

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-25

Date Issued: August 11, 1998

Requested by: Cynthia N. Feland, Grant County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a board of county commissioners has authority to change or otherwise modify the minutes of a meeting of the board as prepared by the county auditor if the modifications do not contain corrections but rather are in the form of deletions or changes.

II.

Whether a remedy exists if a board of county commissioners refuses to approve minutes.

III.

Whether the county auditor may publish minutes in the official newspaper of the county if the minutes are not approved by the board of county commissioners.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a board of county commissioners does not have authority to change or otherwise modify the minutes of a meeting of the board as prepared by the county auditor if the modifications do not correct errors of inaccurate or incomplete information.

II.

It is my opinion that mandamus may issue if a board of county commissioners fails to perform the mandatory act of reading the minutes of a previous meeting, making appropriate corrections, and approving the minutes.

III.

It is my opinion that publication of minutes not approved by the board of county commissioners does not constitute compliance with N.D.C.C. § 11-11-37.

- ANALYSES -

I.

North Dakota law provides that it is the duty of the county auditor to keep an accurate record of the official proceedings of the board of county commissioners. N.D.C.C. § 11-13-02(1). This duty and power expressly granted to the county auditor is the duty and power of the elected county auditor, not the duty and power of the board of county commissioners. See 1996 N.D. Op. Att'y Gen. 1, 2. Although N.D.C.C. § 11-11-11(2) provides the board of county commissioners shall supervise the conduct of the county auditor, the board of county commissioners may not usurp the duties and powers given to the county auditor pursuant to other statutes. Id. at 3. Ultimately, the elected county auditor is responsible to the electorate for his or her conduct and job performance, including the accuracy of official records. Id.

The county auditor's duty and power to maintain minutes of meetings of the board of county commissioners is limited by N.D.C.C. § 11-11-36(3), which authorizes the county commissioners to make corrections to the minutes prior to approval. However, the county commissioner's authority to make corrections to the minutes is limited to defects or errors in the minutes, and does not authorize the county commission to rewrite the minutes or to remove accurate information from the minutes. See The American Heritage Dictionary 326 (2d coll. ed. 1991) ("correction" means "[s]omething offered or substituted for a mistake or fault"). If the minutes contain a complete and accurate account of what occurred at the meeting, they may not be amended to remove accurate information or to recite an action which should have, but did not, occur. See 2 Antieau, Local Government Law § 19B.02 (1995). "An amendment of the record should be allowed only when there is clear and satisfactory proof that a mistake exists in the original record and that the amendment is necessary to correct it." Id. (quoting Frick v. Chicago & E. Ill. Ry. Co., 198 N.E. 212, 215 (Ill. 1935)). What is essential is that the auditor's minutes are an accurate account of what transpired. 5 McQuillin, The Law of Municipal Corporations § 14.02 (3rd ed. rev. 1996). Thus, although county commissioners may make corrections to minutes that are incomplete or inaccurate, they may not usurp the

duty and power given to the county auditor by removing accurate information in minutes maintained by the county auditor.

Murphy v. Swanson, 198 N.W. 116 (N.D. 1924), supports this conclusion. In Murphy, the North Dakota Supreme Court determined that a board of county commissioners did not have the ability to enter into a contract for the investigation of what property was escaping taxation and to get such property on the tax list. The court recognized that "[t]he duty to correct false and incorrect tax lists and to place property escaping taxation upon the assessment roll is the duty of the auditor, and no other officer can place such property upon the assessment roll." Id. at 119. Addressing the supervisory authority of the board of county commissioners, the court explained:

The board of county commissioners is charged with the supervision of the conduct of the county officials, but it has no right to perform their duties or to exercise their prerogatives, and it has no right to delegate to others authority which it cannot itself exercise.

Id. at 119-20.

It is the duty of the county auditor to maintain accurate records. The board of county commissioners has no right to perform that duty, although it may correct minutes to the extent the minutes are incomplete or inaccurate.

II.

N.D.C.C. § 11-11-36 outlines the order in which a board of county commissioners shall conduct the business of its meetings. N.D.C.C. § 11-11-36 is mandatory. See Homer Township v. Zimney, 490 N.W.2d 256, 259 (N.D. 1992) ("shall" is generally imperative or mandatory). N.D.C.C. § 11-11-36 mandates that the third order of business, after the meeting is called to order and there is a roll call of members, is that the minutes of the previous meeting be read, "corrections be made, if any," and the minutes approved. After the minutes are approved, the next order of business is for the chairman of the board of county commissioners to sign the minutes and the county auditor attest the minutes. It is not until after the minutes are approved, signed by the chairman, and attested to by the county auditor, that further commission business may be conducted.

Mandamus is available to compel a county commission to perform a ministerial duty which the law requires the commission to perform. N.D.C.C. § 32-34-01. A writ of mandamus may not be issued to compel a discretionary act. City of Fargo v. Cass County, 286 N.W.2d 494, 501 (N.D. 1979).

N.D.C.C. § 11-11-36(3) requires the board of county commissioners to read the minutes of the previous meeting, make appropriate corrections, and then approve the minutes prior to proceeding to other business. It is my opinion that mandamus is available to compel a board of county commissioners to perform this mandatory duty, although mandamus is not available to direct how the board of county commissioners performs the duty (what corrections are made, if any). Tooley v. Alm, 515 N.W.2d 137, 140 (N.D. 1994); Bismarck Tribune Co. v. Wolf, 255 N.W. 569, 572 (N.D. 1934) (mandamus can command a court to act, but not direct its action); Northern Pac. Transp. Co. v. Public Service Comm'n, 82 N.W.2d 597, 602-03 (N.D. 1957) (mandamus can command agency to act upon application but not to decide a particular way). A citizen of the county may have standing to seek a writ of mandamus if the board of county commissioners refuses to read and approve the minutes as required by N.D.C.C. § 11-11-36(3).

A related question is whether the county auditor could properly attest to the minutes approved by the board and signed by the chairman under N.D.C.C. § 11-11-36 if the auditor feels the minutes have been improperly changed. A similar question arose in a 1991 opinion of this office regarding whether a mayor must sign the minutes of a city commission if the mayor believes the minutes to be in error or incorrect. The attorney general concluded that the mayor was required to sign the minutes, but could qualify his signature by noting the alleged impropriety. Letter from Attorney General Nicholas Spaeth to Steven Tomac (July 17, 1991). Similarly, if the county auditor objects to the minutes as amended and approved by the board, the auditor may attest that they are the minutes as signed by the chairperson and note her objection that these are not the complete minutes as prepared by the auditor.

III.

N.D.C.C. § 11-11-37 provides:

The board of county commissioners shall supply to the official newspaper of the county a full and complete report of its official proceedings at each regular and

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special meeting no later than seven days after the meeting at which the report is read and approved. The publisher of the official newspaper shall publish the report in the issue of the paper next succeeding the time of its reception, and shall file with the county auditor an affidavit of publication executed in the proper form.

Section 11-11-37 mandates that the board of county commissioners supply "a full and complete report of its official proceedings" to the official newspaper of the county no later than seven days after the meeting at which the report is read and approved. It is the duty of the board of county commissioners, not the county auditor, to supply to the official newspaper the report of its official proceedings.

As early as 1936 this office issued an opinion holding that the quoted language does not require publishing a verbatim account of the meeting, but that the publication must consist of a fair statement of what transpired at the meeting. 1934-1936 N.D. Op. Att'y Gen. 62. This opinion has been adhered to since its issuance. 1968-1970 N.D. Op. Att'y Gen. 124; Letter from Attorney General Nicholas Spaeth to Gail Hagerty (Dec. 24, 1985). Although a board of county commissioners may use approved minutes as its report, section 11-11-37 does not require that the "minutes" constitute the report. See 1958-1960 N.D. Op. Att'y Gen. 186 (discussing minutes of city council). Unless the minutes are very detailed, there may be no difference, in practice, between the minutes of the meeting and the information that must necessarily be included in a "full and complete report." Nevertheless, section 11-11-37 only requires the publication of a report, read and approved by the board, that contains a fair statement of what transpired at the meeting.

If a board of county commissioners elects to use minutes as its report, it is my opinion that publication of the minutes prior to approval by the board of county commissioners would not constitute compliance with N.D.C.C. § 11-11-37, and that the county newspaper is not required to publish the unofficial minutes. Section 11-11-37 plainly mandates the report be supplied to the official newspaper after the report is read and approved. However, because minutes drafted but not approved by the board of county commissioners constitute a public record, see N.D.C.C. § 44-04-17.1(15), the county auditor could provide a copy of the unapproved minutes to the official newspaper, other newspapers, or individuals. Any publication of unapproved minutes by the official newspaper of the county would not constitute compliance with N.D.C.C. § 11-11-37; the

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board of county commissioners would still be required to supply to the official newspaper of the county the report (minutes or other full and complete report) no later than seven days after the meeting at which the report is read and approved.

- 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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