

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 92-06

Date issued: February 28, 1992

Requested by: Debra Fohr Levchak, President
Technology Transfer, Inc.

- QUESTIONS PRESENTED -

I.

Whether Technology Transfer, Inc. is an agency of North Dakota state government.

II.

Whether the board members, officers, and employees of Technology Transfer, Inc. are entitled to state government immunity for actions taken within their official capacity.

III.

Whether the chief executive officer of Technology Transfer, Inc. is a state employee and what benefits are available to the individual.

IV.

Whether the board of directors of Technology Transfer, Inc. may hire or contract for other employees and what fringe benefits are available to the employees.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that Technology Transfer, Inc. is an agency of North Dakota state government.

II.

It is further my opinion the board members, officers, and employees of Technology Transfer, Inc. are entitled to state government immunity for actions taken within their official capacities.

III.

It is further my opinion that the chief executive officer of Technology Transfer, Inc. is a state employee and may qualify for participation in the state health insurance plan, the state retirement plan, and accrual of annual and sick leave.

IV.

It is further my opinion that the board of directors of Technology Transfer, Inc. may enter a contract to employ individuals other than the chief executive officer and that those individuals may qualify for the state health insurance plan, the state retirement plan, and accrual of annual and sick leave.

- ANALYSIS -

I.

Technology Transfer, Inc. was authorized by the 1991 Legislative Assembly. 1991 N.D. Sess. Laws ch. 95. It was part of the "Growing North Dakota" bill, a comprehensive effort by state government to stimulate and expand economic development in North Dakota. The purpose of the corporation is to provide a link between the Department of Economic Development and Finance and the state university system. N.D.C.C. ' 10-30.4-03. Its objective is to promise the movement of technology developed by the university system into the private sector and to facilitate the accessibility of the private sector to the technology and expertise of the university system. Id. The corporation is organized as a nonprofit corporation pursuant to N.D.C.C. ch. 10-24. N.D.C.C. ' 10-30.4-04.

The first issue presented is whether Technology Transfer, Inc. is an agency of state government or a private corporation. The issue whether an entity is an arm of state government usually arises in the context of Eleventh Amendment analysis (whether the entity is an arm of state government which deprives the federal courts of jurisdiction) see Stones v. Los Angeles Community College District, 572 F.Supp. 1072 (USDC Cal. 1983) or in the context of sovereign immunity (whether the entity is an arm of state government and can raise the state's immunity from suit) see Applewhite v. Memphis State University, 495 S.W.2d 190 (Tenn. App. 1973). Although the purposes of the analyses are different, similar factors are used under either analysis. These factors were summarized by the 5th circuit court in Blake v. Kline, 612 F.2d 718 (5th Cir. 1979) as follows:

[1] Local law and decisions defining the status and nature of the agency involved in its relation to the sovereign are factors to be considered, but only one of a number that are of significance. Among the others, no one of which is conclusive, perhaps the most important is [2] whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury; significant here also is whether the agency has the funds or the power to satisfy the judgment. Other relevant factors are [3] whether the agency is performing a governmental or proprietary function; [4] whether it has been separately

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incorporated; [5] the degree of autonomy over its operations; [6] whether it has the power to sue and be sued and to enter into contracts; [7] whether its property is immune from state taxation, and [8] whether the sovereign has immunized itself from the responsibility for the agency's operations.

Blake v. Kline, 612 F.2d 718, 722 (5th Cir. 1979). See also, Ainsworth Aristocrat International Pty. v. Tourism Co., 818 F.2d 1034, 1037 (1st Cir. 1987); Hall v. Medical College of Ohio at Toldeo, 742 F.2d 299, 302 (7th Cir. 1984).

A discussion of Technology Transfer, Inc. within the framework of these criteria is necessary to determine whether the corporation is an agency of state government. Several of these factors are closely related so they will be discussed in combination.

The first, fourth, and fifth factors are closely related. Technology Transfer, Inc. is a nonprofit corporation. N.D.C.C. ' 10-30.4-04. The corporation is given some freedom, but the state has retained a considerable amount of control. Members of the board of directors are established by statute or appointed by the Governor. N.D.C.C. ' 10-30.4-03. The Legislature prescribed threshold qualifications for those members of the board of directors in that they may only be those described by statute. N.D.C.C. ' 10-30.4-03. The members of the board of directors must include the president of North Dakota State University, or his designee; the president of the University of North Dakota, or his designee; a representative from the North Dakota Future Fund board of directors; a representative of the North Dakota Industrial Development Association; and three members appointed by the Governor, who must represent primary sector industries of agriculture, energy, manufacturing, and export services. N.D.C.C. ' 10-30.4-03. There is no provision for selecting directors other than pursuant to the statute.

The corporation is also intimately linked to the Department of Economic Development and Finance, an agency of North Dakota state government. The Legislature provided that the chief executive officer of the corporation also serves as the deputy director of the Science and Technology Division of the Department of Economic Development and Finance. N.D.C.C. ' 10-30.4-05. The chief executive officer is selected and compensated by Technology Transfer, Inc., but reports administratively to the director of the Department of Economic Development and Finance. N.D.C.C. ' 54-34.3-07. The director assigns duties to the Technology Division and the deputy director must carry them out. Id.

There are several other factors which indicate that the state has retained control of the corporation. While the corporation is separately incorporated pursuant to N.D.C.C. ' 10-30.4-04, its statutory authority and funding could be eliminated by the next Legislative Assembly. Public corporations are subject to the open meetings and open records laws. The Legislature recognized that the corporation is subject to the state's open meetings and open records laws by specifically exempting certain information from disclosure. N.D.C.C.

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' 10-30.4-06. The corporation's primary objective is to provide an interface between two state entities, the Department of Economic Development, and the university system. N.D.C.C. ' 10-30.4-02. Further, it is required to provide annual reports to the Legislature, the Governor, and the public. N.D.C.C. ' 10-10.4-08. The authority that the state has retained over Technology Transfer, Inc. and its chief executive officer indicate that the corporation is an agency of state government.

The second and eighth factors are also closely related. The state of North Dakota has not specifically immunized itself from liability arising from the operations of Technology Transfer, Inc. Such an omission is inconsistent with the establishment of a distinct and independent corporate body. See Letter from Nicholas J. Spaeth to Mr. Kermit E. Bye, (Dec. 24, 1987). Legislative appropriation is the primary source of funds for the corporation and, therefore, any judgment obtained against the corporation will likely be paid from the State Treasury.

The third factor is whether the agency is performing a governmental or proprietary function. A proprietary function is one which "must be conducted primarily for the purpose of producing a pecuniary profit" and one which "cannot normally be supported by taxes and fees." Totsky v. Henry Ford Hospital, 425 N.W.2d 531, 533 (Mich. 1988). Technology Transfer, Inc. is not organized primarily to produce a profit for the state of North Dakota. Rather, it is organized as a nonprofit corporation to promote and develop business applications for science and technology in North Dakota. N.D.C.C. ' 10-30.4-02. Technology Transfer, Inc. receives considerable support from taxes and fees. Under the Totsky analysis, the function of Technology Transfer, Inc. is not proprietary, but governmental.

A governmental function is defined as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law." Ross v. Consumer Power Co., 363 N.W.2d 641, 661 (Mich. 1984). Technology Transfer, Inc. and its related activities are specifically authorized by statute. N.D.C.C. ch. 10-30.4. The corporation is undertaking the function of the promotion of economic development within the state of North Dakota, a function intended to benefit all citizens of the state, rather than the board of directors of the corporation. But for the action of the Legislature, the corporation would not exist. Following Ross, Technology Transfer, Inc. is performing a governmental function.

The distinction between public and private businesses was addressed by the North Dakota Supreme Court in Green v. Frazier, 176 N.W. 11 (N.D. 1920). The court stated that:

[A private business] may be defined as a business or enterprise in which an individual or individuals, an association, copartnership, or private corporation, has invested capital, time, attention, labor, and intelligence for the purpose of creating and conducting such business, for the sole purpose that those who make such contributions may from the

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conducting of such business make, gain, and acquire a financial profit for their exclusive benefit, improvement, and enjoyment and exclusively for their own purposes.

....

As contra-distinguished from a private business, a public purpose or public business has for its objective the promotion of the general welfare of all the inhabitants or residents within a given political subdivision, as, for example, a state, sovereignty and sovereign powers of which are exercised to promote the public health, safety, morals, general welfare, security, prosperity, contentment, and equality before the law of all the citizens of the state.

Id. at 17. The purpose of Technology Transfer, Inc. is creation of jobs and development of technology which will benefit the residents of North Dakota, not the corporation itself. Therefore, the corporation performs a governmental rather than a proprietary function.

While no one is conclusive, the factors taken together support my opinion that Technology Transfer, Inc. is an agency of North Dakota state government.

II.

The second issue, whether the board members, officers, and employees of Technology Transfer, Inc. are entitled to state government immunity, is closely related to the analysis of the issue of whether the corporation is an agency of state government. N.D.C.C. ' 32-12.1-15(2) provides:

No employee of the state may be held liable in the employee's personal capacity for actions or omissions occurring within the scope of the employee's employment unless such actions or omissions constitute reckless or grossly negligent conduct, malfeasance, or willful or wanton misconduct.

N.D.C.C. ' 32-12.1-15(2).

N.D.C.C. ch. 32-12.1 does not define "employee of the state." However, N.D.C.C. ' 26.1-21-10.1(1)(a), defining "[e]mployee of the state" and N.D.C.C. ' 32-12.1-15(2), which uses the term "employee of the state", both originated in House Bill 1446 during the 1987 Legislative Assembly, and therefore, it is my opinion that the term "employee of the state" as defined in N.D.C.C. ' 26.1-21-10.1(1)(a) is controlling for purposes of N.D.C.C. ' 32-12.1-15(2). Letter from Nicholas J. Spaeth to Kermit E. Bye (December 24, 1981).

An "employee of the state" is defined as "all present or former officers or employees of the state or any of its agencies, departments, boards, or commissions, or persons acting on behalf of such agencies, departments, boards, or commissions in an official capacity, temporarily or permanently, with or without compensation. The term does not include an

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independent contractor." N.D.C.C. ' 26.1-21-10.1(1)(a).

As previously stated, Technology Transfer, Inc. is an agency of North Dakota state government. Therefore, pursuant to N.D.C.C. ' 26.1-21-10.1(1)(a), the board members, officers, and employees of the corporation, when conducting the business of the corporation, are state employees and are entitled to the immunity granted by N.D.C.C. ' 32-12.1-15(2). The immunity will not apply if the individual's actions on behalf of the corporation constitute reckless or grossly negligent conduct, malfeasance, or willful or wanton misconduct. N.D.C.C. ' 32-12.1-15(2).

III.

The third question presented is whether the chief executive officer of Technology Transfer, Inc. is a state employee and what benefits are available to that individual. As previously stated, an "employee of the state" means "all . . . officers or employees of the state or any of its agencies, departments, boards or commissions, or persons acting on behalf of such agencies, departments, boards, or commissions in an official capacity, temporarily or permanently with or without compensation." N.D.C.C. ' 26.1-21-10.1(1)(a). Technology Transfer, Inc. is an agency of state government. The board of directors of Technology Transfer, Inc. must hire or contract for a chief executive officer to manage the corporation. N.D.C.C. ' 10-30.4-05. The chief executive officer serves at the will of the board of directors and receives a salary set by the board of directors within the legislative appropriation. N.D.C.C. ' 54-34.3-07. The chief executive officer also serves as the deputy director for the Science and Technology Division of the North Dakota Department of Economic Development and Finance. *Id.* N.D.C.C. ' 54-34.3-07. The chief executive officer reports administratively to the director of the Department of Economic Development and Finance and performs such duties on behalf of the division as assigned to the division by the director. It is, therefore, my opinion that the chief executive officer of Technology Transfer, Inc. is an employee of the state of North Dakota pursuant to N.D.C.C. ' 26.1-21-10.1(1)(a).

The chief executive officer is hired by the board under a contract and under such terms and conditions as negotiated by the board. The 1991 North Dakota Legislative Assembly did not provide a full-time equivalent for the position and, therefore, the individual filling the chief executive officer's position will not be a classified state employee.

The next issue is whether the chief executive officer may participate in the state health plan, the state retirement plan, and accrue annual and sick leave. An employee eligible to participate in the state health program is defined as "every permanent employee who is employed by a governmental unit." N.D.C.C. ' 54-52.1-01(4). A governmental unit includes the state of North Dakota. N.D.C.C. ' 54-52-01(7). A "permanent employee" is defined as "an individual who is filling an approved and regularly funded position in a governmental

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unit and who is employed at least seventeen and one-half hours per week and at least five months each year." N.D.C.C. ' 54-52.1-01(4).

The chief executive officer will be employed by the state of North Dakota. The individual will be filling a regularly funded and approved position in that the Legislature created a position and authorized the board of directors to set the salary and qualifications for the position. N.D.C.C. ' 54-34.3-07. Whether the individual qualifies for health insurance under the remaining criteria, will depend upon the contract negotiated between the board with the individual. If the individual contracts to work for more than 172 hours a week for more than five months per year and the individual's duration of employment is not limited, the chief executive officer will qualify for health insurance under the state plan. N.D.C.C. ' 54-52.1-03(1).

An "eligible employee," for purposes of participating in the North Dakota Public Employees Retirement System, is defined as a permanent employee who meets the eligibility requirements of N.D.C.C. ch. 54-52 and who is 18 years of age or older. N.D.C.C. ' 54-52-01(3). An "employee" is defined as "any person employed by a governmental unit, whose compensation is paid out of the governmental unit's funds, or funds controlled or administered by a governmental unit." N.D.C.C. ' 54-52-01(4). A governmental unit includes the state of North Dakota. N.D.C.C. ' 54-52-01(7). A "permanent employee" is "a governmental unit employee whose services are not limited in duration and who is filling an approved and regularly funded position in an eligible governmental unit, and is employed twenty hours or more per week and at least five months each year." N.D.C.C. ' 54-52-01(10).

The chief executive officer, as previously determined, will be employed by the state of North Dakota, and compensated by funds controlled or administered by Technology Transfer, Inc. In order to meet the remaining criteria to participate in the Public Employees Retirement System, the individual must be employed for 20 hours or more per week, for more than five months and the contract cannot be for a limited duration.

N.D.C.C. ' 54-06-14 provides that "[a]nnual leave and sick leave must be provided for all persons in the permanent employment of this state who are not employed under a written contract of hire setting forth the terms and conditions of their employment" The chief executive officer will be hired under a contract. Thus, this section allows the board to negotiate the type and amount of leave that may be accrued.

IV.

The final issue is whether the board of directors may hire or contract for employees other than the chief executive officer and what fringe benefits are available to those employees. The 1991 appropriation to Technology Transfer, Inc. limited the amount available for

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administration to \$300,000. 1991 N.D. Sess. Laws ch. 95, '54. The Legislature authorized the establishment of the corporation, but did not provide full-time equivalents for its employees. However, the Legislature did provide that the board of directors of Technology Transfer, Inc. was to determine the minimum qualifications for all staff positions. N.D.C.C. ' 10-30.4-05. The statutes governing Technology Transfer, Inc. do not place limits on the board's ability to hire employees other than the chief executive officer. The only limitation imposed is that the board may not expend more than \$300,000 during the biennium for administration. Therefore, it is my opinion that the board may hire other employees as long as the expenditure for those employees does not exceed the legislative appropriation.

The benefits available to the individual or individuals hired by Technology Transfer, Inc. depend upon whether the qualifications for state health insurance, participation in the Public Employees Retirement System and the annual and sick leave accrual benefits as discussed in relation to hiring of the chief executive officer are met. Because there is no full-time equivalent provided for administrative staff for the corporation, the individuals must be hired under contract under terms and conditions negotiated between the board and the individuals.

- 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 question presented is decided by the courts.

Nicholas J. Spaeth
Attorney General

Assisted by: Carla Smith
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