

N.D.A.G. Letter to Fitzner (June 11, 1987)

June 11, 1987

Mr. R. Jon Fitzner
Valley City City Attorney
P. O. Box 330
Valley City, ND 58072

Dear Mr. Fitzner:

Thank you for your letter of May 26, 1987, inquiring as to the legality of a Valley City ordinance proposing to limit to six months any action brought by any consumer to obtain a refund for an overcharge of a utility payment where the overcharge was the result of an inaccurate meter. You question the validity of this ordinance in light of N.D.C.C. § 28-01-16 which provides a six year statute of limitations. A member of my staff has spoken with you and has learned that Valley City does own and operate its own water and power utilities.

Your letter also means that the ordinance in question was apparently patterned after N.D. Admin. Code §§ 69-09-02-12 and 69-09-02-13. These administrative rules are those of the North Dakota Public Service Commission and concern adjustment of bills for meter errors and refunds. These rules are based upon N.D.C.C. § 49-02-11 which authorizes the commission to adopt rules to secure the accuracy of all meters and appliances for measurements. Our review of the North Dakota Century Code, however, has failed to locate similar authority to that found in N.D.C.C. § 49-02-11 granted to cities operating municipal utilities. Thus, the provisions of N.D Admin. Code §§ 69-09-02-12, 69-09-02-13 would not appear to be applicable to municipal utilities.

The North Dakota Century Code contains several statutes authorizing cities to manage and maintain electric light, power, and water utilities. Furthermore, the authority to fix and regulate the rates, use, and sale of these services is also provided for. N.D.C.C. §§ 40-05-01(36), 40-05-01(67). In addition, where the publicly owned utilities were paid for by special assessment, city governing bodies are authorized to provide for the establishment, imposition, and collection of service charges for utility services. N.D.C.C. § 40-22-16. Nowhere in these statutes or in other statutes have we been able to locate any authority given to a city governing body to establish a separate statute of limitations concerning the recovery of the overpayment of an utility billing.

In North Dakota, cities are authorized to enact and adopt all ordinances as may be proper and necessary to carry into effect the powers granted to municipalities so long as the ordinances are not "repugnant to the constitution and laws of this state." N.D.C.C. § 40-05-01(1). Valley City ordinance number 703 providing a six month statute of limitation for the recovery of the overpayment of an utility billing for meter errors appears to conflict with the six year statute of limitation provided for in N.D.C.C. § 28-01-16(1).

A review of applicable case law has failed to locate any North Dakota case dealing with this specific issue. However, in Richland County v. State, 180 N.W.2d 649 (N.D. 1970), our supreme court applied the six year statute of limitation found at N.D.C.C. § 28-01-16 to a cause of action based upon an overpayment which occurred by mistake. Although this case does not deal with a municipal utility, it is relevant in that the cause of action discussed in Richland County (overpayment occurring by mistake) is the same cause of action as would occur in obtaining a refund from a municipal utility due to an overpayment as a result of an inaccurate meter.

Finally, there are two Texas cases which specifically state that the state's statute of limitation applies to the recovery of overpayments made to municipal utilities. El Paso Electric Co. v. Raynolds Holding Co., 100 S.W.2d 97 (Tex. Civ. App. 1937); Texas Power and Light Co. v. Doering Hotel Co., 147 S.W.2d 897 (Tex. Civ. App. 1941).

In summary, municipalities are able to operate their own utilities. As part of that operation, the municipalities are able to provide for the regulation of the rates for the utilities' services and to provide service charges for those services. However, neither by statute nor by case law have municipalities been provided with the authority to specify a statute of limitation which differs from applicable state statute of limitation for the recovery of an overpayment which occurred due to an inaccurate meter. The attempt by Valley City through Valley City ordinance 703 to establish this specific statute of limitation is repugnant to the laws of this state and is not a valid ordinance. Specific legislation would need to be obtained to provide a city with the authority to adopt its own limitation period for the attempted recovery of overpayments occurring as a result of inaccurate meters.

Sincerely,

Nicholas J. Spaeth

vkk