

OPINION
74-110

May 22, 1974 (OPINION)

Mr. John O. Garaas
State's Attorney
Cass County
10 1/2 Broadway
Fargo, ND 58102

Dear Mr. Garaas:

This is in reply to your letter of May 8, 1974, in which you ask whether Cass County could pay for mileage on amount it desires to employees of the county so long as they are not county officials or deputies of county officers, either elective or appointive.

You note that section 11-10-15 of the North Dakota Century Code provides that county officials and their deputies can receive 10 cents per mile for motor vehicle travel on county business. Section 11-15-12 allows the sheriff and his deputies to receive 12 cents per mile.

You note that the above cited statutes apply only to county officials and their deputies and that you have previously given your opinion that regular employees of the county, other than county officials or their deputies, are not bound by the 10 cents or 12 cents per mile and can be paid whatever the county deems as reasonable through its Board of County Commissioners or other governing bodies having authority to pay bills.

In your letter you cite Ward County v. Halvorson, 274 N.W. 664 (N.D. 1937) in which the court stated, page 667 of the reported case:

"On oral argument counsel for both sides specifically stated that the initiated measure, approved June 29, 1932, Laws 1933, page 495, reducing mileage and travel expenses 'of county officials and their deputies,' has no application to the county superintendent of public health, and hence has no bearing whatever in this case. A consideration of the initiated measure and of then existing as well as subsequent legislation leads us to the conclusion that counsel were correct in their position as regards the initiated measure."

The initiated measure referred to by the court is now found in sections 11-10-15 and 11-15-12, cited above.

The court gives no reason for holding the initiated measure did not apply to the county superintendent of health. It could be that the court did not consider the position a "county official or deputy". It could also be that chapter 105 of the North Dakota Session Laws of 1929, which the court held to be controlling, provided that the county superintendent of health was entitled to receive a certain salary "and in addition thereto, all his other necessary and actual expenses incurred while so engaged." Thus, it may be that the court held this provision as to necessary and actual expenses was

controlling with respect to the specific position involved and not because the initiated measure did not apply to county employees as opposed to county officials and their deputies.

Whatever the rationale of the above cited case, we would agree that there is a distinction between employees and officers. That distinction has been recognized by this office with respect to the State Retirement Fund and membership therein. See opinion dated June 13, 1962, to Mr. Wallace E. Warner, Securities Commissioner.

In your letter you also note that if you are correct in your opinion that employees, as opposed to officials and deputies, are not governed by section 11-10-15, the question of who would be considered as county officials and would be considered as employees would arise. You further note that each would have to be decided on the facts in each particular case.

While we recognize the distinction between an employee and an official or deputy for general purposes, the past opinions of this office, which have not been superseded, would appear to ignore that distinction for the purposes of applying the county mileage law. I am enclosing a copy of an opinion issued by this office to Mr. Carlyle D. Onsrud, Executive Director of the State Public Welfare Board, on April 10, 1947. This opinion, construing section 11-10-15, holds, with reference to welfare workers, that they are officers to the extent that they are entitled to mileage when it is necessary to travel in the performance of their duties but are entitled only to the mileage fixed by section 11-10-15. See also copy of opinion issued August 4, 1949, to Mr. Philip R. Bangs, Assistant State's Attorney of Grand Forks County, enclosed herewith.

You will note the opinion to Mr. Onsrud holds that county welfare board employees are officers for purposes of 11-10-15. There would appear to be little merit in distinguishing between employees of the welfare board and other county employees in this respect. Perhaps this is why the legislature has not attempted to further define the mileage to which county employees are entitled, i.e., it has been accepted they are governed by section 11-10-15. If this provisions were not governing it would appear the county could pay no mileage if the commissioners so determined.

With respect to the specific question concerning the director of the county welfare board, it would appear that specific matter, at least, is governed by the April 10, 1947, opinion to Mr. Onsrud. If the "ordinary" employee of the county welfare board is governed by section 11-10-15 for mileage purposes, then the director of the county welfare board would also be classified as an officer of the county for those purposes, although we do not find that the "director of county welfare" is specifically provided for by statute.

Sincerely yours,

ALLEN I. OLSON

Attorney General