

LETTER OPINION
95-L-79

March 24, 1995

Honorable Dan Wogsland
State Senator
Senate Chambers
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Senator Wogsland:

Thank you for your March 20, 1995, letter asking whether North Dakota Century Code (N.D.C.C.) ? 40-13-04 prohibits a city from decreasing the salary, fees, or other compensation of its employees. The statute provides as follows:

Except where otherwise provided in this code, any officer or employee of a municipality shall receive the salary, fees, or other compensation fixed by ordinance or resolution, and after having been once fixed, the same shall not be diminished to take effect during the term for which the officer was elected or appointed.

The first part of the statute dealing with the setting of compensation by ordinance or resolution specifically mentions the terms "officer" and "employee." However, the last clause of the statute dealing with the prohibition against diminishing compensation during the term of office only mentions the term "officer."

The primary purpose of statutory construction is to ascertain the intent of the Legislature and the intent must first be sought from the language of the statutory provision itself. Production Credit Ass'n of Minot v. Lund, 389 N.W.2d 585, 586 (N.D. 1986). Words in a statute are to be understood in their ordinary sense, unless a contrary intention plainly appears and any words explained in the North Dakota Century Code are to be understood as explained. N.D.C.C. ? 1-02-02. In enacting a statute, it is presumed that the Legislature intended the entire statute to be effective. N.D.C.C. ? 1-02-38.

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N.D.C.C. ? 40-13-04 has been previously construed by this office in a plain-meaning manner. See Letter from Assistant Attorney General Leslie R. Burgum to the Honorable Nick Andreas (July 9, 1968) (the language of the statute makes it clear that the city council, by ordinance or resolution, fixes the salary, fees, or other compensation of all officers or employees of the city). A plain reading of N.D.C.C. ? 40-13-04 indicates that while the salary, fees, or other compensation for an officer or employee of a municipality is to be fixed by ordinance or resolution, the protection against the diminution of such salary, fees, or compensation only applies to officers of the municipality.

Consequently, it is my opinion that N.D.C.C. ? 40-13-04 does not prohibit a city from diminishing the salary, fees, or other compensation of its employees.

This interpretation is supported by the code revisor's notes from the Revised Code of 1943. N.D.C.C. ? 40-13-04 is derived from section 40-1304 of the Revised Code of 1943. The code revisor's notes state:

Revised for clarity without change in meaning. This section constitutes a combination of C.L. 1913, ss. 3802, 3895, and a part of C.L. 1913, s. 3622.

Section 3802 of the Compiled Laws of 1913 provided:

The board of city commissioners shall by resolution provide such salary or compensation for the officers and employes of the city as it shall deem proper. All salaries heretofore fixed or established by law shall be and remain the salaries of such officers until the board of city commissioners shall otherwise determine.

Section 3895 of the Compiled Laws of 1913 provided:

The trustees, clerk, assessor, treasurer, marshal and justice of the peace shall respectively receive for their services such compensation as the board of trustees in their by-laws may decide; and the board shall cause other officers of such village to be

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paid for their services a just and reasonable compensation.

Section 3622 of the Compiled Laws of 1913 stated, in part:

All other officers may receive a salary, fees or other compensation to be fixed by ordinance, and after the same has been once fixed such fees or compensation shall not be diminished to take effect during the term for which any such officer was elected or appointed

Thus, present-day N.D.C.C. ? 40-13-04 is an amalgamation of these three prior statutes. The code revisor indicated there was no intent to change any meaning of the component statutes.

None of these prior sections of law provided any protection to city employees from having their salary or compensation diminished during their employment. The protection against diminution in salary or compensation was only provided to city officers, not city employees.

You also ask for the definitions of "officer" and "employee" as those terms are used in N.D.C.C. ? 40-13-04. In my opinion, the terms "officer" and "employee" are mutually exclusive, as used in N.D.C.C. ? 40-13-04; a person is either an officer or an employee, and a person cannot be both. North Dakota statutes indicate which persons are officers under the particular forms of city government. I will review those statutes in the following paragraph. Any persons on the city payroll who are not officers of the city are employees of the city.

Elected officers in cities under the city council form of government generally include the mayor, council members, and the municipal judge if there is one. N.D.C.C. ? 40-14-01. Appointed officers in cities under the city council form of government generally include the auditor, assessor, city attorney, city engineer, and such other officers as are deemed necessary. N.D.C.C. ? 40-14-04. Elected officers in cities under the commission form of government include the president of the board, the city commissioners, and the municipal judge if there is one. N.D.C.C. ? 40-15-01. Appointed officers in cities under the commission form of government include the treasurer, auditor, attorney, assessor, city health officer, street commissioner, fire department chief, police chief, police officers, city engineer, board of public works, and other officers or boards deemed necessary. N.D.C.C. ? 40-15-05. Officers in home rule cities are the elected and appointed officers of the city including the governing body of

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the city and its members. N.D.C.C. ? 40-05.1-00.1(1).

Finally, you ask whether a city home rule charter provision could supersede N.D.C.C. ? 40-13-04. N.D.C.C. ? 40-05.1-06(4) grants a home rule city the authority to "provide for city officers, agencies, and employees, their selection, terms, powers, duties, qualifications, and compensation. To provide for change, selection, or creation of its form and structure of government including its governing body, executive officer, and city officers." However, in order to exercise such powers they must be provided for in the home rule charter and implemented through appropriate ordinances. N.D.C.C. ? 40-05.1-06; Litten v. City of Fargo, 294 N.W.2d 628, 632 (N.D. 1980). N.D.C.C. ? 40-05.1-05 provides, in pertinent part, that a properly adopted home rule charter and ordinances "shall supersede within the territorial limits and other jurisdiction of the city any law of the state in conflict therewith, and shall be liberally construed for such purposes."

Consequently, it is my further opinion that if the Grand Forks home rule charter includes authority similar to that authorized in N.D.C.C. ? 40-05.1-06(4) and if such authority is properly implemented through city ordinances, then such authority would supersede N.D.C.C. ? 40-13-04.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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