

Rita Binstock

From: Christina Wenko <cwenko@mackoff.com>
Sent: Friday, September 15, 2023 2:38 PM
To: Dustin D. Dassinger
Cc: Rita Binstock
Subject: FW: Oath of Office Issue

Christina M. Wenko, Attorney
Mackoff Kellogg Law Firm
38 2nd Avenue East, Suite A
Dickinson, ND 58601
PH: 701-456-3210 Fax: 701-227-4739
Licensed in North Dakota
Licensed in Montana
Licensed in South Dakota

From: Kelsch, Mary Kae M. <mkelsch@nd.gov>
Sent: Friday, September 15, 2023 2:35 PM
To: Christina Wenko <cwenko@mackoff.com>
Cc: Hicks, Allyson M. <ahicks@nd.gov>
Subject: RE: Oath of Office Issue

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Ms. Wenko,

As you know, Allyson Hicks, the AAG who has the Political Subdivision portfolio is at a training this week. She previously discussed the matter you explain below regarding the oaths of office and employment designations with me. It is my understanding that AAG Hicks had a phone conversation with you where she told you that she agreed with your legal analysis and your plan for a course of action moving forward. I also have reviewed your legal analysis and agree with your assessment. Regarding the oaths of office – you are correct that upon the discovery that the City overlooked the oath requirement, it can either appoint the positions immediately and vote to ratify their appointments and any previous actions taken since each of their respective dates of hire or move to amend the ordinance and remove the reference to appointed positions. Your city commission can decide which course of action to take. Chapter 40 of the Century Code does not provide any penalties for the oversight.

I hope this is helpful.

Mary Kae Kelsch
Assistant Attorney General
Division Director, General Counsel Division
ND Attorney General's Office

From: Christina Wenko <cwenko@mackoff.com>
Sent: Tuesday, September 12, 2023 10:13 AM

To: Kelsch, Mary Kae M. <mkelsch@nd.gov>

Cc: Hicks, Allyson M. <ahicks@nd.gov>

Subject: Oath of Office Issue

Importance: High

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Mary Kae -

I am writing to you because I see that Allyson is out of the office. Several week ago, I reached out to Allyson for an opinion regarding oaths of office. I sent her the following email. I send it again to give you some context. In response to the email, Allyson called my office and spoke with my associate Olivia Krebs. In that conversation, Allyson informed us that the City would need to appoint its city officials and vote to ratify their actions. She also indicated that the City could exercise its home rule charter powers and make these positions employed positions rather than an appointed positions. She mentioned that if asked to give an opinion that is what it would say.

The City is in the process of passing an ordinance to make these positions employed positions. Is there anyway that your office could get me something in writing that confirms Allyson's prior opinion? I know it's asking for a small miracle to get a formal opinion by September 19, but is it possible? If not, am I able get an informal opinion by then? I'm expecting some public outcry and concern over this matter, so I want to be fully prepared to answer all questions.

Prior Email to Allyson.

In discussions with the League of Cities and my own research, if adopted in the home rule charter, a city has the authority "[t]o provide for city officers, agencies, and employees, their selection, terms, powers, duties, qualifications, and compensation." There's an AG's opinion providing that under this home rule power, a city had the ability to adopt an ordinance changing the municipal judge from an elected to an appointed position. The opinion is attached to this email. As such, it appears a city could use its home rule authority to change any of these appointed offices to employees through ordinance. I'm not sure if any cities have actually done this.

From what I am being told, the City of Dickinson hasn't, for likely multiple decades, actually gone through the process of appointing its department heads in June after every election (i.e. city auditor, city engineer, public works director, fire chief, police chief, city assessor, and city attorney). The city has always considered these "employee" positions and not "appointed" positions. NDCC 44-01-05 requires an oath of office by any civil officer appointed by a commission. Currently, of these positions, the chief of police is the only individual with a signed oath because the City has required that for police officers. I do not have an oath as the City Attorney because my firm has never officially been appointed. My firm is contracted by the city. Whether that is right or wrong, I'm not sure. But I have never been asked to sign one.

Dickinson is a home rule city. It has an identical provision in its home rule charter as listed above. It also has the following provisions listed below.

Section 2.12.010 Enumerated

The board of city commissioners at their first meeting after their qualification, or as soon thereafter as possible, shall appoint the following officers: Treasurer; auditor; attorney; one or more assessors; a public health officer; a street commissioner; chief of the fire department; a board of public works; chief of police; one or more policemen, city engineer and such other officers or boards as the board of city commissioners may deem necessary; provided, that the board of city commissioners, by a majority vote, may dispense with the

offices which in its judgment are unnecessary and provide that the duties thereof shall be performed by other officers or boards, by the board of city commissioners or by a committee thereof. (Code 1958, § 2-20.)

For similar state law, see NDCC, § 40-15-05.

Section 2.12.030 Terms

The appointive officers of the city shall take office on the first day of May following their appointment, and shall serve in such capacity for a term of two years or until their successors are appointed and qualified. (Code 1958, § 2-22.)

For state law as to terms of office of appointees, see NDCC, § 40-15-06.

I take the AG's opinion to mean that the City can enact whatever ordinance it deems appropriate that will supersede the Century Code's requirements. Therefore, would it be possible that the City could simply remove the provision regarding its appointed offices and make them all employed positions? Seems to me to 'appoint' an employee every year or every two years as a formality doesn't seem to make sense at all.

My second question. The City's ordinance says it appoints those positions. I'm being told it hasn't done that officially in a very long while. Has the City been running afoul by not following this protocol? If so, I would say the remedy right now is to (1) appoint these positions immediately and vote to ratify their appointments and any previous actions taken since each of their respective dates of hire or (2) move to amend the ordinance and remove the reference to appointed positions.

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38 2nd Avenue East, Suite A
Dickinson, ND 58601
PH: 701-456-3210 Fax: 701-227-4739
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