paid to a sheriff. That same section provides:

The board of county commissioners of any county may, by resolution, increase the salary of any full-time county official provided in this section, if, in the judgment of such board, by reason of duties performed, the official merits the increase. The salary of a county official may not be reduced during the official's term of office.¹⁸

Although N.D.C.C. § 11-10-14 states that the "salaries fixed by this chapter [11-10] shall be full compensation for all county officials," there is no fixed salary or maximum salary provided in chapter 11-10 for county sheriffs. Thus, this situation is unlike that in N.D.A.G. 98-F-17, where the county commissioners were paid in excess of the statutory maximum compensation.

The amount paid for the sheriff's performance of all of the sheriff's duties, including jail administrator, was the amount negotiated between the county and the sheriff. That amount does not violate any statutory guidelines. Accordingly, it is my opinion that the

¹⁵ N.D.C.C. § 11-10.2-01(3).

¹⁶ 1999 N.D. Sess. Laws ch. 98, § 14.

¹⁷ 1999 N.D. Sess. Laws ch. 565, § 1.

¹⁸ N.D.C.C. § 11-10-10(3).

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salary negotiated between the parties for all of the sheriff's duties was acceptable, and that the current salary of the sheriff may not be reduced during the sheriff's term of office.

Sincerely,

Wayne Stenehjem
Attorney General

sam/vkk

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).