

**OPINION**  
**66-169**

March 30, 1966 (OPINION)

Mr. John A. Alphson

State's Attorney

Grand Forks County

RE: Mentally Ill - Service Units - Operation

This is in reply to your letter presenting several questions with regard to the operation of your county's Mental Health Service Unit.

You give us historical background as follows:

"During the formulative period of our mental health unit, a non-profit corporation was formed to serve as a vehicle to organize five counties into what would be known as the Northeast Regional Mental Health and Retardation Center. The directors of this corporation secured the statutory petition of eight percent of the voters and that petition called upon the county commissioners to establish a service unit as an arm of the county. Thereafter the county commissioners appointed directors pursuant to law and established a Mental Health Service Unit as an agency of the county. At the same time the county commissioners appropriated from the general fund of the county an approximate sum of \$21,000 for the Mental Health Service Unit. There was no contractual relationship between either the county or the Mental Health Service Unit and the non-profit corporation, and the unit is therefore considered strictly as a county agency."

You further inform us that at the current time members of the non-profit corporation are requesting that the county commissioners contract with the non-profit corporation, rather than run the unit as a county agency. On such basis you present the following questions.

Your first question is stated as:

1. Under the law, does the service unit have the ability without consent of the commissioners to contract with a non-profit corporation for service?"

This question must be answered in the negative. The fourth paragraph of section 25-12-01 of the 1965 Supplement to the North Dakota Century Code provides:

"Such service unit may be established by the county or city and operated by the political subdivisions involved, or in the discretion of their respective governing bodies such service unit may be operated by contract with a nonprofit corporation which shall agree to furnish such services in the field of

mental health and retardation in accordance with such contract in a manner consistent with state law and rules of the division of mental health of the state health department."

The statutory provision obviously authorizes such "contract" in the discretion of the governing body of the political subdivision, in this instance, the county.

Your second question is stated as:

2. If the directors of the service unit are capable of contracting as stated in question no. 1, must there be any type of approval by the board of county commissioners?"

The discretion referred to in the above quoted portion of section 25-12-01 of the 1965 Supplement to the North Dakota Century Code is that the Board of County Commissioners in this case. Exercise of same would necessarily include authorization for any such contracts entered into.

Your third question is stated as:

3. If the answers to no. 1 and 2 permit the county and/or the service unit to contract with a non-profit corporation and there is an appropriation from the general fund of the county, it is required that those expenditures from the general funds of the county be expended by individual itemized expense voucher, or is it permissible for the county to pay on a single voucher all of the monies directly to the non-profit corporation with which the county or service unit has contracted?"

To look at the broadest possible interpretation of the language of the fourth paragraph of section 25-12-01 of the 1965 Supplement To the North Dakota Century Code, as quoted above, it is perhaps conceivable that a contract to provide "mental health service" at a cost of "\$21,000.00" to the county could be entered into, a "budget" listing the one item "mental health service - \$21,000.00 - 1966" could be sent to the county auditor upon which the county's warrant-check could be issued in the total sum of \$21,000.00. This, however, does not seem to be within the contemplation of all of chapter 25-12 of the 1965 Supplement to the North Dakota Century Code.

Subsection 4 of section 25-12-04 of the 1965 Supplement to the North Dakota Century Code provides, for example:

"The following powers and duties shall be performed by the board of directors of the mental health and retardation service unit:

\* \* \*

4. Determine the budgets and submit them to the governing bodies of the political subdivisions concerned for their approval and prepare detailed plans for services and programs of the unit for the forthcoming years; and

\* \* \*."

We do not believe that the requirement of "budgets" and "detailed plans for services and programs" will be satisfied by one account "for mental health service - \$21,000.00."

Also, even though a contract is entered into whereby the service unit receives all of its "services" from one non-profit corporation, it would appear that the chapter as a whole contemplates at least some administrative costs of the service unit.

In this regard note, for example, the provision of section 25-12-03 of the 1965 Supplement to the North Dakota Century Code that:

"\* \* \* No compensation shall be allowed the board members, but they shall be allowed the same mileage and expenses as is allowed state officials. \* \* \*."

The chapter is designed along extremely flexible lines; however, its clear implications are that the county service unit as such will be at least an intelligent, negotiating, contracting agency. We do not believe that it will adequately fulfill this function where all county monies to be utilized in this field are turned directly over to the non-profit corporation for a single, non-itemized, undetailed voucher.

Your fourth question is stated as:

4. If it is permissible to contract as in question no. 1 and 2, and such contract is consummated, in what manner would other funds, such as state funds, grants, or donations, be expended? Would it be by voucher on the county treasurer or could the non-profit corporation establish its own accounting system and expend those funds without depositing them in the county treasury?"

Considering the basis of state aid as an example of contracts that can be entered into and consummated we note the beginning of section 25-12-02 of the 1965 Supplement to the North Dakota Century Code which provides:

"Cities, counties, or other political subdivisions or any combination thereof, and private non-profit corporations may apply to the Mental Health Division of the State Department of Health for assistance in establishing and maintaining mental health and retardation service units. In the case of a private non-profit corporation a contract between the Mental Health Division and the corporation shall be entered into for state aid and for the provision of mental health and retardation services by such corporation, which contract shall be upon such terms as the mental health division shall prescribe. \* \* \*."

Thus it would appear that the answer to your fourth question would depend upon which agency applied for and/or received the funds in question. Assuming that the non-profit corporation applied for and received state funds in exchange for services pursuant to contract,

such funds could be expended by the non-profit corporation as its own funds without deposit of such moneys in the county treasury and without voucher on the county treasury. If on the other hand the county's service unit applied for and received such funds they should properly be deposited in the county treasury and paid out only upon vouchers upon the county treasury.

We must, of course, consider the possibility that the county service unit might conceivably contract for complete service, including all administrative functions with the non-profit corporation, in which case, there would be no advantage in the county service unit applying for state funds, rather than the non-profit corporation applying for such funds, excepting the sales and use tax advantage mentioned in a previous letter from this office to Mr. Moosbrugger of your office. On the other hand, we believe it is entirely possible that the county's service unit might administer the funds and in so doing might contract not only the non-profit corporation you mention, but with other agencies, corporations, and business organizations, as well as incurring expenses in the course of such administration. In such instances it might well be advisable for the county service unit rather than the non-profit corporation to apply for and expend the funds, considering the tax advantage previously mentioned and considering that the county service unit's expenditures would be greater for your county than the non-profit corporation's, thus entitling the county service unit to a greater amount of state support pursuant to the criteria set forth in the second paragraph of section 25-12-02 of the 1965 Supplement to the North Dakota Century Code.

Your fifth question is stated as:

5. If the answer to question no. 4 would permit the non-profit corporation to establish its own accounting system, what would be the auditing requirements under our laws as to monies received from the county general fund, monies received from state appropriations, monies received from grants and donations?"

Assuming that as considered possible in the answers to questions 4 and 1 above that the county service unit contracted for service, both in the mental health field and in the administrative field from the non-profit corporation, the only basis of audit on behalf of the county under the provisions of chapter 25-12 of the 1965 Supplement to the North Dakota Century Code would appear to be the provisions of subsection 1 of section 25-12-04 of the 1965 Supplement to the North Dakota Century Code which provides:

"The following powers and duties shall be performed by the board of directors of the mental health and retardation service unit:

1. Determine, review, and evaluate services and programs provided by the unit and make periodic reports thereon to the mental health division of the state department of health, together with any recommendations the board may have for improvement in services, programs, or facilities;  
\* \* \*."

We might suggest at this point that specific contractual provisions in regard to audits generally and in regard to the board of directors of the mental health and retardation service unit's duties under the above quoted statutory provision might clarify difficult points in this regard to the time that they arise. In legal theory, however, a county or county agency has no inherent right to audit the records of private corporations doing business with, or furnishing services, etc., to the county or county agency merely by reason of the fact that such private corporation is doing business with, furnishing services to and/or receiving funds from such county or county agency. At such time, of course, as a controversy might arise as to the value of the services, or as to whether contractual responsibilities have been fulfilled, audit of the books of such private corporation might well serve to clarify the situation.

We might also mention in this regard the last sentence of the first paragraph of section 25-12-02 of the 1965 Supplement to the North Dakota Century Code which provides:

"The division shall have authority to reallocate unencumbered funds that have been allocated and may withdraw unencumbered funds if the services and programs of the mental health and retardation service unit do not correspond to the approved budget and plans forwarded to the health department."

While possibly varying constructions of this provision may be appropriate dependent upon all surrounding circumstances, it seems entirely conceivable that the burden might well be upon either a county service unit, or the non-profit corporate entity considered throughout this letter to justify through audit of its books, that its services and programs correspond to the approved budget and plans forwarded to the health department, dependent upon the factual circumstances at such time as an audit would be requested. Similar provisions might of course be embodied in agreements involving moneys received from grants and donations, as well as in contracts with a county mental health service unit.

Considering the nature of the problems presented in your letter and the context of the within and foregoing as a whole we might further suggest that section 185 of the North Dakota Constitution might well serve to shed some light on the scope of authority and responsibility of the county, the county agency and the private non-profit corporation previously considered herein. Said section 185 provides:

"The state, any county or city make make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation."

While we would never question that the furnishing of "mental health" service where appropriate is legitimately within the scope of the health, safety and welfare phases of a county's exercise of its

police powers, we do not believe that chapter 25-12 of the 1965 Supplement to the North Dakota Century Code authorizes a county to exercise its governmental powers to raise funds for a legitimate county function, and then abdicate its position of governmental responsibility for the proper expenditure thereof in favor of any private association or group.

HELGI JOHANNESON

Attorney General