**OPINION**
**56-75**

October 5, 1956 (OPINION)

COUNTY MEMORIALS

RE: Funds - Authority and Liability of County Commissioners - Expend

This is in reply to your letter requesting an opinion of this office in regard to authority of particular county officers.

The facts as given are substantially as follows: The board of county commissioners has been sued by a resident and taxpayer, concerning legality of particular proceedings involving the county World War II Memorial Fund and contemplated expenditures therefrom. The complaint alleges certain actions they have taken are in contempt of a prior court order and judgment involving them and the county auditor, prays that they be held in contempt of court and for further injunctive relief. Some aspects of the case are already before the District Judge for decision.

You, as state's attorney of the county, have officially advised them that by continuing to proceed along the present course, they are running the risk of becoming personally liable, as well as liable under their bonds, for the money spent, and you as such state's attorney have recommended that further proceedings be deferred until determination of the suit.

A majority of the board has continued along the lines complained of in the suit, although the chairman of the board, a minority of its members and the county auditor do not wish to take the possible risks involved.

Your first question is stated as: "Both the chairman and the auditor wish to be advised whether they may legally refuse to execute contracts, approve claim vouchers, or sign warrants on this fund, even though they have been directed to do so by a majority of the Board, inview of the facts above recited."

In the case of State ex rel Diebold Safe and Lock Co. v. Getchell, 3 N.D. 243, the Supreme Court of this state found that the warrant concerned was issued to pay an illegal debt, and concluded that the defendant county auditor was fully justified in refusing to attest said warrant under section 187 of the state Constitution, the supreme court in that decision specifically pointing out that the question of the illegality of the claim was not finally settled, in so far as the county itself was not made a party to the proceeding. In the case of McDermont v. Dinnie, 6 N.D. 278, we find the court holding the claim to be illegal and therefore concluding that the mayor and auditor of the city concerned were justified in refusing to honor the claim.

In State ex rel Miller v. Leech, 33 N.D. 513, where the county auditor was faced with conflicting assessments, we find the court holding in effect that the acting upon the state's attorney's advice was justified in relying on the unconstitutionality of the statute

establishing one of said assessments. In Department of State Highway v. Baker, 69 N.D. 702, we find that the state auditor, asserting that the one cent gas tax law was unconstitutional, refused to issue warrants for the payment of intermediate estimate vouchers. The court finding that the attorney general had advised her that the statute was unconstitutional, held that the question of such constitutionality could be raised by the said state auditor. In State ex rel Johnson v. Baker, 74 N.D. 244, where the attorney general had not advised that the statute was unconstitutional, we find the court holding to the contrary.

In view of the above, it is the opinion of this office that while the question has not been directly settled by the supreme court of this state, that the decisions would indicate that your question should properly be answered in the affirmative, i. e. that acting upon advice of the state's attorney to the effect that they are running the risk of aggravating any possible contempt and running the risk of becoming personally liable, as well as liable under their bonds for money spent by further proceeding in this matter, both the chairman of the board of county commissioners and the county auditor may legally refuse to execute contracts, approve claim vouchers or sign and certify warrants.

Your second question is stated as: "Both the chairman and the auditor wish to know whether they or either of them may become personally liable, under such circumstances, if they do what the majority of the board directs them to do and it is later decided in the case that the proceedings are illegal.

The language of the cases above cited at least indicates a possibility of personal liability of the officers themselves if they do what the majority of the board directs them to do and it is later decided in the case that the proceedings are illegal. Thus in McDermont v. Dinnie, at page 184 of the decision of court states: "They are municipal officers, charged by their oaths of office with the duty of protecting the funds of the municipality. It would be a violation of their official duty should they proceed to pay out the funds of the city upon unwarranted and illegal claims. * * *" In Department of State Highways v. Baker, at page 707, we find the statement: "If the law in question is unconstitutional, the drawing of the warrants which this proceeding seeks to coerce, would be an act violative of the statutory duty of the state auditor in that there would not be 'funds in the treasury applicable to the payment thereof to meet the same'."

We do not mean to suggest that the officers concerned must personally assume all responsibility for actions they must take under circumstances where there is some question as to the legality of such actions. Our supreme court has in effect pointed out the course the state auditor should take where she is in doubt as to the proper legal course in State ex rel Johnson v. Baker (supra). After quoting from pertinent portions of chapter 54-12 N.D.R.C. 1943 and particularly section 54-1201 prescribing the duties of the attorney general in advising that officers, the court goes on to say at page 259: "* * * Reading this statute we can reach no other conclusion than that the Legislature, thus imposing these duties upon the attorney general, made him the chief law officer of the state - the

responsible legal adviser for the state auditor as well as for the other state officers, whose opinions shall guide these officers until superseded by judicial decision; that it took note of the fact that these officers are not required to be learned in the law and contemplated that when any constitutional or other legal question arises regarding the performance of an official act their duty is to consult with the attorney general and be guided by the opinion which that officer, if requested to do so, must give them. If they follow this course, they will perform their duty, and even though the opinion thus given them be later held to be erroneous, they will be protected by it. If they do not follow this course, they will be derelict to their duty and act at their peril. * * *." While no North Dakota case goes into the matter of the obligations of the county officers under similar circumstances we believe that the duties of the state's attorney under section 11-1601 of the N.D.R.C. of 1943 are at least analogous to those of the attorney general under chapter 54-12 of the N.D.R.C. of 1943 and it is therefore our conclusion that principles analogous to those announced in the State v. Baker cases would be applicable.

In view of the terms of the question asked, we have answered this question only in regard to the recovery of county moneys illegally expended from the county officers, who are apparently knowingly expending same, either on the basis of their own legal views or without regard to law. The related question of penalties that such county officers might incur by reason of taking action that was actually found to be in contempt of court would, of course, be a matter of their personal responsibility, not the county's.

Your third question is stated as: "3. Should such continuing actions of a majority of the board be reported to the administrator of the State Bonding Fund and by whom?"

As we understand the facts you present, even the state's attorney has not decided that the continuing actions of the board of county commissioners is wrongful as yet. He has merely advised that the court may find such actions to be wrongful. Until such time as such continuing actions are found to be wrongful, we see no point in informing the administrator of the State Bonding Fund.

LESLIE R. BURGUM

Attorney General