

LETTER OPINION
97-L-32

March 31, 1997

Mr. John T. Goff
Cass County State's Attorney
Box 2806
Fargo, ND 58108

Dear Mr. Goff:

Thank you for your letter regarding the authority of a board of county commissioners to limit an elected county officer's authority to discharge an employee working in the officer's office or department.

This office has issued several opinions regarding a board of county commissioners' control over employees working for an elected county officer. These opinions interpret N.D.C.C. § 11-10-11, which provides in part:

The salaries of deputies, clerks, and assistants for the county auditor, county treasurer, sheriff, register of deeds, 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

See also N.D.C.C. § 11-16-02 (assistant state's attorneys appointed by state's attorney). The officers listed in N.D.C.C. § 11-10-11 are those that generally are elected in each county. See N.D.C.C. § 11-10-02. I will assume for the purpose of this opinion that the county has not adopted a home rule charter and implementing ordinance giving the board of county commissioners (hereafter, board) additional control over an employee working for an elected officer. See N.D.C.C. § 11-09.1-05.

The officers listed in N.D.C.C. § 11-10-11 have authority to hire "deputies, clerks, and assistants" for their own departments, subject to salary and budget limitations set by the board. A person hired by

Mr. John T. Goff
March 31, 1997
Page 2

an elected county officer is a county employee. 1993 N.D. Op. Att'y Gen. L-333 (Nov. 16 letter to Greenwood); see also Scofield v. Wilcox, 156 N.W. 918, 919 (N.D. 1916). However, the board does not have authority to decide whether a particular person is hired by an elected county officer; the power to make that decision belongs to the officer. 1996 N.D. Op. Att'y Gen. 1, 5; 1993 N.D. Op. Att'y Gen. L-161 (May 20 letter to Robb); Letter from Attorney General Nicholas Spaeth to Wade Enget (Jan. 7, 1991); Letter from Attorney General Nicholas Spaeth to Joseph Kubik (Dec. 5, 1986).

It has long been the position of this office that implicit in a county officer's power to appoint or hire an employee under N.D.C.C. § 11-10-11 is the power to fire that employee. 1993 N.D. Op. Att'y Gen. L-261 (Sept. 10 letter to Greenwood); Letter to Enget, supra; 1982 N.D. Op. Att'y Gen. 108, 110; Letter from Attorney General Allen Olson to Gordon Taylor (September 7, 1978). This right, however, is not unfettered. 1993 N.D. Op. Att'y Gen. at L-334. For example, an officer's discharge of an employee is subject to due process considerations if the employee has a property interest in that employment. 1993 N.D. Op. Att'y Gen. at L-261.

The authority of an officer to fire an employee is also subject to the authority of the board under N.D.C.C. § 11-11-11(2) to "supervise the conduct of the respective county officers." The board's supervisory authority under this section includes ensuring that discharges by county officers are lawfully implemented in accordance with county policies. Letter to Enget, supra; Letter to Kubik, supra. The board may adopt personnel policies that apply to all county employees, including those hired by county officers under N.D.C.C. § 11-10-11. 1993 N.D. Op. Att'y Gen. at L-335 (board may require termination for cause rather than at-will). However, as I recently indicated, the board's supervisory authority also is not unfettered. See 1996 N.D. Op. Att'y Gen. at 4-5; Murphy v. Swanson, 198 N.W. 116, 119-20 (N.D. 1924). The board would exceed its supervisory authority under N.D.C.C. § 11-11-11(2) if it adopted burdensome or stringent personnel policies that, in effect, usurped or significantly interfered with the authority of the officer to hire or fire employees working in the officer's department.

In conclusion, it is my opinion that a board of county commissioners may not restrict or remove a county officer's authority to fire an employee hired by that officer under N.D.C.C. § 11-10-11, except through personnel policies that do not usurp or significantly interfere with an elected officer's authority to fire employees in the officer's department.

Mr. John T. Goff
March 31, 1997
Page 3

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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