

LETTER OPINION
97-L-53

May 22, 1997

Mr. Alon Wieland, Chairman
Cass County Board of Commissioners
Box 2806
Fargo, ND 58108

Dear Mr. Wieland:

Thank you for your April 21 and May 7, 1997, letters asking for my opinion on whether the Cass County Board of Commissioners (Board) is legally obligated to pay attorney fees incurred by the Cass County State's Attorney.

Normally, this office provides legal advice upon request to a county state's attorney, as legal adviser for a county, rather than a board of county commissioners. See N.D.C.C. § 54-12-01(4). However, because of the unique circumstances presented in your letter involving the Cass County State's Attorney, I have concluded that providing an opinion to the Board in this matter is appropriate.

In 1985, then Attorney General Nicholas Spaeth issued an opinion on a county's obligation to provide legal representation to county officials. Letter from Attorney General Nicholas Spaeth to Richard Schnell (July 8, 1985). Citing previous opinions from 1962 and 1965, the Attorney General concluded:

In summary, a county is not obligated, through the office of state's attorney or otherwise, to provide legal representation to county officials who find themselves the subject of civil litigation. The only exceptions to this rule are those statutory requirements as to legal representation stated in N.D.C.C. §§ 44-08-11 and 32-12.1-04. Of course, the county may provide legal representation to such county officials, either through the state's attorney or otherwise, if it so desires.

Id. A copy of this opinion is attached for your reference.

For purposes of chapter 32-12.1, elected county officials are included in the definition of "employee." N.D.C.C. § 32-12.1-02(3). Thus, a county would be obligated to defend an elected county official under N.D.C.C. § 32-12.1-04 if a "claim" is filed. However,

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from the correspondence attached to your letter, it does not appear that a "claim" was ever filed against the Cass County State's Attorney in this matter. "Claim" is defined as "any claim permitted by [chapter 32-12.1] brought against a political subdivision for an injury caused by . . . an employee of the political subdivision acting within the scope of the employee's employment or office." The claims permitted in N.D.C.C. chapter 32-12.1 are legal causes of action as limited in that chapter. As a result, county officials are not entitled to legal representation at county expense under N.D.C.C. § 32-12.1-04 for personal injury claims until the official is sued, which has not happened in this situation.

Similarly, N.D.C.C. § 44-08-11 does not require the county to pay the attorney fees because no "action" had been brought to recover damages. See 1982 N.D. Op. Att'y Gen. 225.

Your letter asks whether payment of the attorney fees is required under N.D.C.C. § 34-02-01, which requires employers to indemnify employees for expenses incurred in the course of the employee's employment. The term "employee" is defined for limited purposes in several state statutes to include elected officials. See N.D.C.C. §§ 32-12.1-02, 54-52-01, 65-01-02. Although a definition of a term in one statute generally applies to uses of the same term in other statutes, N.D.C.C. § 1-01-09, the definitions in the examples cited above are each expressly limited to the chapter or title in which the terms are used. There is no statutory definition that applies to the term "employee" as used in N.D.C.C. § 34-02-01.

An undefined term in a statute must be given its plain meaning and interpreted in the context in which the term is used. N.D.C.C. §§ 1-02-02; 1-02-03. To interpret the term "employee" as used in N.D.C.C. ch. 34-02 to include an elected county official would also require the conclusion that the official, as an employee, must obey the reasonable instructions of the Board under N.D.C.C. § 34-02-08. Such a conclusion would be completely at odds with the independence provided by state law to elected county officials. Furthermore, unless otherwise defined by statute, the terms "official" and "employee" are distinguishable. Cf. Moy v. County of Cook, 640 N.E.2d 926 (Ill. 1994) (county not responsible under respondeat superior for acts of elected county sheriff). The office of state's attorney is listed as a county officer in N.D.C.C. § 11-10-02(4). Therefore, I conclude that the term "employee" as used in N.D.C.C. § 34-02-01 does not include an elected county state's attorney.

Even if the meaning of the term "employee" as used N.D.C.C. § 34-02-01 included elected county officials, I would conclude that Cass County is not required to indemnify the Cass County State's Attorney for the legal fees he incurred in this matter. It is a cardinal rule of statutory construction that statutes must be interpreted to give meaning to every part if possible, but that in case of a conflict between statutes, a specific statute prevails over a more general statute. N.D.C.C. § 1-02-07. As discussed above, a county is not required to indemnify a county official under N.D.C.C. § 32-12.1-04 or § 44-08-11 unless a cause of action has been commenced against the official. Assuming an elected county official generally would be entitled to indemnification under N.D.C.C. § 34-02-01 for expenses incurred in the course of the official's "employment," indemnification for legal fees for potential personal injury claims would be precluded under the more specific provisions in N.D.C.C. §§ 32-12.1-04 and § 44-08-11 limiting a county's indemnification obligation to pending "claims" or actions. To conclude otherwise would render meaningless both the indemnification limitations found in N.D.C.C. § 32-12.1-04 and the liability caps in N.D.C.C. § 32-12.1-03. Therefore, it is my opinion that Cass County's indemnification obligation for potential or pending claims for personal injuries is limited to the requirements in N.D.C.C. ch. 32-12.1. This conclusion is supported by the 1977 Legislative Council summary of the tort claims act as introduced. This report indicated that, without the indemnification obligation imposed under the act, public employees would not have the same liability protection as commonly afforded to employees in the private sector. Legislative Council Report, p. 178 (1977).

Although not required by state law, it is possible for a county, through its budgeting process, to delegate sufficient spending authority to a county official to pay expenses incurred by that office, including legal fees. See 1981 N.D. Op. Att'y Gen. 115. The extent of the Cass County State's Attorney's spending authority, including any limitations on the purposes for which available funds may be used to retain outside counsel, is a question of fact on which I cannot give an opinion. Except as provided in the budget for the office of state's attorney, payment of the fees requires the approval of the Board, and the Cass County State's Attorney is not otherwise authorized to incur this expense on behalf of Cass County.

In conclusion, it is my opinion that the Board is not obligated to pay the attorney fees in question. Whether to pay them is a policy decision for the Board to make.

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Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jcf/vkk

cc: Bonnie Johnson