

**LETTER OPINION
2003-L-37**

September 4, 2003

Mr. William J. Brudvik
Mayville City Attorney
PO Box 547
Mayville, ND 58257-0547

Dear Mr. Brudvik:

Thank you for your letter raising several questions about the actions of the Mayville mayor in appointing special counsel to represent the city in relation to an employment matter and in authorizing the payment of a settlement claim.

You state that a city police officer was terminated by the Mayville police commission for just cause in October 2001. A notice of termination and right to a hearing signed by the police chief was delivered to the police officer at that time. The police officer, through his attorney, declined to participate in the hearing. You also indicate that you notified the city's insurance carrier and provided them with information regarding the termination.

You state that about a year later, without your knowledge or participation, the mayor retained special legal counsel who negotiated a settlement on behalf of the city with the former police officer in the amount of \$3,800. You also indicate that there is no record of any formal action taken by the city council to retain the special counsel or enter into a settlement with the former police officer. The matter was raised in a recent meeting of the city council and you included a newspaper account of the discussion.¹

You first ask whether the mayor acting alone has the authority to retain special counsel for the city. You included a copy of the city ordinance dealing with the city attorney which provides, in part, that "[n]othing herein contained shall prohibit the City Council from retaining special counsel to aid or replace the City Attorney should the City Council deem such action advisable." Mayville City Ordinance #2-0505.

¹ Sheila R. Anderson, *Roehrich remains Mayville police chief*, Trail County Tribune, July 12, 2003, at 1.

It has long been recognized that in the absence of statutory provisions to the contrary, a city has the implied authority to employ additional counsel if, in the view of the city council or the proper officials, the interests of the city require such assistance. See Scott v. City of Jamestown, 217 N.W. 668, 672 (N.D. 1928). There is also explicit statutory authority for cities to appoint special counsel “when it deems such counsel to be necessary for the best interests of the city.” N.D.C.C. § 44-20-02.

Thus, while the city council may employ special counsel, the question becomes whether the mayor alone may exercise that authority. One well respected treatise on municipal corporations provides that a city council may not delegate its power to employ an attorney to the mayor unless there is express authority to do so. 10 Eugene McQuillin, The Law of Municipal Corporations § 29.16 (3d ed. 1999). “[W]here the power to hire an attorney is vested by charter in the city council, it cannot be delegated to another officer or board.” Id. at § 29.15. Cf. Bosard v. City of Grand Forks, 102 N.W. 164 (N.D. 1904) (city not liable upon implied contract to pay reasonable value of professional services rendered by an attorney other than the city attorney in advising mayor and aldermen where employment had not been authorized or ratified by a vote of the council).

Based on the foregoing, it is my opinion that the mayor acting alone does not have the authority to retain special counsel.

You next ask whether the payment of city funds to a former employee without city council approval was lawful. Generally, a municipal or other public corporation has the power to settle and compromise disputed claims. N.D.A.G. 94-L-90 (quoting 17 Eugene McQuillin, The Law of Municipal Corporations § 48.17 (1993)). “To be legal and binding a compromise on behalf of the municipality must be made by the proper and duly authorized corporate officers.” C.T. Dreschler, Annotation, Power of City, Town, or County or Their Officials to Compromise Claim, 15 A.L.R.2d 1359, § 16 (1951). Generally speaking it is the municipality’s governing body alone that may compromise claims on behalf of the municipality. Id. at §§ 16-17. Cf. Traill County v. Moackrud, 260 N.W. 821, 823 (N.D. 1935) (power of municipal corporations to compromise specifically recognized in North Dakota).

While the city council could compromise a claim on behalf of the city, the question remains whether the mayor alone could do so. That same respected treatise on municipal corporations provides that, “[g]enerally the power to make contracts on behalf of a municipality rests in the council or governing body.” 10 Eugene McQuillin, The Law of Municipal Corporations § 29.15 (3d ed. 1999). The individual members acting singly have no authority to bind the municipality. Id. Further, the governing body must act at a legal meeting and give notice of the meeting required by law. Id.

Another authority provides:

The mayor of a city cannot, unless specially authorized, compromise any claim, or, by acting under such a compromise, estop the assertion of the city's legal rights. . . . It was held in *Jenkins v. Bowling Green* (1935) 261 Ky 679, 88 SW2d 692, that the mayor of a city has no power to authorize or control litigation on behalf of the city or to compromise a claim against the city for damages, unless there exists a serious emergency.

C.T. Dreschler, Annotation, Power of City, Town, or County or Their Officials to Compromise Claim, 15 A.L.R.2d 1359, § 20 (1951).

You noted in your letter that there is no record of any formal action taken by the city council to enter into the settlement with the former police officer. The newspaper article you submitted with your request states the mayor went to each council member individually and worked out a settlement, but the matter was never brought to the full council for formal action. The article also states that several council members claimed to have no knowledge of the payment until after it had been made. Even if the mayor consulted individually with each member of the council, such consultations do not constitute a properly noticed and held public meeting as required by N.D.C.C. §§ 44-04-19.1 through 44-04-21. See N.D.C.C. § 44-04-17.1(8)(a)(2); N.D.A.G. 98-O-05. Under state law, the governing body of a city has the authority to allow and pay claims made against the city, but the actions of the governing body must be shown in the minutes of the proceeding. N.D.C.C. §§ 40-01-12 and 40-01-13. There is no similar authority granted to a mayor. Since the settlement agreement was apparently not acted upon by the governing body in a public meeting, it is my opinion the payment of city funds to the former employee was not lawful.

Finally, you ask about remedies available to the city concerning the settlement. A city may ratify what it could previously have lawfully authorized. *Hennum v. City of Medina*, 402 N.W.2d 327, 333 (N.D. 1987).

If the contract is made by the wrong officer, it may be ratified by the officer or body having the power to make the contract in the first instance. Thus, a county may, through its board of commissioners, ratify the previously unauthorized contracts of its agents and officers, provided the contract is within the board's powers and not otherwise illegal.

10 Eugene McQuillin, The Law of Municipal Corporations § 29.17 (3d ed. 1999); 17 Eugene McQuillin, The Law of Municipal Corporations § 48.11 (3d ed. 1993) (the irregular allowance of valid claim may be ratified by the proper authority). Thus, the most obvious remedy would be to place the matter before the full council for a vote as to whether to ratify the previous action of the mayor.

Failing ratification by the full city council, other potential remedies that might be considered would be an action for rescission of the settlement agreement and recovery of the amount paid either from the former employee or from the mayor. Rescission of a contract² is permissible under certain circumstances, including instances when the consent of the rescinding contracting party was given by mistake. N.D.C.C. § 9-09-02. A mistake of law is “[a] misapprehension of the law by all parties, all supposing that they knew and understood it and all making substantially the same mistake as to the law” or “[a] misapprehension of the law by one party of which the others are aware . . . but which they do not rectify.” N.D.C.C. § 9-03-14.

A city has more authority to obtain a recovery of money paid to its officers and employees than recovery of money mistakenly paid in the ordinary course of business or propriety powers. Chrysler Light & Power Co. v. City of Belfield, 224 N.W. 871, 876-77 (N.D. 1929). “[F]ees or compensation paid to public officers, out of public funds, in excess of that allowed by statute, or in defiance of statute, or not legally chargeable, or under mistake of law, or through fraud or mistake, can be recovered.” Ward County v. Halverson, 274 N.W. 664, 665 (N.D. 1937). See also, Chrysler Light & Power, 224 N.W. at 877-78.

There have been two instances recently where this office has implicitly or explicitly recognized the power of a state’s attorney to attempt to collect payments wrongfully made by county commissioners personally from those individual commissioners. In N.D.A.G. 98-F-17, county commissioners had authorized payments to themselves for the dollar amount of individual health insurance in lieu of having the county actually pay the premiums and provide coverage. Id. It was determined that the action by the county commission resulted in exceeding the maximum salary for the commissioners set by law. Id. The commissioners were characterized as being fiduciaries and were obligated to return amounts in excess to the maximum statutory salary to the county treasury. Id. In the case of the city, however, there is no suggestion that the mayor personally benefited in any manner from the settlement of this claim. In addition, “[m]unicipal officers who sign a contract are not ordinarily personally liable on the contract.” 10 Eugene McQuillin, The Law of Municipal Corporations § 29.15 (3d ed. 1999).

In the other opinion, N.D.A.G. 2002-F-09, it was recognized that the state’s attorney had authority to seek recovery of funds improperly donated for a Fourth of July celebration from individual commissioners who had voted for the donation. However, this authority was based on a statute, N.D.C.C. § 11-16-01(13), which permits the state’s attorney to recover money unlawfully paid. Id. Furthermore, the opinion noted that the

² “A settlement agreement is a contract.” Hastings Pork v. Johanneson, 335 N.W.2d 802, 806 (N.D. 1983). All contracts, whether public or private, are interpreted by the same rules, except as otherwise provided by law. N.D.C.C. § 9-07-01.

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commissioners did not personally benefit from the donation which was a factor that could be considered by the state's attorney in determining whether or not to institute an action to recover the funds. Id. There is no similar statute applicable to a city.

If an action were brought against the former employee to recover the amounts paid, there may be a host of practical and legal problems raised. Somewhat murky issues of estoppel against the city or city liability on an implied contract theory might be raised, in addition to any practical problems of collection of such an amount after it may have been expended or dissipated. See 10 Eugene McQuillin, The Law of Municipal Corporations § 29.17 (3d ed. 1999).

Whether any of these potential remedies would ultimately prove successful is beyond the scope of this letter.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/vkk