

LETTER OPINION
94-L-90

April 4, 1994

Honorable Jim Yockim
State Senator
1123 2nd Avenue East
Williston, ND 58801

Dear Senator Yockim:

Thank you for your February 25, 1994, letter concerning certain payments made by the Williams County Commission (hereafter, the County) to the former county auditor pursuant to an agreement. You indicate in your letter that the County is contemplating changing the auditor's position from an elective to an appointive position.

You first ask whether it is lawful for a county commission to pay compensation to an elected official in exchange for the official's resignation and as part of a settlement agreement which may require payments after the date of resignation. Whether a county lawfully may pay compensation to an elected official as part of a settlement agreement which includes the official's resignation depends upon the specific facts of the settlement. Such a settlement, conceivably, could be entered into to compromise a legal claim against the county, as a result of a resolution and plan by the county to redesignate an elective county office as an appointive office pursuant to N.D.C.C. ch. 11-10.2, or as a manner of granting severance pay.

The agreement between the County and the former county auditor is entitled "Resignation Agreement" (hereafter, Agreement). The language in the Agreement requiring the payment of compensation is terse and the Agreement does not recite the authority under which it is entered. Nor are the nature, purpose, and underlying facts and circumstances clear from the written terms and conditions of the Agreement. Therefore, the legality of settlements under each of the theories mentioned above will be addressed.

Honorable Jim Yockim
April 4, 1994
Page 2

The Agreement may be lawful if it was entered into for the purpose of paying, settling, or compromising a claim or demand against the County. Generally, unless forbidden by law, a "municipal or other public corporation has the power to settle and compromise disputed claims in its favor or against it before or after suit has begun on it, and at any time before final judgment." 17 McQuillin, Municipal Corporations ? 48.17 (1993). Further, the "proper municipal authorities may compromise doubtful controversies to which the corporation is a party, either as plaintiff or defendant. The law invests them with discretion in such adjustments which they are to exercise for the best interests of the corporation." Id.

N.D.C.C. ? 21-05-07 provides:

Whenever an account, claim, or demand against any township or county is reviewed in the manner prescribed in section 21-05-01, the board to which the same is presented may receive and consider the same and may allow or disallow the same, in whole or in part, as to the board appears just and lawful, saving to such claimant the right of appeal. . . .

N.D.C.C. ? 21-05-01 provides:

No account or claim against any township or county of this state may be allowed by the governing body thereof until a full itemized statement in writing has been filed with the governing body or unless otherwise authorized by the governing body pursuant to contract or other action.

Therefore, to the extent the Agreement pays, settles, or compromises a claim or demand against the County that the County determines is just and lawful, any such payments made pursuant to such a settlement would be authorized by law. If such payments are legally authorized, the manner of payment, i.e., whether authorized payments were to be made in a lump sum or spread out over a reasonable time, would be

Honorable Jim Yockim
April 4, 1994
Page 3

immaterial.

Upon reviewing the terms and conditions of the Agreement, I cannot determine as a matter of law whether the Agreement, in whole or in part, relates to the settlement or compromise of any legal claim or demand made against the County by the former county official.

If the Agreement was not made as a compromise of a legal claim against the county, it presumably was made either pursuant to a plan under N.D.C.C. ch. 11-10.2 or as a severance pay agreement.

N.D.C.C. ch. 11-10.2 authorizes a county to develop a proposed plan for redesignating an elective county office as an appointive office. N.D.C.C. ? 11-10.2-03(1). After adoption of a preliminary resolution incorporating the proposed plan, the county must hold public hearings on the proposed plan. N.D.C.C. ? 11-10.2-02(1). Then, the county, by final resolution, may approve a finalized plan for implementation. N.D.C.C. ? 11-10.2-02(1). This final resolution may be referred to the qualified electors by petition. N.D.C.C. ? 11-10.2-02(1).

The plan for redesignating a county office as elective or appointive may include provisions for the "termination of personnel associated with each affected office"; provisions for "[t]ransition in implementation of the plan, including elements that consider the reasonable expectations of current officeholders. . ."; and "[a]ny other provision deemed necessary for combining or separating the offices or redesignating an office as elective or appointive." N.D.C.C. ? 11-10.2-03. However, "a plan may not propose to diminish the term of office for which a current county officer was elected," nor may it "redesignate that elected office during that term as appointed" N.D.C.C. ? 11-10.2-03(4).

It is unclear whether the County's Agreement with the former county auditor was made pursuant to a plan authorized by N.D.C.C. ch. 11-10.2. If it was, in my opinion, the plan and any agreement based upon such plan would violate the proscription of N.D.C.C. ? 11-10.2-03(4) that such a plan not diminish the term

Honorable Jim Yockim
April 4, 1994
Page 4

of office of a current officeholder or redesignate an elective office as appointive during the current officeholder's term. Such a contract provision would be unlawful as contrary to an express provision of law or to the policy of express law. N.D.C.C. ? 9-08-01.

Severance pay has been defined as:

Payment by an employer to employee beyond his wages on termination of his employment. Such pay represents a form of compensation for the termination of the employment relation, for reasons other than the displaced employee's misconduct, primarily to alleviate the consequent need for economic readjustment but also to recompense the employee for certain losses attributable to the dismissal.

Black's Law Dictionary 1374 (6th ed. 1990). While there is a statute which permits severance pay to be given to state employees and officers in certain circumstances, no comparable statute exists for county employees and officers. See N.D.C.C. ? 54-14-04.3. Normally, when an officer of a political subdivision resigns and the resignation is accepted, the officer is not entitled to any compensation after the date of the resignation. 4 McQuillin, Municipal Corporations ? 12.202 (1992); see also N.D. Const. art. X, ? 18. Consequently, it is my opinion that a county has no authority to enter into severance pay agreements with its employees and officers.

Your second question is whether it is permissible for the County to withhold the specific terms and conditions of the settlement from the public. To the extent that the terms and conditions of any settlement are reduced to writing, they constitute a public record within the meaning of the North Dakota open records statute. See N.D.C.C. ? 44-04-18. For an exception to the open records law to apply, the Legislature must have specifically exempted such record in a statute. Hovet v. Hebron Pub. School Dist., 419 N.W.2d 189 (N.D. 1988). Further, the board of county commissioners is statutorily required to supply to the official newspaper of the county a "full and complete report of its official proceedings at each regular and special meeting no later than seven days after the meeting at which the report is read and approved." N.D.C.C. ? 11-11-37.

Honorable Jim Yockim
April 4, 1994
Page 5

I am unaware of any statutory exception which would exempt such an agreement from the provisions of North Dakota's open records law. Consequently, it is my opinion the written agreement is an open record which must be available to the public pursuant to N.D.C.C. ? 44-04-18.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

bab/pg