

N.D.A.G. Letter to McIntee (Dec. 24, 1986)

December 23, 1986

Mr. Michael S. McIntee
McHenry County State's Attorney
P. O. Box 246
Towner, North Dakota 58788

Dear Mr. McIntee:

Thank you for your letter of December 8, 1986, posing three questions to us for responses.

Your first question concerns a possible conflict of interest existing within your board of county commissioners. According to your letter, a current commissioner is active in highway road contracts. You indicate that possible conflicts of interest may occur where the county involves itself in its road contracts.

I agree with your assessment of the potential conflict of interest in this matter and believe your suggested resolution is a reasonable one. The statutes do not provide for any method whereby potential conflicts involving members of a board of county commissioners may be resolved. A procedure is provided to resolve potential conflicts existing on city governing bodies (N.D.C.C. §§40-13-05, 40-13-05.1), but this procedure has not been extended to boards of county commissioners.

As for other possible conflicts, it is difficult to predict or to anticipate factual situations which may occur whereby this conflict of interest may reveal itself. Obviously, any business of the county involving county roads and the contractors who perform work on behalf of the county may place this commissioner in a difficult situation.

Your second question concerns overtime pay for law enforcement officers. You inquire as to whether part-time officers must be counted in determining whether the law enforcement agency satisfies the less-than-five exemption from FLSA coverage.

The Fair Labor Standards Act does provide a complete overtime exemption for any employee of a public agency engaged in law enforcement activities so long as that agency employs fewer than five employees during the work week. 29 U.S.C. 213(b)(2). However, part-time employees are counted in determining the number of such employees. 29 C.F.R. 553.1(d). Thus, in your factual situation, the four part-time officers would have to be counted in determining whether the department has fewer than five law enforcement employees.

You pose a subsidiary question as to whether a deputy sheriff may be fired when he indicates that unless he is paid for his overtime, he will not work more than the required

number of hours for which straight time pay is to be compensated. We are unable to indicate whether the county may fire such an individual given the possible presence of county employee personnel policies, employment contractual terms and obligations, and the possible relevance of case law as to the dismissal of public employees and their due process requirements.

We can point out that Section 8 of the 1985 amendments to the Fair Labor Standards Act makes it a violation of that act for any public agency to discriminate against an employee with respect to an employee's wages or other terms or conditions of employment where the employee asserts his FLSA entitlements. Put another way, this provision prohibits "adjustments" from being made with respect to an employee's compensation or other terms of his employment where the employee seeks to receive that to which he is entitled pursuant to the FLSA. Action by the county in dismissing an employee who refuses to work overtime hours due to their nonpayment as required by the Fair Labor Standards Act may be in violation of this provision. Surely, the nonpayment of overtime hours by itself is a violation of the Fair Labor Standards Act and provides the basis for legal action by the U.S. Department of Labor, the individual, or both.

Your third question concerns the purchase of county equipment by a competitive bidding process.

There is no statutory requirement that counties utilize a competitive bidding process when purchasing equipment other than county road machinery under N.D.C.C. § 24-05-04. N.D.C.C. §11-11-26 requires competitive bidding for the "erection of county buildings, for the purchase of fuel, or for election ballots and supplies" which exceed \$2,500 for the year. It is my interpretation of N.D.C.C. §11-1126 that "election" modifies supplies and, therefore, office equipment (and even office supplies) would not be subject to the competitive bidding requirements.

This interpretation is supported by previous correspondence of this office. See attached September 1, 1966, letter to R. R. Robinson (N.D.C.C. §11-11-26 does not require that office supplies and furniture be let on bids). However, as noted in the R. R. Robinson letter, this office has always advised that the wisest procedure for public procurement involves the utilization of public bidding.

Sincerely,

Nicholas J. Spaeth

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Enclosure

cc: McHenry County Auditor