

**OPINION
72-35**

July 25, 1972 (OPINION)

Mr. Frank E. Hull
Deputy Commissioner of Insurance
State Capitol
Bismarck, ND 58501

Dear Mr. Hull:

This is in response to your letter of June 20, 1972, wherein you make inquiry of this office regarding the State Bonding Fund. You submit the following in your letter:

"The State Game and Fish Department provides that county auditors may appoint subagents to sell fishing and hunting licenses. The Bonding Fund would like to know if these subagents may be bonded under the county bond as employees of the count."

Initially we would note the provisions of Section 26-23-02.1 of the North Dakota Century Code, as amended, which provides as follows:

"26-23-02.1. BLANKET BOND COVERAGE AVAILABLE TO STATE DEPARTMENTS, AGENCIES, INDUSTRIES, AND INSTITUTIONS. The state bonding fund shall provide coverage as set forth in section 26-23-09 in the form of a blanket bond to state departments, agencies, industries, and institutions, and to political subdivisions, subject to the approval of the commissioner who may exclude certain employees or groups of employees. The commissioner shall prescribe the kind or kinds of blanket bond coverage, with or without deductible provisions, available through the fund, the procedure to be followed in obtaining such blanket bond coverage, and the forms upon which blanket bond coverage shall be requested. Public employees required to be bonded by law may be included in such blanket bond coverage, and such blanket bond coverage may be greater but not less than the maximum bond as provided in the law for such positions. Such blanket bond shall fulfill statutory bonding requirements for any position." (emphasis supplied)

This statute makes it clear that the blanket bond shall provide coverage to, among other governmental entities, "political subdivision." We would interpret this to include and mean counties. We would note, however, that the furnishing of such blanket bond is also subject to the approval of the commissioner who may exclude certain employees or groups of employees. In this respect it would appear that the ultimate determination would like with the discretion of the commissioner. We would note the provisions of Section 26-23-01 of the North Dakota Century Code, as amended, which provides in part:

"DEFINITIONS.

* * *

3. 'Blanket bond' shall mean a bond which covers collectively the entire personnel without the necessity of scheduling the employees' names or positions as a part of the bond, and a bond whereby new employees entering employment during the period of the bond are automatically included without notice to the fund;

* * *."

Accordingly, it would appear that the only question remaining for determination is whether such subagents as referred to in your letter are employees of the county or political subdivision as are contemplated by the statute.

In this regard we would note the provisions of section 20-03-21 of the North Dakota Century Code, as amended, which provides as follows in part:

"ISSUANCE OF LICENSES - WHO TO ISSUE - COUNTY AUDITOR MAY APPOINT AGENTS WHO SHALL RECEIVE SERVICE FEES - DISPOSITION OF PROCEEDS. * * * The county auditor may appoint agents to distribute hunting and fishing licenses. Such agents may charge the purchaser of any hunting, fishing or trapping license or stamp a service fee of fifteen cents. Service fees shall be retained by the agent. The remainder of the license fees shall be deposited with the county treasurer at least once each month, and not later than three days after the close of the month, accompanied by a report showing the amounts received from the sale of each type of license, the amount retained, and the net amounts deposited. The county treasurer shall credit the fees so deposited to a separate account and shall hold such fees, subject to warrant for payment thereof drawn by the county auditor in favor of the state game and fish commissioner. The commissioner shall deposit all receipts from the issuance of licenses or stamps received by him with the state treasurer to be credited to the game and fish fund."
(emphasis supplied)

We would note that the statute providing for the appointment of such agents is silent with regard to qualifications of such agents or the requirements of bond. Since such personnel is not paid by county or public funds but rather on a fee basis for licenses sold, it would appear that the subject appointees are not employees within the meaning of that term as referred to in Section 26-23-02.1 of the North Dakota Century Code, as amended, hereinbefore quoted. We further note that Section 11-10-05 of the North Dakota Century Code required bonds of the various county officers. Section 11-10-12 makes provision for the requirement of bonds of deputy county officers at the discretion and order of the county officer. Since the appointees referred to in Section 20-03-21 are agents of the county auditor, it would appear that the auditor would be responsible for their acts and any claim filed thereunder would be a valid claim against the bond of the auditor.

We would further note the provisions of Section 26-23-02 of the North Dakota Century Code insofar as the same appears applicable to

the instant question. the same provides as follows:

"26-23-02. STATE BONDING FUND UNDER MANAGEMENT OF COMMISSIONER OF INSURANCE. The fund shall be under the management of the commissioner, and shall be maintained as a fund for the bonding of public employees including those who are not specifically required by law to be bonded. All moneys collected under the provisions of this chapter shall be paid into such fund."
(emphasis supplied)

Accordingly, it would appear that the sole criteria of eligibility for being bonded under the State Bonding Fund, particularly under the blanket bond provided for in said Section 26-23-02.1, is not that the statutes specifically require a bond of a particular employee, again leaving the matter under the management and discretionary powers of the Commissioner of Insurance as the administrator of the fund.

Since we note that the Commissioner of Insurance of Insurance is the administrator of the State Bonding Fund and since the statute provides that the commissioner may exclude certain employees or groups of employees, it would appear that the question is more of an administrative determination than a legal conclusion. It is to be noted that the agents referred to in the statute are to deposit such funds with the county treasurer and that such funds are public funds. For this reason it may be proper to bond such agents under the provisions of Section 26-23-02.1, authorizing the blanket bond coverage.

In conclusion, it would appear that the matter presented is basically an administrative determination by the Commissioner of Insurance and that such agents may be bonded under the terms of Section 26-23-02.1 of the North Dakota Century Code, as amended, but that such determination rests upon the approval of the Commissioner of Insurance, effected by a nonexclusion of such employees or agents.

We trust that the foregoing general observations, comments and information will be of interest and assistance to you and that the same will adequately reflect the opinion of this office upon the matters presented.

Yours truly,

HELGI JOHANNESON

Attorney General