

LETTER OPINION
94-L-258

October 6, 1994

Mr. Doug Mattson
Ward County State's Attorney
Ward County Courthouse
Minot, ND 58701

Dear Mr. Mattson:

Thank you for your letter inquiring whether Ward County Social Services can minimize demands on its staff by fulfilling some of its responsibilities through contracts with other public entities or private parties. You specifically ask whether the First District Health Unit can agree to conduct child protective service investigations on behalf of Ward County Social Services.

Political subdivisions are creatures of state law and possess only those powers that are expressly granted by statute or that may be necessarily inferred from those expressly granted. N.D. Const. art. VII, ? 2; County of Stutsman v. State Historical Society, 371 N.W.2d 321 (N.D. 1985); Eikevic v. Lee, 13 N.W.2d 94 (N.D. 1944); 1994 N.D. Op. Att'y Gen. 5. In 1993, the State Legislature passed House Bill 1347, commonly known as the "Tool Chest Bill," which provides in part:

Any county, city, township, city park district, school district, or other political subdivision of this state, upon approval of its respective governing body, may enter into an agreement with any other political subdivision of this state for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them.

North Dakota Century Code (N.D.C.C.) ? 54.40.3-01(1) (emphasis added); 1993 N.D. Sess. Laws ch. 401 ? 49; see also N.D. Const. art. VII, ? 10.

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Under this statute, separate political subdivisions¹ have the authority to cooperatively perform their statutory functions. Ward County Social Services is a county agency organized by Ward County through the appointment of a county social service board. N.D.C.C. ? 50-01-07. Similarly, the First District Health Unit is a multi-county agency organized by a joint board of county commissioners through the appointment of a district board of health. N.D.C.C. ? 23-14-04; see also 1986 N.D. Op. Att'y Gen. 146. Thus, any joint powers agreement between Ward County Social Services and the First District Health Unit would involve separate political subdivisions. See also N.D.C.C. ? 26.1-21-01(4).

N.D.C.C. ? 54-40.3-01(1) authorizes the cooperative or joint administration of any power assigned to "one or more" of the contracting parties. Even before this statute was enacted, state law provided:

Any . . . political subdivision of this state, upon approval of its respective governing body, may enter agreements with one another for joint or cooperative action . . . to carry out any function or duty which may be authorized by law or assigned to one or more of them. . . .

N.D.C.C. ? 54-40-08(1) (Supp. 1991) (amended by 1993 N.D. Sess. Laws ch. 401, ? 50)(emphasis added). However, any power jointly or cooperatively administered under that statute had to be common to all the parties to the agreement. Letter from Attorney General Allen Olson to Robert Peterson (July 17, 1973). Although the disjunctive "one or more" provision in former N.D.C.C. ? 54-40-08(1) suggested a contrary interpretation, this office concluded that such an interpretation, when viewed with the rest of N.D.C.C. ch. 54-40, would "do violence to the provisions of Section 54-40-01" allowing separate governmental units to "exercise their respective separate powers or any power common to the contracting parties. . . ." Id. (emphasis added), quoting N.D.C.C. ? 54-40-01; see also Letter from Attorney General Nicholas J. Spaeth to John Mahoney (October 3,

¹N.D.C.C. ch. 54-40.3 applies only to separate political subdivisions. It does not authorize agreements between entities within the same political subdivision or between a political subdivision and a private party.

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1991). The North Dakota Supreme Court reached a similar result, concluding that N.D.C.C. ch. 54-40 simply allowed "one or more governmental units to do jointly what each may do individually." City of Hazelton v. Daugherty, 275 N.W.2d 624, 629 n.1 (N.D. 1979).

In 1993, the State Legislature deleted former N.D.C.C. ? 54-40-08(1) and replaced it with N.D.C.C. ? 54-40.3-01(1), which contains the similar language quoted above but is located in a separate chapter of the code. 1993 N.D. Laws ch. 401, ?? 49, 50. "General statutory construction principles require application of a presumption that when the Legislature uses language which has previously been interpreted by the courts to mean one thing, that meaning will continue." Letter from Attorney General Heidi Heitkamp to Patricia Burke (June 25, 1993). However, several factors rebut this presumption as applied to N.D.C.C. ? 54-40.3-01(1). First, the reauthorization of joint powers agreements in a separate chapter of the code distinguishes N.D.C.C. ? 54-40.3-01(1) from this office's interpretation of former N.D.C.C. ? 54-40-08(1). See Letter to Robert Peterson, supra. Second, as this office recognized in its 1973 letter, the disjunctive "one or more" provision in both N.D.C.C. ? 54-40.3-01(1) and former N.D.C.C. ? 54-40-08(1) suggests that only one political subdivision needs to independently possess the power that will be cooperatively administered. Finally, as this office recently stated:

Although the Tool Chest Bill uses the same language as [formerly] found in N.D.C.C. ch. 54-40, the intent of the drafters and the Legislature was to allow entities to contract to do those things which only one entity had the authority to do.

Letter to Patricia Burke, supra (emphasis added); see also Hearing on H. 1347 Before the Senate Comm. on Political Subdivisions 53rd Leg. (March 4, 1993) (Written statements of Bruce Levi and the North Dakota Consensus Council). Therefore, despite this office's prior interpretation of similar statutory language, it is my opinion that the First District Health Unit can agree to perform child protective service investigations on behalf of Ward County Social Services even if it does not independently possess the

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power to do so.

However, such an agreement would not "relieve [Ward County Social Services] of any obligation or responsibility imposed by law, except to the extent of actual and timely performance" N.D.C.C. ? 54-40.3-01(3). Ward County Social Services must investigate reports of child neglect as the designee of the Department of Human Services (Department). N.D.C.C. ? 50-25.1-05; N.D. Admin. Code ? 75-03-19-02; 1990 N.D. Op. Att'y Gen. 70. N.D.C.C. ? 54-40.3-01(1) does not authorize Ward County Social Services to completely transfer this obligation to the First District Health Unit. Compare N.D.C.C. ch. 54-40.5. Investigations of child neglect must be initiated "in accordance with rules adopted by the department," N.D.C.C. ? 50-25.01-05, which require that these investigations be "conducted in substantial conformity with the policies and procedures contained in North Dakota department of human services manual chapter 640." N.D. Admin. Code ? 75-03-19-06. As the enclosed excerpt from this manual shows, all child protective service investigations must be conducted by a social worker trained by the Department. See NDDHS Manual ? 640-01-15-03.

Under the agreement suggested in your letter, the First District Health Unit would effectively act as an agent of Ward County Social Services, which would continue to be responsible for conducting these investigations. This obligation can only be satisfied through complete and timely performance by Ward County Social Services or by the First District Health Unit on its behalf. Thus, for the proposed agreement to satisfy the obligations of Ward County Social Services, the First District Health Unit would have to conduct these investigations through a social worker trained by the Department, just as Ward County Social Services would be required to do.

In summary, the First District Health Unit can agree to conduct child protective service investigations on behalf of Ward County Social Services. However, whether actually performed by Ward County Social Services or by the First District Health Unit pursuant to a valid joint powers agreement, all child protective service investigations must be conducted by a qualified social worker.

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Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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