

**LETTER OPINION**  
**98-L-107**

August 24, 1998

Ms. Cynthia M. Feland  
Grant County State's Attorney  
PO Box 104  
Carson, ND 58529-0104

Dear Ms. Feland:

Thank you for your letter concerning the authority of county commissioners to supervise elected county officers and to appoint its own members as district overseers of highways in unorganized townships.

N.D.C.C. § 11-11-11(2) provides that the board of county commissioners "[s]hall supervise the conduct of the respective county officers." Each county, subject to certain exceptions depending upon options adopted by the county, has the following officers: an auditor, register of deeds, clerk of district court, state's attorney, sheriff, treasurer, coroner, and county commissioners. N.D.C.C. § 11-10-02. I will assume, for the purposes of this letter, that the county has not adopted a home rule charter and implementing ordinance or other form of county government under which the powers and duties otherwise assigned to these officials lawfully could be altered.

The Grant County Board of Commissioners questions the extent of their role in supervising county officers. It would be impossible to list all of the authority a county commission has under N.D.C.C. § 11-11-11(2). I previously advised Representative Bill Oban 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." 1996 N.D. Op. Att'y Gen. 1, 2. But, "the board of county commissioners may not usurp the duties and powers given to the respective elected county officers pursuant to other statutes." Id. I also advised Representative Oban that the duty to supervise is to be interpreted in light of the statutes that specify the powers and duties of the respective elected county officers. Id. See generally N.D.C.C. chs. 11-13 (auditor); 11-14 (treasurer); 11-15 (sheriff); 11-16 (state's attorney); 11-17 (clerk of district court); 11-18 (register of deeds); and 11-19 and 11-19.1 (coroner).

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While opinions of this office have recognized the responsibility of a board of county commissioners to supervise county officers, they have also recognized that this responsibility is significantly limited. 1996 N.D. Op. Att'y Gen. 1, 2-3. The responsibility might best be characterized as advisory. For example, the North Dakota Supreme Court observed that under N.D.C.C. § 11-11-11(2), 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 . . . ." Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924). "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." Id. Thus, the Board may advise a county officer of facts that are relevant to the duties of a particular county officer so that the officer may accomplish those duties. 1996 N.D. Op. Att'y Gen. 1, 3. See also 1997 N.D. Op. Att'y Gen. L-32 (concluding that the board of county commissioners' supervisory authority may not unduly restrict a county officer's authority to hire or fire employees). A board of county commissioners may ensure that employees are discharged by county officers in accordance with county personnel policies, but those policies may not usurp or significantly interfere with an elected officer's authority to manage the officer's office. Id. at L-33. The restrictive nature of the supervisory authority is emphasized by the absence of any 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." 1996 N.D. Op. Att'y Gen. 1, 2.

You also ask whether an elected county officer or the board of county commissioners has the authority to determine when and how much vacation time the elected county officer may take. As I advised in 1996 N.D. Op. Att'y Gen. 1, 2, "the duties and powers necessarily implied from those expressly granted to the respective elected county officers . . . are not the duties and powers of the board of county commissioners." Instead, those powers belong to the respective county officers. Id. I emphasized that the board of county commissioners' supervisory function does not give it authority to "usurp the duties and powers given to the respective elected county officers." Id. See also Murphy v. Swanson, 198 N.W. at 119 (board has no right to perform county officers' duties or to exercise their prerogatives). Thus, a board of county commissioners may not determine whether an employee is hired or fired by an elected county officer, but only that such decisions conform with reasonable county

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personnel policies which do not interfere with the management of an elected officer's office. 1997 N.D. Op. Att'y Gen. L-32, L-33. For the same reasons, it is my opinion that elected county officers have implied authority to determine when and how much vacation time they take. I am aware of an earlier opinion of this office suggesting that a board of county commissioners may determine the length of time of vacations for county officers, and to that extent, it is overruled. See 1957 N.D. Op. Att'y Gen. 72.

You also ask whether a board of county commissioners can appoint its own members as district overseers of highways in the territory consisting of unorganized townships and compensate themselves for performing these duties.

The board of county commissioners is required to appoint a district overseer of highways to perform the same services in territory in the county that is not organized into civil townships as a township overseer of highways performs in an organized township. N.D.C.C. § 24-06-14. The compensation of the district overseer of highways is fixed by the board of county commissioners. Id. The district overseer of highways is paid out of moneys derived from road taxes from the territory in the county that is not organized into civil townships. N.D.C.C. § 24-06-15. On or before the first Monday in January in each year, the district overseer of highways reports to the board of county commissioners the amount and days of labor performed during the preceding year, and the board of county commissioners pays the district overseer of highways for such services. N.D.C.C. § 24-06-16. The district overseer of highways has direct charge of the construction and maintenance of all highways and bridges in the unorganized territory and must execute all lawful orders of the board of county commissioners. See N.D.C.C. § 58-12-03.

The general rule regarding self-appointment is as follows:

Officers who have appointing power are usually disqualified for appointment to office to which they may appoint. Such exercise of the appointive power is against public policy, and is void on its face . . . . Statutes may provide, however, that officers having appointive power may appoint one of their number to an office . . . .

3 Eugene McQuillin, The Law of Municipal Corporations, § 12.75 (3rd ed. 1990) (footnotes omitted).

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State law does not authorize the board of county commissioners to appoint its members as district overseers of highways in unorganized townships. Compare N.D.C.C. § 11-11-17 (permitting the board of county commissioners to designate one or more of its members to oversee county roads). It must be presumed the Legislature says what it means. Little v. Tracy 497 N.W.2d 700, 705 (N.D. 1993). The law is what the Legislature says, not what is unsaid. Id. It is improper to construe a statute "so as to legislate that which the words of the statute do not themselves provide." Peterson v. Heitkamp, 442 N.W.2d 219, 221 (N.D. 1989). Therefore, it is my opinion that the board of county commissioners cannot appoint its members as district overseers of highways in unorganized townships. Accord 1963 N.D. Op. Att'y Gen. 81 (a board of county commissioners may not select its members to make spot checks of real and personal property assessments); see also 1950 N.D. Op. Att'y Gen. 195 (township supervisors may not compensate themselves as township overseers of highways).

It is not necessary to address your additional questions regarding the compensation of the board of county commissioners for performing the duties of a district overseer of highways.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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