

Date Issued: June 15, 1982 (AGO 82-46)

Requested by: Duane R. Liffbrig, Commissioner State Highway Department

- QUESTION PRESENTED -

Whether the memoranda of working rules and regulations between the American Federation of State, County and Municipal Employees Council 95 (AFSCME) and a former commissioner of the State Highway Department are agreements which contractually bind the commissioner of the State Highway Department to their provisions.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the memoranda of working rules and regulations between the American Federation of State, County and Municipal Employees Council 95 (AFSCME) and a former commissioner of the State Highway Department are not agreements which contractually bind the commissioner of the State Highway Department to their provisions.

- ANALYSIS -

The commissioner of the State Highway Department is a statutory officer whose authority and power to act is limited to that which is expressly set forth in law. The only actions which any commissioner may take are those actions which are within the scope of his express authority. See First American Bank and Trust Company v. Ellwein, 198 N.W.2d. 84 (N.D. 1972). The responsibilities of the commissioner are set forth in section 4-02-03 of the North Dakota Century Code, which states in part 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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In construing the authority which this statute confers upon the commissioner to enter into contracts with the labor union representing certain Highway Department employees, the District Court in Cunningham v. Wentz, (Dist. Ct. Fourth Judicial District North Dakota, March 28, 1958) Memorandum Decision, found that the commissioner had no power to enter a contract with a labor union representing Highway Department employees.

Although many states have public employee labor-management acts which explicitly or implicitly provide the general authority for public officers to enter binding contracts with labor organizations representing public employees, North Dakota has no such statute.

See, e.g., chapter 34-12, N.D.C.C., North Dakota Labor-Management Relation Act, which excludes the state and its political subdivisions from its provisions. It is clear that had the Legislative Assembly intended to give public officers general authority to enter contracts with labor organizations, the Legislative Assembly would have expressly provided them with such authority. See, e.g., chapter 15-38.1, N.D.C.C., which provides a comprehensive framework for the negotiation and execution of contracts with labor organizations representing teachers. Without the general statutory authority to enter such contracts, however, the commissioner has no power to enter into contracts with labor organizations representing employees of the State Highway Department. See also American Federation of State, County and Municipal Employees v. Polta, 394 N.E.2d. 310 (Ohio Ct. App. 1977); Nichols v. Bolding, 277 So.2d. 868 (Ala. 1973), and Civil Service Employees Association v. Helsby, 236 N.E.2d. 481 (N.Y. 1968). As stated by the Court in Nichols supra:

. . . Public employers cannot abdicate or bargain away their continuing legislative discretion with reference to the subject matter of any labor contract. It is said that public officials have no authority to surrender any of their responsibilities as public officials at a negotiating conference. (Citation omitted). 277 S.2d. at 868, 870.

When public officials, such as the highway commissioner, make an agreement with a labor organization without the authority to do so, the agreement is invalid and not binding on any party to the agreement. See Maryland Classified Employees Association, Inc. v. Anderson, 380 A.2d. 1032 (Md. 1977); Nichols v. Bolding supra. See also International Association of Firefighters Local 2069 v. City of Sylacauga, 407 F. Supp. 402 (N.D. Ala., 1977); Fellows v. LaTronica, 377 P.2d. 547 (Colo. 1962); Annot., A.L.R. 2d. 1142 (1953).

Section 9-04-03, N.D.C.C., states as follows:

9-04-03. UNLAWFUL, IMPOSSIBLE, OR UNASCERTAINABLE OBJECT VOIDS CONTRACT. - When a contract has but a single object, and such object is unlawful in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void.

Thus the provisions of the memoranda of working rules and regulations are not binding upon the commissioner.

The lack of authority for a commissioner to enter a binding agreement with a labor organization representing certain Highway Department employees does not preclude the commissioner from receiving proposals from AFSCME and making written memoranda of the proposals and plans concerning such proposals. See Nichols v. Bolding supra, and the cases cited therein. Indeed, such a course of action would appear not only to conform to, but also to go beyond the requirements of section 34-11-01, N.D.C.C., which specifies that public employees have the right to present complaints or grievances "pertaining to public employment or to the betterment of his working conditions" and which further

prohibits public officers from "refusing to consider grievances concerning employment problems with the representatives duly chosen by a union, association or affiliation of public employees." Neither the authority to exercise discretion to make such memoranda nor the specificity of the proposals or plans regarding salaries, grievances, etc., as set forth in the memoranda, result in a binding contract, however. See Nichols v. Bolding supra, and the cases cited therein and Clifton Teachers Association, Inc. v. Board of Education, 346 A.2d. 107 (N.J. Super. Ct. App. Div. 1975).

The memoranda of working rules and regulations between AFSCME and the State Highway Department for the most part merely set forth the substance of various state statutes and policies regarding terms and conditions of employment for all employees of the state. See, e.g., chapters 1-03, 44-08, and 54-06, N.D.C.C., and chapters 4, 5, and 12 of the State of North Dakota Personnel Policies. Employees of the State Highway Department are by statute and policy subject to and entitled to benefit from these terms and conditions of employment. Memoranda of working rules and conditions can neither enlarge nor reduce employee rights beyond those granted by statute or policy. See Attorney General's Opinion dated August 11, 1965, to Mr. Walter R. Hjelle; Clifton Teachers Association, Inc. v. Board of Education supra; and Maryland Classified Employees Association, Inc. v. Anderson supra.

In view of the state of the law, and the substantive provisions of the memoranda, it is clear that the purpose of the memoranda is to serve as a tool for promoting employee awareness and understanding. The memoranda are not, however, contracts which bind any signatory to the provisions set forth. Instead, either the highway commissioner or AFSCME may reject the memoranda or any of the provisions at will. See Nichols v. Bolding supra.

- EFFECT -

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

ROBERT O. WEFALD  
Attorney General

Prepared by: Marilyn Foss  
Assistant Attorney General