

Office of the Attorney General
State of North Dakota

Opinion No. 96-F-01
Date Issued: January 9, 1996

Representative Bill Oban

- QUESTIONS PRESENTED -

I.

Whether, pursuant to > N.D.C.C. § 11-11-11(2), all duties and powers not expressly granted to the respective elected county officers, i.e., those that are necessarily implied, are those of the board of county commissioners.

II.

Whether, pursuant to > N.D.C.C. § 11-11-11(2), it is the duty of the board of county commissioners to direct or oversee the behavior or management of the respective elected county officers.

III.

Whether there are any North Dakota Supreme Court cases or Attorney General opinions that provide guidance to boards of county commissioners regarding the extent of their authority under > N.D.C.C. § 11-11-11(2).

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that the duties and powers necessarily implied from those expressly granted to the respective elected county officers are duties and powers of the respective elected county officers, and are not the duties and powers of the board of county commissioners.

II.

It is my opinion that, pursuant to > N.D.C.C. § 11-11-11(2), it is the duty of the board of county commissioners to direct or oversee the behavior or management of the respective elected county officers. This duty of the board of county commissioners, however, must be interpreted in conjunction with the statutes specifying the powers and duties of the respective elected county officers. The board of county commissioners may not usurp the duties and powers given to the respective elected county officers pursuant to other statutes.

III.

It is my opinion that one North Dakota Supreme Court case and various Attorney General opinions provide guidance to boards of county commissioners regarding the extent of their authority under > N.D.C.C. § 11-11-11(2).

- ANALYSES -

I.

> N.D.C.C. § 11-11-11 lists certain duties of the board of county commissioners. Subsection 2 of this statute provides that the board of county commissioners "[s]hall supervise the conduct of the respective county officers." > N.D.C.C. § 11-11-11(2). Various questions have arisen about the meaning of this quoted language.

The first question is whether all duties and powers not expressly granted to the respective elected county officers, i.e., those that are necessarily implied, are those of the county commission. "[W]here the powers and duties of an officer are prescribed by the Constitution and statutes, such powers and duties are measured by the terms and necessary implication of such grants. . . ." *Brink v. Curless*, > 209 N.W.2d 758, 767 (N.D. 1973) (emphasis added); *Kopplin v. Burleigh County*, > 47 N.W.2d 137, 140 (N.D. 1951). Thus, it is my opinion that the duties and powers necessarily implied from those expressly granted to the respective elected county officers are duties and powers of the respective elected county officers, and are not the duties and powers of the board of county commissioners.

II.

The next question is whether, pursuant to > N.D.C.C. § 11-11-11(2), it is the duty of the county commissioners to direct or oversee the behavior or management of the respective elected county officers. > N.D.C.C. § 11-11-11(2) requires the board of county commissioners to "supervise the conduct of the respective county officers." "Words used in any statute are to be understood in their ordinary sense. . . ." > N.D.C.C. § 1-02-02. "Supervise" means "[t]o direct and inspect the performance of; . . . to look over". The *American Heritage Dictionary* 1221 (2d coll. ed. 1991). "Conduct" means "1. The way a person acts; behavior. 2. The act of directing or controlling; management." *Id.* at 307. Thus, it is my opinion that > N.D.C.C. § 11-11-11(2) makes it a duty of the board of county commissioners to direct or oversee the behavior or management of the respective elected county officers. This duty of the board of county commissioners, however, must be interpreted in conjunction with the statutes specifying the powers and duties of the respective elected county officers. Thus, despite the duty of the board of county

commissioners to "supervise the conduct of the respective county officers" as provided for in > N.D.C.C. § 11-11-11(2), the board of county commissioners may not usurp the duties and powers given to the respective elected county officers pursuant to other statutes. Ultimately, elected county officials are responsible to the electorate for their conduct and job performance.

Actions to remove an elected county official from office are covered by N.D.C.C. chs. 44-09 Removal by Impeachment, 44-10 Removal by Judicial Proceedings, 44-11 Removal by Governor, and §§ 44-02-01 Vacancies- Causes Thereof, and 44-08-21 Recall of Elected Officials of Political Subdivisions. The board of county commissioners has no statutory authority to sanction elected county officials for poor job performance, improper behavior, or failure to properly perform their jobs. Consequently, the duty of the board of county commissioners to supervise the conduct of elected county officials must be interpreted in light of the absence of any specific enforcement powers. The board of county commissioners' authority over appointed county officials is of course greater than its authority over elected county officials, since the board would have the power to remove the appointed official and appoint someone else to the position.

III.

The remaining question is whether there are any North Dakota Supreme Court cases or Attorney General opinions that provide guidance to boards of county commissioners regarding the extent of their authority under > N.D.C.C. § 11-11-11(2). As discussed above, the ability of the board of county commissioners to effectively supervise the conduct of the elected county officers is severely limited due to the statutory authority given to the elected officers, the ultimate and separate accountability of the elected county officers to the electorate, and the absence of any specific enforcement powers by the board of county commissioners against the elected officials.

In *Murphy v. Swanson*, > 198 N.W. 116 (N.D. 1924), the North Dakota Supreme Court determined that a board of county commissioners did not have the authority to enter into a contract for the investigation of what property was escaping taxation and to get such property on the tax lists. The court recognized that "[t]he duty to correct false and incorrect tax lists and to place property escaping taxation upon the assessment role is the duty of the auditor, and no other officer can place such property upon the assessment role." > *Id.* at 119. In regard to the meaning of > N.D.C.C. § 11-11-11(2), the Court stated:

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. . . . If [the board of county commissioners] or its members individually have notice of the fact that property has escaped taxation, then the obligation may rest upon it or them to advise the county auditor to the end that that officer properly charged with the duty may place such property upon the assessment role. Under its supervisory power it may and should require the auditor to list for taxation all taxable property that such auditor has or may have notice of.

> Id. at 119-120. Thus, > N.D.C.C. § 11-11-11(2) does not give the board of county commissioners the right to perform the duties or exercise the prerogatives of the county officers, and it does not give the board the right to delegate to others authority which it cannot itself exercise. If the board is aware of facts that are relevant to the duties of a particular county officer, > N.D.C.C. § 11-11-11(2) may give the board the duty to advise that county officer of those facts so the officer may accomplish the officer's duty.

In addition to the guidance provided by the North Dakota Supreme Court in the Murphy case discussed above, the Attorney General has issued various opinions interpreting > N.D.C.C. § 11-11-11(2). For example, > N.D.C.C. § 11-11-11(2) gives the board of county commissioners the authority to fix the time for opening and closing the courthouse and the authority to determine the length of time of vacations for county officers. 1957 N.D. Op. Att'y Gen. 72. It also gives the board of county commissioners the power to determine the hours county officials' offices will be open. Letter from Attorney General Helgi Johanneson to Governor William L. Guy (May 24, 1968). Based on subsections 1 and 2 of > N.D.C.C. § 11-11-11 (subsection 1 requires the board of county commissioners to "superintend the fiscal affairs of the county"), the board of county commissioners has sufficient legal interest in the dividing line between time zones to permit it to seek an advisory vote of the electors regarding where the dividing line should be. Id.

Based on > N.D.C.C. § 11-11-11(2) and > N.D.C.C. § 11-11-14(2) (which gives the board of county commissioners the power to "make all orders respecting property of the county"), the board of county commissioners has general supervisory responsibility over the county courthouse and, therefore, has the authority to determine smoking areas. Letter from Attorney General Nicholas J. Spaeth to Mr. John P. Brindle (September 25, 1987).

Based on > N.D.C.C. § 11-10-10(4) (which states county officials working less than full time may be paid a reduced salary as set by the board of county commissioners) and "the broad discretion granted boards of county commissioners in [subsection 2 of] > Section 11-11-11", the board of county commissioners may provide that the office of county superintendent of schools be less than full time and salaried

at a reduced rate. Letter from Attorney General Robert O. Wefald to Raymond R. Rund (January 18, 1984).

In a 1991 Attorney General's opinion it was determined that subsections 1 and 2 of > N.D.C.C. § 11-11-11 did not give the board of county commissioners the authority to appoint the various county deputies, clerks, and assistants. > N.D.C.C. § 11-10-11 gives that authority to the various county officers. However, the board does have the authority, pursuant to subsections 1 and 2 of > 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. Letter from Attorney General Nicholas J. Spaeth to Wade E. Enget (January 7, 1991).

- EFFECT -

This opinion is issued pursuant to > N.D.C.C. § 11-11-11(2). It governs the actions of public officials until such time as the questions presented are decided by the courts.

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