N.D.A.G. Letter to Fine (July 1, 1986)

July 1, 1986

Ms.. Karlene K. Fine
Secretary
Industrial Commission
State Capitol
Bismarck, ND 58505

Dear Ms. Fine:

I have received an inquiry from Mr. Sam Kuhl, general manager, North Dakota Mill and Elevator, concerning the scheduled August 1, 1986, salary increases for union employees of the Mill and Elevator. Specifically, Mr. Kuhl inquired whether the state's policy to delay the scheduled July 1, 1986, salary increases, as declared by Governor Sinner, is applicable to union employees of the State Mill and Elevator.

In the summer of 1985, the North Dakota Mill and Elevator negotiated a two-year contract with the American Federation of Grain Millers International Local #135. The agreement is for the period of August 1, 1985, to August 1, 1987. The collective bargaining agreement provided for two consecutive 3 percent salary raises on August 1, 1985, and August 1, 1986.

In 1982, a similar issue arose when Governor Olson ordered a reduction in scheduled salary increases for all public employees. During this time, the question of honoring the State Mill's union contract was a major issue. The Industrial Commission did honor the contract and its provision for a 10 percent wage increase for union employees. It should be noted that this action by the Industrial Commission precipitated an argument by the American Federation of State, County, and Municipal Employees Union (AFSCME) that its constitutional right to equal protection had been violated because its collective bargaining agreement with the Highway Department was not honored.

The issue of the effect of Governor Olson's order denying salary increases to employees of the Highway Department who had collectively bargained for such increases was presented to the North Dakota Supreme Court in Am. Fed. of State, Co., and Mun. Emp. v. Olson, 338 N.W.2d 97 (N.D. 1983). The relevant issue in AFSCME was whether employees of the State Highway Department represented by the Union were entitled to an eight percent (8%) salary increase on July 1, 1982, as provided for in the collective bargaining agreement entered into between the Union and the State Highway Department.

In AFSCME, it was undisputed that there existed no express statutory authority for the State Highway Commissioner to enter into collective bargaining agreements. The Union

asserted, however, that the Commissioner had the implied authority to enter into such agreements.

The statute relied upon by the Union as providing the implied authority was N.D.C.C. § 24-02-03(4), which states as follows:

> 24-02-03. RESPONSIBILITIES OF COMMISSIONER. The commissioner shall:
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> 4. Employ all engineers, assistants, clerks, agents, attorneys, and other employees, required for the proper transaction of the business of his office, or of the department, fix their titles, determine their duties, the amount of their bonds in the state bonding fund, if any are required, and their compensation, and shall discharge them in his discretion.
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> * * *

The court rejected the Union's argument and adopted the general rule that, "absent express statutory authority, public officials do not have authority to enter exclusive collective bargaining agreements with public employees." Id. at 100.

In addition to its interpretation of the statutory authority of the Highway Commissioner, the court also relied on N.D.C.C. Ch. 34-12 (North Dakota Labor Management Relations Act). This chapter establishes various safeguards and guidelines pertaining to the collective bargaining process in North Dakota.

The state and its political subdivisions are expressly excluded from the definition of "employer" for purposes of applying N.D.C.C. Ch. 34-12. Thus, the court reasoned that the Legislature could not have intended "to give the commissioner implied authority to enter collective bargaining agreements absent the type of statutory provision" contained in N.D.C.C. Ch. 34-12. Id. at 101.

The court also took judicial notice of "the fact that on numerous occasions our legislature has refused to enact into law bills which were introduced to provide for collective bargaining by public employees." Id. at 102. The court interpreted the Legislature's repeated refusal to enact such legislation as indicative of its intent that public officials do not have the implied power to collectively bargain with state employees.

The court did not expressly rely on the fact that employees of the State Highway Department are included in the classification system of the state. N.D.C.C. § 54-44.3-20. Other courts, however, have upheld collective bargaining agreements with unions representing public employees where such employees were not subject to a statutory personnel system. International Brotherhood of Electrical Workers v. Town of Farmington,

405 P.2d 233 (N.M. 1965); Local 266, etc. v. Salt River Project Agricultural Improvement and Power District, 275 P.2d 393 (Ariz. 1954). See also 1982 N.D. Op. Att'y Gen. 46 (concluding that the collective bargaining agreement between AFSCME and the State Highway Department was not enforceable. The opinion noted that the State Highway Department employees are subject to and entitled to benefit from the state of North Dakota personnel policies).

In Local 266, the Supreme Court of Arizona upheld the validity of a collective bargaining agreement between an Agricultural and Power District of the State of Arizona and a union in the absence of a conflicting legislatively established personnel system.

Statutory regulation of employment negates the view that such would be open for contractual negotiations between the employer and employees. If a civil service scheme provides for the regulation of matters normally contained in a collective bargaining agreement, the conflicting terms of both cannot exist concurrently. The inconsistency would be resolved in favor of the statute. Under these circumstances, the power to enter into a collective bargaining agreement would be properly denied as an attempt to subvert legislative direction. A statute must be given effect. (Citation omitted).

Id. at 397. See also International Brotherhood of Electrical Workers, 405 P.2d at 236 ("If a merit system provides for those matters usually contained in a collective bargaining agreement, both could not exist concurrently and the inconsistency must be resolved in favor of the statute or municipal ordinance, and the authority to enter into a legally binding collective bargaining agreement should properly be denied.")

"Officers and employees of the North Dakota Mill and Elevator Association" are excluded from the state's central personnel system. N.D.C.C. § 54-44.3-20(11). As such, the employees and officers of the State Mill are not subject to, nor entitled to benefit from, the state of North Dakota personnel policies. Thus, the above-cited cases are persuasive in resolving the present issue.

The legislative history of N.D.C.C. §54-44.3-20(11) indicates that the Legislature is aware that the State Mill collectively bargains with the Union concerning employment policies. The following excerpts are from the minutes of the House Appropriations Committee's discussion on March 31, 1983:

> Senator Fritzell explained to the committee that they [State Mill and Elevator employees] are unionized and they have their own health insurance. This just makes the entire process, which has gone on for years, legal.
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> Representative Boyle had a point of inquiry. He wanted to know if because of the union contract, some people from the Highway Department who felt that they were under just such a contract might react. It seemed to him that when they were informed that they would not receive those wages that they went into litigation, and that was where the question was resolved. His question was did this eliminate other unions?

> Representative Lardy indicated that State Mill and Elevator is a quasi corporation competing on the open market, highway department employees could not be considered in this same area. He did agree that specifically listing the state mill employees may open up further litigation from the highway department in the future.
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> Senator Heigaard agreed that the employees of the State Mill and Elevator are unionized, and no one knows the affect [sic] of the bills [sic] passage on the Highway Department but the bill is necessary.

There are several sources of statutory powers from which it can be argued that the management of the State Mill had the authority to enter into the collective bargaining agreement at issue. It should be preliminarily noted that the Industrial Commission may appoint a "manager [as] its general agent, in respect to the functions of the association, but subject, nevertheless, in such agency, to the supervision, limitation, and control of the commission." N.D.C.C. § 54-18-05. Inasmuch as the collective bargaining agreements between the Union and the State Mill have occurred consistently for the past 40 years, it is assumed that the Industrial Commission authorized the State Mill management to negotiate collective bargaining employment contracts.

N.D.C.C. §54-18-02 provides that "the business of the association [State Mill and Elevator], in addition to other matters specified in this chapter, may include anything that any private individual or corporation lawfully may do in conducting a similar business except as restricted by the provisions of this chapter."

N.D.C.C. §54-18-06, states as follows:

> 54-18-06. MANAGER SHALL APPOINT NECESSARY EMPLOYEES. Subject to the control and regulation of the industrial commission, the manager of the association shall appoint and employ such deputies and other subordinates, and such contractors, architects, builders, attorneys, clerks, accountants and other experts, agents, and servants as he shall find required by the interests of the association.

N.D.C.C. §54-18-07, states as follows:

> 54-18-07. COMPENSATION OF EMPLOYEES AND EXPENDITURES REMAIN WITHIN APPROPRIATION. The total compensation of the appointees and employees of the association, together with other expenditures for the operation and maintenance of the association, shall remain within the appropriation and earnings lawfully available in each year for such purposes.

N.D.C.C. §54-17-08, states as follows:

> 54-17-08. COMMISSION TO MAKE RULES FOR ITS PROCEDURE -- GENERAL POWERS OF COMMISSION. . . . It may do any and all things necessary or expedient in conducting the business of the industries, utilities, enterprises, and business projects under its control.

Although the above-quoted statutes do not expressly authorize the State Mill, or the Industrial Commission, to enter into collective bargaining agreements, it is necessary to imply such authority in the present context, where State Mill union employees are exempt from the state's central personnel system. The Supreme Court of West Virginia implied the authority of a municipality to enter into a collective bargaining agreement from a general provision enabling municipalities "to contract and be contracted with." Local 598, Council 58 American Federation v. City of Huntington, 317 S.E.2d 167, 168 (W.Va. 1984). (Interestingly, the court rejected an Attorney General's opinion that "the final determination of wages, hours, working conditions and the like, rests with the particular governmental unit and cannot be delegated away." Id. at 169.)

The opinion of the North Dakota Supreme Court in AFSCME should be limited to its facts: a collective bargaining agreement between a union representing State Highway Department employees belonging to the legislatively established central personnel system and the Highway Commissioner, acting under limited statutory authority. The rationale of the cases upholding collective bargaining agreements where the employees were not subject to a statutory employment scheme is persuasive in the present context.

It is my opinion, therefore, that the collective bargaining agreement entered into by the North Dakota Mill and Elevator and American Federation of Grain Millers International Local #135 Union is a legally enforceable contract.

Sincerely,

Nicholas J. Spaeth

cv
cc: Sam Kuhl