

OFFICIAL OPINION NO. 77-45, Employment by county commissioners of special legal counsel

May 17, 1977

Mr. Michael T. Hogan
Edmunds County State's Attorney
Ipswich, South Dakota 57451

Official Opinion No. 77-45

Employment by county commissioners of special legal counsel

Dear Mr. Hogan:

You have requested an official opinion on the following questions:

QUESTIONS:

1. May the board of commissioners of a county employ a private attorney to represent the county's interests in labor negotiations with unions representing county employees, said representation to include negotiation, drafting all pertinent documents, appearances before the Department of Labor, appeals to both the Circuit Court and Supreme Court, and all other matters relating thereto, when the county does have a State's Attorney?
2. Also, would the answer to the above question differ in an instance where the private counsel employed by the county and the State's Attorney are members of the same law firm?

IN RE QUESTION NO. 1:

To rephrase your question, you have asked if the county commissioners may hire an attorney, independent of the state's attorney's office, to conduct county labor matters from the initial negotiation through possible litigation of a labor agreement litigation. An answer to this question requires an analysis of the statute relating both to the authority of the board of county commissioners and the duties of the office of the state's attorney, as well as the relationship between the two offices.

The duties of the state's attorney are found throughout SDCL 7-16. With regard to court appearances on behalf of the county, SDCL 7-16-9 provides:

It shall be the duty of the state's attorney to appear in all courts of his county and prosecute and defend on behalf of the state or his county all actions or proceedings, civil or criminal, in which the state or county is interested or a party.

There is no question that the county is an interested party in any action involving contract rights of county employees. The final decision could affect the county in a number of ways, including financially. Therefore, in my opinion, the state's attorney is the person required to prosecute or defend on behalf of the county in lawsuits involving labor negotiations and the board of county commissioners is precluded from employing special counsel to handle such litigation. This is not intended to preclude the appointment of deputy state's attorneys pursuant to SDCL 7-16-3 and 7-16-6.

The authority of the board of county commissioners to appoint special legal counsel for labor negotiations other than court appearances is not as clearly defined. First, the general powers of county commissioners are enumerated in SDCL 7-8-20. Subdivision (7) specifically provides that they have the power "To superintend the fiscal concerns of the county and secure their management in the best possible manner." However, SDCL 7-16-8 requires the state's attorney as one of his duties "to give opinions and advice without fee to the board of county commissioners and other civil officers of his county, when requested by such board or officers."

The real issue, then, is whether it is to be implied from the above-cited statutes that the state's attorney or his deputies are the exclusive legal counsel for the county, or whether the general powers of the county commissioners are sufficiently broad to authorize employment of counsel independent from the state's attorney.

For the following reasons, it is my opinion that the board of county commissioners may hire a private attorney to conduct labor negotiations. First in addition to expressly conferred powers, boards of county commissioners have such implied powers as are reasonably necessary to enable them to exercise and perform those powers imposed or granted. *Pearson v. Johnson*, 59 S. D. 163, 238 N.W. 644. The authority "To superintend the fiscal affairs of the county and secure their management" is a broad grant of power. I

do not believe it is an unreasonable interpretation to conclude that employment of professional services to protect the county's interest in labor matters is an exercise of this authority.

Second, SDCL 7-16-8 is a permissive statute insofar as the board of county commissioners is concerned. The board determines when it wants to request the opinion or advice of the state's attorney. Implicit in this is the authority to seek legal opinions or advice from other sources when, in the judgment of the board, it is feasible. In the absence of a statute expressly imposing a duty on a county official, the county commissioners have discretion in ensuring that the function is performed and by whom. *Pearson v. Johnson, supra*.

Therefore, subject to the limitations set forth herein, the answer to your first question is yes.

IN RE QUESTION NO. 2:

In my opinion, there is no inherent conflict if the state's attorney and another attorney hired by the board of county commissioners for special services are members of the same law firm. The board must exercise its discretion in such matters. The answer to your second question is no.

Respectfully submitted,

William J. Janklow
Attorney General

WJJ:LLV:pk