

N.D.A.G. Letter to Syverson (Jan. 5, 1988)

January 5, 1988

Mr. Gayle Syverson
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Bismarck, ND 58505

Dear Mr. Syverson:

Thank you for your September 14, 1987, letter concerning the potential personal liability of the members of political subdivision governing boards. I apologize for the delay in responding to your letter.

In your letter you ask three general questions: first, whether the members of city governing boards continue to have potential joint and several liability under N.D.C.C. § 40-40-15 in light of statutory changes made by the 1987 Legislature; second, whether the term "appropriation," as used in N.D.C.C. § 40-40-15, refers to budget line items or to the total "fund" or "group" appropriation within the budget; and, third, whether members of county and school district governing bodies may be jointly and severally liable for authorizing expenditures exceeding the county or school district budgets. I will answer each of these questions in turn.

N.D.C.C. § 40-40-15 imposes personal liability on those members of a city's governing body who authorize expenditures that are in excess of the appropriations contained in the city's final municipal budget. That statute provides:

40-40-15. EXPENDITURES MADE OR LIABILITIES INCURRED BEYOND APPROPRIATION -- JOINT AND SEVERAL LIABILITY OF MEMBERS OF GOVERNING BODY. Except as otherwise provided in sections 40-40-17 and 40-40-18, no municipal expenditure shall be made nor liability incurred, and no bill shall be paid for any purpose in excess of the appropriation made therefor in the final budget. Expenditures made, liabilities incurred, or warrants issued in excess of the appropriations shall be a joint and several liability of the members of the governing body who authorized the making, incurring, or issuing thereof or who were present when they were authorized and did not vote against authorizing the same.

N.D.C.C. § 40-40-15.

The 1987 Legislature did not enact any changes in N.D.C.C. § 40-40-15. The Legislature did, however, amend N.D.C.C. ch. 32-12.1, the statute that generally governs the immunity and the potential liability of political subdivision employees. See 1987 N.D. Sess.

Laws chs. 232, 261, 320, 351, 405, 406, 407. Two of those amendments are particularly relevant here.

First, the Legislature amended N.D.C.C. § 32-12.1-04 to provide protection from liability for a political subdivision employee for actions within the scope of his or her employment or office unless such actions are reckless or grossly negligent, or constitute willful or wanton misconduct. See 1987 N.D. Sess. Laws ch. 406. N.D.C.C. § 32-12.1-04 now provides in relevant part:

32.12.1-04. POLITICAL SUBDIVISION TO BE NAMED IN ACTION
-- PERSONAL LIABILITY OF EMPLOYEES -- INDEMNIFICATION OF
CLAIMS AND FINAL JUDGMENTS.

....

2. An employee shall not be personally liable for money damages for injuries when the injuries are proximately caused by the negligence, wrongful act, or omission of the employee acting within the scope of the employee's employment or office.
3. No employee may be held liable in the employee's personal capacity for acts or omissions of the employee occurring within the scope of the employee's employment unless the acts or omission constitute reckless or grossly negligent conduct, or willful or wanton misconduct. An employee may be personally liable for money damages for injuries when the injuries are proximately caused by the negligence, wrongful act, or omission of the employee acting outside the scope of the employee's employment or office. The plaintiff in such an action bears the burden of proof to show by clear and convincing evidence that the employee was either acting outside the scope of the employee's employment or office or the employee was acting within the scope of employment in a reckless, grossly negligent, willful, or wanton manner.

N.D.C.C. § 32-12.1-04(2), (3).

Second, the Legislature amended the statute to clarify that the immunity and liability provisions of N.D.C.C. ch. 32-12.1 cover members of political subdivision governing boards. 1987 N.D. Sess. Laws ch. 405 amended the definition of "employee," as used in N.D.C.C. ch. 32-12.1, to read as follows:

As used in this chapter, unless the context or subject matter otherwise requires:

....

3. "Employee" means any officer, employee, board member, volunteer, or servant of a political subdivision, whether elected or appointed and whether or not compensated, but does not include an independent contractor, or any person performing tasks, the details of which the political subdivision has no right to control.

N.D.C.C. § 32-12.1-02. The term "political subdivision" includes cities, counties, and school districts. N.D.C.C. § 32-12.1-02(5)(a).

Your question concerns an apparent conflict between N.D.C.C. ch. 32-12.1 and N.D.C.C. § 40-40-15. The issue is whether the changes in N.D.C.C. ch. 32-12.1 eliminated the potential personal liability established in N.D.C.C. § 40-40-15. If possible, N.D.C.C. ch. 32-12.1 and N.D.C.C. § 40-40-15 must be construed to give effect to both. See N.D.C.C. § 1-02-07. Such a construction is possible in this case.

Under the terms of N.D.C.C. ch. 32-12.1, an employee who acts within the scope of his or her employment may not be held personally liable unless he or she acts in a reckless, grossly negligent, willful or wanton manner. See N.D.C.C. § 32-12.1-04. We need not be concerned with reckless, grossly negligent, willful or wanton behavior here. The resolution of your question turns upon the definition of the term "scope of employment."

Governing bodies of political subdivisions are created by statute and derive their authority from those statutes. Those statutes define the scope of that authority and the scope of employment of the governing board. Some such statutes grant power to engage in certain activities; others proscribe certain activities.

N.D.C.C. § 40-40-15 defines the scope of employment of city governing board members by proscribing certain acts. Thus, if members of the city governing body engage in any activity proscribed by that section they act outside the scope of their employment. Where the activity is outside the scope of employment, N.D.C.C. ch. 32-12.1 offers no protection from liability.

The liability imposed by N.D.C.C. § 40-40-15, therefore, does not conflict with the immunity provided by N.D.C.C. ch. 32-12.1. Under N.D.C.C. § 40-40-15, members of city governing bodies may still be held personally liable for authorizing expenditures, liabilities, or warrants in excess of the budgeted appropriation, because such activity is outside the scope of their employment.

The liability imposed by N.D.C.C. § 40-40-15 is joint and several on the part of the members of the governing body who authorized the improper expenditure, liability, or warrant or who were present when one of those actions was authorized and did not vote against that action. The 1987 Legislature did limit the circumstances in which joint and several liability may be imposed. See 1987 N.D. Sess. Law ch. 404, §§ 2, 3. However, even under the 1987 law limiting when joint and several liability may be imposed, two or more persons continue to have joint and several liability when those parties "act in concert

in committing a tortious act or aid or encourage the act, or ratif[y] or adopt[] the act for their benefit." See N.D.C.C. § 32-03.2-02. Members of a city's governing board who unlawfully vote to approve (or fail to vote not to approve) a non-appropriated expenditure are acting "in concert" or are at least ratifying the act of the voting members. Therefore, the parties who are liable under N.D.C.C. § 40-40-15 could be held jointly and severally liable even under the terms of N.D.C.C. § 32-03.2-02.

Your second question is whether the term "appropriation," as used in N.D.C.C. § 40-40-15, refers to each line item of the city's budget or only to the total appropriation for a "fund" or "group" within that budget. As discussed above, N.D.C.C. § 40-40-15 imposes personal liability on city governing board members who authorize expenditures "in excess of the appropriation made therefor in the final budget." Your question is, therefore, whether board members face personal liability if they approve an expenditure for any individual item in excess of the appropriation for that item or whether they face personal liability only if total approved expenditures for a particular group within the municipal budget exceed the total appropriation for that group.

The term "appropriation" is not defined in N.D.C.C. ch. 40-40 or elsewhere in the North Dakota Century Code. Reading N.D.C.C. ch. 40-40 as a whole, however, it seems clear that the term "appropriation" in N.D.C.C. § 40-40-15 refers to the total appropriation for a "group" within the municipal budget.

N.D.C.C. § 40-40-04 requires the governing body of each municipality to prepare an itemized preliminary budget statement setting forth the proposed expenditures of the municipality for the next fiscal year. That preliminary budget statement must include an estimated revenue schedule and an appropriations schedule for the general fund of the municipality. N.D.C.C. § 40-40-05. The appropriations schedule must include estimated expenditures for all purposes for the upcoming fiscal year. Those estimated expenditures must be segregated into three groups: a current expenditure group, a capital expenditure group, and a debt service expenditure group. The estimated expenditures are then itemized within each of these three groups. Id. Notice of that preliminary budget statement is given to the public, N.D.C.C. § 40-40-06, and the public is given an opportunity to comment on the preliminary budget, N.D.C.C. § 40-40-08. After that public hearing, the governing board adopts a final budget (which is still segregated in the three groups), id., and levies taxes in an amount sufficient to meet the total expenditures contained within the entire final budget, N.D.C.C. § 40-40-09.

There are several indications within N.D.C.C. ch. 40-40 that the term "appropriation," as used within N.D.C.C. § 40-40-15, refers to the total appropriation for each of the three groups set out in N.D.C.C. § 40-40-05.

First, N.D.C.C. § 40-40-16 gives the state's attorney authority to sue to collect unauthorized expenditures only when those expenditures are in excess of the total appropriation for one of the groups of the final budget. N.D.C.C. § 40-40-16 provides:

40-40-16. STATE'S ATTORNEY TO SUE FOR EXCESSIVE EXPENDITURES. Upon good and sufficient information laid before him by any taxpayer in the municipality or obtained from any other source, the state's attorney of the county in which the municipality lies shall bring suit to recover from the members of the governing body, jointly and severally, the amount of expenditures, payments, or warrants in excess of the amount shown in any group of the final budget.

(Emphasis supplied.) The collection provision of N.D.C.C. § 40-40-16 is closely related to the liability provision of N.D.C.C. § 40-40-15. Reading these two sections together, it appears that the Legislature intended to impose personal liability only when the governing board members approved an expenditure that caused the total expenditures for any group of the final budget to exceed the total appropriation for that group.

Moreover, when N.D.C.C. ch. 40-40 was enacted, the Legislature gave the cities' governing bodies the authority to transfer moneys appropriated for one item to another appropriated item within the final budget. See N.D.C.C. § 40-40-17 (1983). It should be noted that N.D.C.C. § 40-40-17 was recently repealed by the 1987 Legislature. See 1987 N.D. Sess. Laws ch. 497, § 3. However, section 40-40-17 was repealed only because other sections in the North Dakota Century Code already govern the specifics contained in that section. See Hearing on H. 1116 Before the Senate Committee on Political Subdivisions, 50th Leg., (February 26, 1987) (testimony of Gayle L. Syverson, Deputy State Auditor). Whether or not N.D.C.C. § 40-40-17 remains in effect, the fact that the Legislature gave the cities' governing boards this power to transfer appropriated moneys from one item to another item demonstrates that the Legislature was not concerned about city governing boards deciding to change the amount expended for any particular appropriated item. Rather, the Legislature imposed personal liability under section 40-40-15 only to prevent the governing boards from spending more total funds than had been budgeted (and collected in revenue based upon that budget).

When N.D.C.C. ch. 40-40 is considered as a whole, therefore, it is evident that the term "appropriation" in N.D.C.C. § 40-40-15 refers only to the total appropriation for one of the groups set forth in N.D.C.C. § 40-40-05.

Your third question is whether members of the governing body of a county or a school district may be held jointly and severally liable for approving expenditures that are in excess of the governing body's budget. N.D.C.C. § 40-40-15 applies only to municipalities. It does not apply to counties or school boards. See N.D.C.C. §§ 40-01-01(4), 40-40-02 (defining "municipality" and "city"). There are no statutory provisions in the North Dakota Century Code, similar to N.D.C.C. § 40-40-15, imposing personal liability on members of county or school district governing bodies. It is possible, of course, that a lawsuit could be brought against a member of a county governing body or a school board for breach of duty if that governing body member authorized an improper expenditure. If so, whether that member would be held personally liable would depend upon the facts in that case and the court's interpretation of the parties' legal arguments and N.D.C.C. ch. 32-12.1. If liability were imposed, whether or not that liability

would be joint and several would also depend upon the facts of the case as well as how those facts were interpreted in light of N.D.C.C. § 32-03.2-02.

I hope this discussion is of assistance to you.

Sincerely,

Nicholas J. Spaeth

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