

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 93-F-23

December 22, 1993

Representative Francis J. Wald

- QUESTIONS PRESENTED -

I.

Whether a city having a municipal court and a population of 5,000 or greater may contract with a county under N.D.C.C. ? 40-18-06.2 for the transfer of municipal court cases to the county court, and, if so, whether such a city may abolish its municipal court.

II.

Whether a city may transfer municipal court cases to the county court pursuant to a joint powers agreement under N.D.C.C. ch. 54-40.3 or pursuant to an agreement to transfer local control to the county under N.D.C.C. ch. 54-40.5.

III.

Whether a home rule city may unilaterally abolish its municipal court without the approval of the county and, after January 1, 1995, without the approval of the state judicial system.

IV.

Whether a person may be a municipal judge and a county judge at the same time.

V.

Whether a municipal judge's salary and term of office may be reduced pursuant to the transfer of municipal court cases to the county court.

VI.

Whether the duties of the clerk of the county or district court include duties related to municipal court cases which

have been transferred to the county or district courts.

VII.

Whether the transfer of municipal court cases to county courts automatically continues in effect with the district courts after the county courts are eliminated on January 1, 1995.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a city having a municipal court and a population of 5,000 or greater may contract with a county under N.D.C.C. ? 40-18-06.2 for the transfer of municipal court cases to the county court. It is my further opinion that a city having a municipal court and having a population of 5,000 or greater may not abolish its municipal court under N.D.C.C. ? 40-18-06.2.

II.

It is my opinion that a city may enter into a joint powers agreement under N.D.C.C. ch. 54-40.3 or an agreement to transfer local powers to the county under N.D.C.C. ch. 54-40.5 for the cooperative or joint exercise of municipal court functions with the county. It is my further opinion that such agreements do not abolish the municipal court.

III.

It is my opinion that a home rule city may not abolish its municipal court unless it falls within the statutory authority of N.D.C.C. ? 40-18-06.2.

IV.

It is my opinion that the same person may not simultaneously be a municipal judge and a county judge. It is my further opinion that a county judge may hear municipal court cases, but that in hearing such cases, the county judge remains and functions solely as a county judge.

V.

It is my opinion that a municipal judge's salary and term of office may be reduced during the judge's term only by abolishing the municipal court in accordance with N.D.C.C. ? 40-18-06.2.

VI.

It is my opinion that if the county or district courts have agreed to accept municipal court cases, the clerk of the appropriate court must perform the duties required in the municipal cases.

VII.

It is my opinion that agreements to transfer municipal court cases to county courts will not continue in effect after the county courts are eliminated on January 1, 1995. It is my further opinion that in order to transfer municipal court cases to district courts, a city will have to obtain the agreement of the presiding judge of the judicial district and the state court administrator under N.D.C.C. ? 40-18-06.2.

- ANALYSES -

The issues presented in this opinion arise as a result of a proposed court services contract between the city of Dickinson and Stark County. Dickinson is considering combining its municipal court with the Stark County court pursuant to N.D.C.C. ch. 40-18 and Dickinson's home rule charter. Under the contract, all matters formerly venued in the Dickinson municipal court would be transferred to the Stark County court for adjudication and disposition. The transferred cases are to be deemed county court cases for purposes of appeal. Furthermore, the contract provides that the judge of the Stark County court shall act as the Dickinson municipal judge for all purposes and the Stark County court shall act as the Dickinson municipal court for all purposes. The term of the contract is for one year commencing January 1, 1994, and is continued for annual terms of one year unless terminated by either party.

I.

Under either the commission or the council form of government, a city may elect a municipal judge. N.D.C.C. ?? 40-14-01 and

40-15-01. See also N.D.C.C. ? 40-05.1-06(5). A municipal judge has jurisdiction to hear, try, and determine violations of city ordinances. N.D.C.C. ? 40-18-01(1). County court jurisdiction includes "criminal misdemeanor, infraction, and noncriminal traffic cases involving violations of city ordinances." N.D.C.C. ? 27-07.1-17(3). If a city never institutes a municipal court, its ordinances may be enforced in the county court. However, once instituted, a municipal court may only be eliminated as provided by statute.

Under current law any city may transfer its municipal court cases to the county court with the county's agreement. N.D.C.C. ? 40-18-06.2 (1987). In 1991, the Legislature restricted the elimination of municipal courts to cities with a population of less than 5,000. This amendment to N.D.C.C. ? 40-18-06.2 was proposed by the North Dakota Clerks of Court Association and explained as follows:

John Olson, North Dakota Clerks of Court Association, testified in support of HB 1413, but proposed amendments. See attached.

The bill would deal with those cities having a population of 5,000 or less. The North Dakota Clerks of Court Association's position is that if you have a city that is at least 5,000, the amount of traffic and activity in those municipal courts are such that it would be a burden and quite a load to transfer those cases to the county court.

In response to a question from Sen. Stenehjem, Mr. Olson said the clerks of court care about this, because they do not want major court loads combined together. They're fearful that the counties will not divide [sic] the budget or the resources necessary to take care of those kinds of caseloads. The intent of the bill itself is for the smaller cities, where everyone agrees and knows that there should be some consolidation going on and have no problem with that.

Bill Severin, Bismarck Municipal Judge, testified that municipal courts, generally, serve an important function in the state of North Dakota. It is more of a people's court than a lawyer's court. Bismarck handles a high volume of cases, and if you start moving that many into

district [sic] court, that system will be bogged down.

Hearing on H. 1413 Before the Senate Comm. on Judiciary, 52nd N.D. Leg. (March 5, 1991).

Therefore, it is my opinion that, although a city having a municipal court and a population of 5,000 or greater may contract with a county for the transfer of municipal court cases to the county court under N.D.C.C. ? 40-18-06.2, the city may not abolish its municipal court.

II.

Both N.D.C.C. ? 54-40.3 and N.D.C.C. ch. 54-40.5 authorize a county and city to enter into an agreement for the exercise of a city's powers by the county or in conjunction with the county. The purpose of these chapters is to allow cities and counties to "collectively reshape their local governments in ways that best serve their needs and provide effective, creative, and efficient local government functions and services in the future." 1993 N.D. Sess. Laws, ch. 401, ? 1(2)(b).

N.D.C.C. ch. 54-40.3 governs joint powers agreements generally. Under this chapter, counties and cities "may enter into an agreement with any other political subdivision of this state for the cooperative or joint administration of any power or function that is authorized by law or is assigned to one or more of them." N.D.C.C. ? 54-40.3-01(1). A joint powers agreement may address "any power or function which any of the parties is permitted by law to undertake." N.D.C.C. ? 54-40.3-01(2). Thus, a joint powers agreement may address a city's power to have a municipal court. N.D.C.C. ?? 40-14-01 and 40-15-01. See also N.D.C.C. ? 40-05.1-06(5). However, the authority to enter into joint powers agreements pursuant to N.D.C.C. ch. 54-40.3 "does not dispense with the procedural requirements of any other statute providing for the joint or cooperative exercise of any governmental power." N.D.C.C. ? 54-40.3-02(2).

N.D.C.C. ch. 54-40.5 specifically governs the transfer of general local government power to the county. Under chapter 54-40.5, a city (and other enumerated political subdivisions) can enter into an agreement to transfer its legal,

administrative, and financial responsibilities to the county. N.D.C.C. ? 54-40.5-01. A city may also enter into an agreement for the transfer of the legal, administrative, and financial responsibilities for carrying out a power or function of the city as required or permitted by law or home rule charter. N.D.C.C. ? 54-40.5-03. An agreement addressing a city's power to have a municipal court is permitted under chapter 54-40.5. N.D.C.C. ?? 40-14-01 and 40-15-01. See also N.D.C.C. ? 40-05.1-06(5). Any agreement which transfers powers from a city to a county must address the nature of the power or function to be transferred, the responsibility for administration of the power or function to be transferred, and the manner in which affected employees currently engaged in the performance of the power or function will be transferred, reassigned, or otherwise treated. N.D.C.C. ? 54-40.5-03(1, 3, and 4).

Therefore, it is my opinion that a city may enter a joint powers agreement under N.D.C.C. ch. 54-40.5 or transfer its municipal court services to a county under N.D.C.C. ch. 54-40.5 through a combination or consolidation of powers with the county court. It is my further opinion that such a joint powers agreement or transfer of powers is not a transfer of municipal cases (such as occurs under N.D.C.C. ? 40-18-06.2), nor does it abolish the municipal court because the occurrence of the grant or transfer itself is a recognition of the city's primary duty to provide municipal court services. See N.D.C.C. ?? 54-40.3-01(3) and 54-40.5-03.

It must be noted that any such agreement will be ineffective after January 1, 1995, when the county courts are abolished. 1991 N.D. Sess. Laws, ch. 326, ?? 1(1) and 205. Only with the agreement of the presiding judge of the judicial district and the state court administrator may a district court hear municipal court cases pursuant to an agreement. Therefore, a city desiring to transfer its municipal court duties to the district court after January 1, 1995, must enter into an agreement pursuant to N.D.C.C. ? 40-18-06.2 as that section will exist at that time.

III.

Article VII, Section 6 of the North Dakota Constitution provides for the establishment of home rule authority.

However, a city continues to exercise only those powers the Legislature has provided. Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980); State v. Gronna, 59 N.W.2d 514, 529 (N.D. 1953). Accordingly, a city choosing to implement home rule may only do so only with regard to the powers enumerated in the statutes and through the prescribed procedures. Litten, 294 N.W.2d 628.

The Legislature has provided for the powers which may be implemented through home rule and the procedure to implement them. N.D.C.C. ch. 40-05.1. The scope of a city's powers is strictly construed. Meyer v. City of Dickinson, 451 N.W.2d 113, 115-16 (N.D. 1990). Additionally, a city's implementation of home rule may not "supersede or prevail over conflicting general law dealing with affairs purely of statewide concern, even though [the matter implemented] may pertain to municipal corporations." 6 McQuillin, Municipal Corporations, ? 21.30.(1988). See also N.D.C.C. ? 40-05.1-06 (home rule authority only extends to "local and city" matters).

Included among the home rule powers a city may exercise is the power to "provide for city courts, their jurisdiction and powers over ordinance violations." N.D.C.C. ? 40-05.1-06(5). The extent and scope of this power must be construed strictly and may not be exercised in a manner which conflicts with general laws which deal with matters of statewide concern. Meyer, supra; 6 McQuillin, Municipal Corporations, ? 21.30.(1988).

At issue here is the conflict between a home rule city's authority to provide for a municipal court system and the state's interest in the state court system. Except as noted previously with regard to cities with a population of less than 5000 residents, there is no specific authority allowing a home rule city to abolish its municipal court. Although the power to establish arguably includes the power to abolish, the abolishment of a municipal court system has statewide implications. See generally, City of Fargo v. Cass County, 286 N.W.2d 494, 500 (N.D. 1980); N.D.C.C. ? 40-05.1-06.

The practical effect of allowing a city to abolish its municipal court is to place the burden of enforcement of the city's ordinances upon the county court, and, with the eventual abolishment of the county court, ultimately upon the

state. As resources at all levels of government are scarce, the added burden upon the state district court could have an adverse affect upon the state's ability to enforce its own statutes. Thus, to permit a home rule city to unilaterally abolish its municipal court would allow a home rule city's desire to prevail over a matter of statewide concern. Cf. City of Fargo, 286 N.W.2d at 500. The Legislature has recognized that not every transfer of a city's cases to the district court will have an adverse affect upon the district court. Consequently, the Legislature permits the presiding judge of the judicial district and the state court administrator to agree to undertake municipal court cases. It is, therefore, my opinion that cities may not incorporate the authority to unilaterally abolish a municipal court into their home rule charters. It is my further opinion that a home rule city with a municipal court must comply with the procedures and limitation contained in N.D.C.C. ? 40-18-06.2 or N.D.C.C. chs. 54-40.3 and 54-40.5 to have its municipal cases heard by the county or district court.

IV.

"The offices of municipal judge and county judge may not be held by the same person, except pursuant to assignment of the presiding judge of the judicial district." N.D.C.C. ? 40-18-01(1), note. The procedure for the presiding judge of the judicial district to assign a municipal court case to a county judge is set forth in Administrative Rule 17.

N.D.C.C. ? 40-18-06.2 currently provides:

Transfer of municipal ordinance cases to county court - Abolition of office of municipal judge. With the agreement of the governing body of the county, or the counties of the multicounty agreement area pursuant to section 27-07.1-02, the governing body of a city may, by ordinance, transfer some or all of the cases of the municipal court to the county court of the county in which the city is located. These cases are deemed county court cases for purposes of appeal. The governing body of a city with a population of less than five thousand, upon transferring all municipal court cases to the county, may abolish, by resolution, the office of municipal judge. The term of office of the municipal judge elected to serve that city terminates upon the date the governing body of the city abolishes the office of municipal judge.

This provision allows a city to transfer municipal court cases to the county court. However, it does not permit the county court to act in any capacity other than a county court would act if hearing matters involving violations of city ordinances where a city has never established a municipal court. See N.D.C.C. ? 27-07.1-17(3).

The situation is similar where a city and county agree a county judge may hear municipal cases pursuant to a joint powers agreement under N.D.C.C. ch. 54-40.3. In that situation, the individual does not hold both the county and the municipal judges' offices, but rather acts as a county judge exercising the county and city courts' jurisdiction regarding violations of city ordinances. N.D.C.C. ? 27-07.1-17(3).

In the event a city and county agree to transfer the city's judicial powers to the county, the county judge continues to be a county judge exercising the county judge's authority over violations of city ordinances. N.D.C.C. ? 27-07.1-17(3). In each situation, the county court continues to be a county court. The county court simply exercises the authority of a municipal court to hear violations of city ordinances. Although the county judge exercises the additional municipal authority authorized by the agreement, that person does not hold both the office of county judge and the office of city

judge.

V.

A municipal judge's salary may not be reduced during the term of office. N.D.C.C. ? 40-18-06. See also N.D.C.C. ? 40-13-04. This prohibition applies even when municipal cases have been transferred to the county court pursuant to N.D.C.C. ? 40-18-06.2. Letter from Attorney General Nicholas J. Spaeth to Mr. Gerald Galloway, Beach City Attorney, (December 31, 1987). The term of office of a municipal judge is four years. N.D.C.C. ? 40-14-02 and 40-15-02.

Generally, statutes should not be construed to shorten the term of elected incumbent officeholders. 63A Am.Jur. 2d Public Officers and Employees ? 159. The majority rule is that where a state legislature has authorized a political subdivision to create an elective office, but has itself defined the duties, manner of election, and term of the office, the political subdivision may not abolish the office during the term of an elected incumbent. 67 C.J.S. Officers ? 14. A city cannot remove an incumbent from an elective office by effectively abolishing that office through a joint powers agreement or a local powers transfer.

Neither a joint powers agreement nor a local powers transfer to the county operates to abolish the municipal court. Such provisions merely transfer the duties of the city but do not abolish those duties themselves. See N.D.C.C. ?? 54-40.3-01(3) and 54-40.5-03. In 1991, N.D.C.C. ? 40-18-06.2 was amended to allow the abolition of the municipal court in cities with a population less than 5,000. 1991 N.D. Sess. Laws ch. 326, ? 156. As part of this amendment, the Legislature also provided that "[t]he term of office of the municipal judge elected to serve that city terminates upon the date the governing body of the city abolishes the office of municipal judge." Id. This is the only authority for the abolition of the office of a municipal judge and the termination of that person's elected office. Therefore, it is my opinion that the salary of a municipal judge may not be reduced during the term of the municipal judge's office nor may the term be shortened unless the governing body of the city abolishes the office of municipal judge as provided in N.D.C.C. ? 40-18-06.2.

VI.

The duties of the clerk of district court include acting as clerk of the district court and attending the judge of the district court in chambers during sessions of the district court when required to do so by the judge. N.D.C.C. ? 11-17-01(2). The clerk of district court's duties also include issuing all processes and notices the district court must issue, keeping a judgment docket, and keeping a register of all actions. N.D.C.C. ? 11-17-01(3), (4), and (6). The clerk of a county court must perform all the duties in all actions and proceedings commenced in the county court in the same manner as the clerk of the district court is required to perform the duties of that office which are applicable. N.D.C.C. ? 27-07.1-10.

To the extent that municipal court cases are transferred to the county court or to the district court, the clerk of the appropriate court must fulfill his or her duties as required by the judge of the court. Therefore, it is my opinion that when municipal court cases are heard by the county court, the duties of the clerk of court regarding these cases will be the same as the duties required for any other case of the court.

VII.

The governing body of a city may enact an ordinance permitting the transfer of some or all of the cases of its municipal court to the appropriate county court with the agreement of the governing body of the county, or of the counties of a multicounty agreement area established pursuant to N.D.C.C. ? 27-07.1-02. N.D.C.C. ? 40-18-06.2. However, on January 2, 1995, municipal court cases may be transferred to the district courts only under the requirements set out in N.D.C.C. ? 40-18-06.2. That section, effective January 2, 1995, provides:

40-18-06.2. Transfer of municipal ordinance cases to district court - Abolition of office of municipal judge.

With the agreement of the governing body of the county, the presiding judge of the judicial district in which the city is located, and the state court administrator, the governing body of a city may, by ordinance, transfer some or all of the cases of the municipal court to the district court serving the county in which the city is

located. These cases are deemed district court cases for the purposes of appeal. The governing body of a city with a population of less than 5,000, upon transferring all municipal court cases to the district court, may abolish by resolution the office of municipal judge. The term of office of the municipal judge elected to serve that city terminates upon the date the governing body of the city abolishes the office of municipal judge.

1991 N.D. Sess. Laws, ch. 326, ? 157.

The Legislature provided that the county courts will be abolished at the close of business on January 1, 1995. 1991 N.D. Sess. Laws, ch. 326, ?? 1(1) and 205. However, the status of preexisting agreements between cities and counties which transfer municipal cases to the county courts was not specifically addressed. Although municipal cases which have already been transferred to the county court may be heard in the district court, the only procedure for the transfer of new municipal cases to the district courts as of January 2, 1995, requires the consent of the presiding judge of the appropriate judicial district and the approval of the state court administrator. 1991 N.D. Sess. Laws, ch. 326, ?? 1(4) and 157.

It is my opinion that agreements between cities and counties for the transfer of municipal court cases to the county court will not be valid after January 1, 1995. 1993 N.D. Op. Att'y Gen. 65. It is my further opinion that any city wishing to transfer its municipal court cases to the district court must obtain the agreement of the presiding judge of the district court and the state court administrator.

- EFFECT -

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

Heidi Heitkamp
ATTORNEY GENERAL

d by: Edward Erickson

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Assistant Attorney General