N.D.A.G. Letter to Schneider (Aug. 24, 1987)

August 24, 1987

Hon. John T. Schneider
State Representative
District 21
1117 Third Avenue South
Fargo, ND 58103

Dear Representative Schneider:

Thank you for your letter of July 29, 1987, incorporating six questions posed by Fargo Mayor Jon G. Lindgren in your request for an opinion concerning a proposed contract for the hiring of a city administrator on behalf of the Fargo City Commission.

Questions A, B, C, and E inquire as to the legality of the contract in question with respect to certain ordinances of the city of Fargo. Traditionally, this office has not responded with formal legal opinions on such issues as we are not authorized to provide opinions on matters involving city ordinances. Instead, these are matters that the city attorney for the city of Fargo should respond to and upon which he is authorized to render opinions. N.D.C.C. § 40-20-01. Thus, we would recommend that these questions be forwarded to the attention of the Fargo city attorney for his analysis and opinion with respect to the applicable city ordinances.

Question D inquires as to whether the contract concerning the employment of a city administrator may occur despite the fact that the home rule charter and the applicable ordinances of the city of Fargo apparently do not provide for the city administrator position. North Dakota law, as found at N.D.C.C. § 40-05.1-06(4), authorizes home rule cities to include within their charters the power to provide for city officers, agencies, and employees, as well as their selection, terms, powers, duties, qualifications, and compensation. From a review of the information supplied with your opinion request, it appears that the city ordinances of Fargo have also repeated this authority.

Assuming this to be correct, it appears that the authority to provide for city officers and employees has been included within the home rule charter and has been implemented through ordinance by the city of Fargo as required by N.D.C.C. § 40-05.1-06. We do not believe that the authority to provide for city officers or employees requires a particular officer to be specifically named in an ordinance and the home rule charter in order for the power to be effective. Instead, it is the general power or authority that must be included within the charter as well as implemented by ordinance in order for the power to become available to home rule cities. See Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980).

Finally, Question F inquires as to the legality of the proposed contract in terms of possible infringement on the governmental powers of future commissioners. Specifically, Question

F inquires whether a city governing body may enter into a contract for the employment of a city administrator for a term extending beyond the term of office of any member of that governing body.

The contract in question concerns the employment of an individual to act as a city administrator for the city of Fargo. According to the terms of the contract, the city administrator will be responsible for the direction, supervision, and coordination of all city departments. The administrator will be the chief administrative officer for the city and will be responsible for the day-to-day operations of the city. The administrator is required to implement, develop, and expedite as economically and responsibly as possible the policies, guidelines, and programs adopted by the city commission. Finally, the contract states that the city administrator reports to the city commission.

The contract is for a term of three years beginning on October 1, 1987, although the administrator may be removed for cause. Information obtained from the Fargo City Hall indicates, of those persons presently sitting on the Fargo City Commission, two will be up for reelection in April of 1988 and two will be up for reelection in April of 1990.

A number of jurisdictions across the country have considered the binding effect of contracts entered into by public entities which extend beyond the terms of the officers acting on behalf of the entities. In these disputes, a clear distinction in judicial decisions has occurred between governmental and proprietary powers. With respect to governmental powers, it has been stated that the exercise of such powers is so limited that no action taken by government is binding upon its successors. However, proprietary powers are not subject to this stringent limitation. 10 E. McQuillin Municipal Corporations §29.101 (3d ed. 1981).

A city has two classes of powers, -- the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked [as to nonbinding effect upon successors]. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired.

Illinois Trust & Savings Bank v. City of Arkansas City, 76 F. 271, 282 (8th Cir. 1896). Thus, it has been generally held that the hands of successors cannot be tied by contracts relating to governmental matters. 10 E. McQuillin, supra.

A city council, in the exercise of its legislative power, cannot enter into a contract which will bind succeeding city councils and thereby deprive them of the unrestricted exercise of their legislative power.

Keeling v. City of Grand Junction, 689 P.2d 679, 680 (Colo. Ct. App. 1984); see also Jacobberger v. School Dist. No. 1, 256 P. 652 (Or. 1927); Pitzer v. City of Abilene, 323 S.W.2d 623 (Tex. Civ. App. 1959); Bair v. Layton City Corp., 307 P.2d 895 (Utah 1957).

With respect to employment contracts and public officers, the general rule followed in nearly all jurisdictions is that the appointment and removal of public officers is a governmental function and, as such, a municipal governing body cannot engage a public officer by contract for a term extending beyond the term of its own members. 56 Am. Jur. 2d Municipal Corporations § 154 (1971); City of Riviera Beach v. Witt, 286 So.2d 574 (Fla. App. 1973); Parent v. Woonsocket Housing Authority, 143 A.2d 146 (RI 1958), Annot., 149 A.L.R. 336, 342 (1944).

The rule has been stated that where the nature of an office or employment is such as to require a municipal board to exercise supervisory control over the appointee or employee, together with the power of removal, such employment or contract of employment by the board is in the exercise of a governmental function, and contracts relating thereto must not be extended beyond the life of the board. 10 E. McQuillin, supra; see also McCormick v. Hanover Tp., 92 A. 195, 196-7 (Pa. 1914); 63A Am. Jur. 2d Public Officers and Employees § 333 (1984).

In Morin v. Foster, 380 N.E.2d 217, 408 N.Y.S.2d 387 (N.Y. 1978), the court considered a dispute involving the change of the term of office and removal procedures of a county manager. The court initially held that the appointment of a county manager was precisely and unmistakably a governmental matter. Then, the court continued by restating the general rule on this subject and refused to allow a contract to extend beyond the term of office of any member of the governing body.

> Elected officials must exercise legislative and governmental powers, within their own sound discretion, as the needs require. Ordinarily they may not so exercise their powers as to limit the same discretionary right of their successors to exercise that power and must transmit that power to their successors unimpaired.

308 N.E.2d at 293; 408 N.Y.S.2d at 390.

Another New York court had the occasion to review employment contracts for professional services by a public body. In Harrison Central School Dist. v. Nyquist, 400 N.Y.S.2d 218, 219 (N.Y. Sup. Ct. 1977), the court considered an attempt by a school board, in power on July 3, 1973, to contract for a three-year period for legal services, despite the fact that the membership of the board could change on July 1st of each year. The court stated as follows:

> We see no reason to depart from the general rule in this State that the board of a municipal corporation cannot bind its successor to an employment contract for professional services which extend beyond its term of office. . . .

In summary, the ability of a governing body to enter into a contract for services depends upon the nature of the contract. Where the contract involves the exercise of governmental

powers, the contract may not extend beyond the term of office of any member of the body in question. However, with respect to a proprietary contract, this limitation does not apply and contracts may extend in the future. Employment contracts for the rendering of professional services involving the governing of a municipality are clearly an exercise of a governmental power and are subject to the above limitation.

The proposed city administrator employment contract calls for the rendering of professional services for a period of three years despite the fact that the current membership of the city governing body may change during that time. If the membership of the governing body did change during the three-year period, the successor body may be bound by the terms of this employment contract executed by a predecessor body. To allow such a contract to occur under such circumstances would violate the general rule that a board does not have the power to enter into employment contracts for professional services which bind successor boards.

Therefore, it is my opinion that a city governing body may not enter into a contract for the employment of a city administrator for a term extending beyond the term of office of any member of that governing body.

I hope this opinion has been helpful in this matter.

Sincerely,

Nicholas J. Spaeth

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