

LETTER OPINION
93-L-310

October 28, 1993

Mr. Ronald C. Stastney
Assistant Superintendent
of Public Instruction
Department of Public Instruction
State Capitol
Bismarck, ND 58505

Dear Mr. Stastney:

Thank you for your letter asking two questions concerning county superintendents of schools and the effect of 1993 House Bill 1426 on the reorganization of the office of county superintendent of schools created by 1989 N.D. Sess. Laws ch. 137.

The 1989 law (the relevant parts of which are codified in N.D.C.C. ch. 15-22) provided for the appointment, rather than election, of a county superintendent of schools by one or more counties. N.D.C.C. ?? 15-22-01, 15-22-25. N.D.C.C. ? 15-22-01 provides for the appointment of a county superintendent of schools by the board of county commissioners upon the recommendation of the presidents of the school boards of the school districts with headquarters located within the county.

A county with a school age population of less than 1,000 is required to combine with another county or counties to jointly employ a county superintendent. N.D.C.C. ? 15-22-25(1). N.D.C.C. ? 15-22-25 provides for the preparation of a plan to jointly employ a county superintendent and the confirmation of that plan by the superintendent of public instruction. A plan is reviewed and amended if necessary by the boards of county commissioners, approved by the school boards, and reconfirmed by the superintendent of public instruction biennially. The specific process for selecting a person to fill the position of joint

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county superintendent pursuant to N.D.C.C. ? 15-22-25 is not stated.

County superintendents of schools appointed pursuant to the 1989 law were to commence their terms of office on January 1, 1993. 1989 N.D. Sess. Laws ch. 137, ? 11.

The 1993 Legislative Assembly enacted House Bill 1426 which superimposes over the procedures in N.D.C.C. ch. 15-22 the authority of a board of county commissioners to employ a part-time county superintendent for a county by majority vote of the board of county commissioners. 1993 N.D. Sess. Laws ch. 94, ? 1. House Bill 1426 amended N.D.C.C. ? 11-10-10.5 by adding the following language:

Notwithstanding any other provision of law except section 15-22-01, a board of county commissioners may by majority vote employ a person who meets the qualifications provided in section 15-22-02 to serve as the county superintendent of schools on a part-time basis. 1993 N.D. Sess. Laws ch. 94, ? 1.

The word "notwithstanding" means without prevention or obstruction from or by, or in spite of. King v. Sununu, 490 A.2d 796, 800 (N.H. 1985). Similarly, the phrase "notwithstanding any other provision of law" means that remedies (or authority) provided by the act containing that phrase are not to be modified by any preexisting law. United States v. Oswego Barge Corporation, 664 F.2d 327, 340 (2d Cir. 1981).

Your first question is whether a county that is currently operating under an approved plan under N.D.C.C. ? 15-22-25 may utilize the authority of N.D.C.C. ? 11-10-10.5 as amended to employ its own part-time county superintendent of schools before the approved plan has been fulfilled for its full term. Because the phrase "notwithstanding any other provision of law" has only been limited by its own terms with respect to N.D.C.C. ?? 15-22-01 and 15-22-02, it is my opinion that a county, even if currently operating under a N.D.C.C. ? 15-22-25 approved plan,

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may exercise authority under N.D.C.C. ? 11-10-10.5 at any time after August 1, 1993, the effective date of the amendment, to employ a part-time superintendent of schools.

Your second question is whether a county superintendent of schools having been employed under an approved N.D.C.C. ? 15-22-25 plan, retains employment if the board of county commissioners elects to employ a part-time superintendent of schools under N.D.C.C. ? 11-10-10.5 as amended. 1993 N.D. Sess. Laws ch. 94, ? 1 excludes N.D.C.C. ?? 15-22-01 (and effectively 15-22-02) from the application of the broad authority to avoid other conflicting provisions of law concerning the appointment of a county superintendent of schools.

N.D.C.C. ? 15-22-01 provides the method for employing and terminating the employment of a county superintendent of schools. N.D.C.C. ? 15-22-01 as amended in pertinent part, states that the "candidate selected shall serve as county superintendent of schools until the candidate resigns or is discharged by the board of county commissioners at the request of a majority of the presidents of the school boards within the county in the manner provided for discharge of teachers pursuant to section 15-47-38." Discharge of teachers is conducted under N.D.C.C. ? 15-47-38(2). To be discharged from employment means to be dismissed or released from employment. The American Heritage Dictionary (1991), p. 402. This connotes a complete loss of employment. N.D.C.C. ? 11-10-10.5 as amended in 1993 must be read together with N.D.C.C. ? 15-22-01 so as to give effect to both, if possible. N.D.C.C. ? 1-02-07.

Currently, county superintendents may be employed by one or more counties on either a full or part-time basis depending on the plan approved under N.D.C.C. ? 15-22-25. Because N.D.C.C. ? 11-10-10.5 as amended exempts section 15-22-01 from the broad authority granted to counties under N.D.C.C. ? 11-10-10.5, it is my opinion that if a board of county commissioners decides to employ a part-time county superintendent of schools it must follow the discharge of employment provisions required in N.D.C.C. ? 15-22-01 if its action will mean the complete loss of employment by the county superintendent currently holding the

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position. The discharge of employment provisions would not apply, however, if the county superintendent position was only changed from a full-time to a part-time position and the same county superintendent of schools was retained. If a county superintendent was jointly employed by two or more counties and did not completely lose employment as a county superintendent of schools as a result of the decision of one or more of the counties under the plan to employ a part-time superintendent under N.D.C.C. ? 11-10-10.5, then the discharge of employment provisions required by N.D.C.C. ? 15-22-01 would also not apply.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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