

N.D.A.G. Letter to Enget (Jan. 7, 1991)

January 7, 1991

Mr. Wade G. Enget
Mountrail County State's Attorney
P.O. Box 369
Stanley, ND 58784

Dear Mr. Enget:

Thank you for your December 19, 1990, letter. The questions you raise are answered, in part, by a prior opinion issued by this office. See 1982 N.D. Op. Att'y Gen. 108. I have enclosed a copy of that opinion for your information.

You first asked whether a re-elected sheriff has a statutory right to request that all of his employees reapply for their positions at the beginning of the new term of office. I have found no statute that expressly covers the question you pose. Implicit in your question, however, is whether the sheriff has the authority to terminate some or all of his employees at a given time.

A sheriff does have the authority to appoint deputies, clerks, and assistants in accordance with the salaries fixed by the county commission. N.D.C.C. § 11-10-11 provides, in part:

The salaries of deputies, clerks, and assistants for the county auditor, county treasurer, sheriff, register of deeds, county judge, clerk of the district court, and state's attorney must be fixed by a resolution of the board of county commissioners. Each of the named officers may appoint such deputies, clerks, and assistants, in accordance with the budget, except none of the officers mentioned in this section may appoint as deputy any other officer mentioned in this section.

Part II of the 1982 N.D. Op. Att'y Gen. 108 states:

Since the sheriff has the authority to hire or appoint a deputy without the approval of the board of county commissioners, as long as the appointment is within the salary set by the county commissioners and is within the number of employees approved by them, it would also follow that the sheriff has the authority to dismiss such deputy.

The North Dakota Supreme Court noted in Carlson v. Dunn County, 409 N.W.2d 111, 113 (N.D. 1987), that sheriffs have historically been granted wide latitude in the appointment of deputies. However, the authority to terminate public employees may be constrained by constitutional considerations, particularly if those public employees are determined to have a constitutionally protected property interest in the employment.

The general rule in North Dakota is that employment is "at will." N.D.C.C. § 34-03-01 provides:

An employment having no specified term may be terminated at the will of either party on notice to the other, except when otherwise provided by this title.

Unless a public employee has a constitutionally protected property interest in the employment, that employee is also subject to the "at will" rule and may be terminated without procedural due process protections. Hennum v. City of Medina, 402 N.W.2d 327 (N.D. 1987).

Constitutionally protected property interests are not created by the constitution, but rather by "existing rules or understandings that stem from an independent source such as state law . . ." [Citation omitted]. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). If such a property interest is found to exist, the "tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" before the termination takes place. Id. at 546. This must be followed by the opportunity for a full post-termination hearing. Id.

Whether these procedural protections apply to county employees depends on whether a cognizable property interest exists. Inquiry would have to be made to determine "if rules or understandings that secured certain benefits and support claims of entitlement to those benefits" exist. Board of Regents of State College v. Roth, 408 U.S. 564, 578 (1972). It would have to be determined whether, for example, a written contract exists or whether there is an employee manual or employment policy which provides that the employee can only be terminated for cause or that termination requires notice and a hearing prior to discharge. If so, a constitutionally protected property interest in the nature of a contract right or a reasonable expectation of continued employment may exist requiring procedural due process protections prior to termination. E.g., Nicholson v. Gant, 816 F.2d 591 (11th Cir. 1987); Moore v. Warwick Pub. School Dist. No. 29, 794 F.2d 322 (8th Cir. 1986).

The second question you asked concerns the power of the county commission to restrict the authority of elected county officials to terminate or rehire staff. This question is essentially answered in 1982 N.D. Op. Att'y Gen. 108. I note that though the county commission has the duty to "superintend the fiscal affairs of the county" and to "supervise the conduct of the respective county officers" (N.D.C.C. § 11-11-11), it lacks the authority to appoint the various county deputies, clerks, and assistants. N.D.C.C. § 11-10-11. The commission's power with respect to the hiring or rehiring of county employees is limited to fixing the salaries by resolution. Id. While the commission lacks the authority to determine which individuals will fill budgeted positions, it is my opinion that the commission does have the authority under N.D.C.C. § 11-11-11 to supervise the conduct of county officers who may be terminating employees to ensure that such discharges are lawfully implemented. This power derives from the commission's duty to supervise the conduct of

the various county officials and to oversee the fiscal affairs of the county. Id.

I hope this discussion is helpful to you.

Sincerely,

Nicholas J. Spaeth

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Enclosure