

GOSBEE LAW OFFICE

103 3rd Avenue, N.W.
Mandan, ND 58554-3129
701-663-2225
Fax: 701-667-2070
email: jgosbee@gosbeelaw.com
Web Page: gosbeelaw.com

June 18, 2008

R. Jon Fitzner, Esq.
City Attorney - Valley City
[fax to 701-845-4474]
[e-mail also to jon.fitzner@valleycitylaw.com]

Re: Irregularities in City Election of June 10, 2008

Dear Mr. Fitzner:

Several Valley City citizens have consulted me concerning the irregularities surrounding the recent election on the initiated measure that proposed to abolish the job of City Administrator.

By far the most serious irregularity was the ballot description, which I understand was written by you, or at least approved by you. The ballot description states (emphasis added):

A yes vote will approve the initiated ordinance prohibiting the future employment of a new city administrator but will not affect the continued employment of the current city administrator.

Provisions relating to a Director of Public Works would not mandate the filling of said position during the continued employment of the current city administrator.

A no vote will disapprove the initiated ordinance and will leave the elected city commissioners with their existing authority to establish positions and employ people.

When the initiative sponsors told me about the ballot language, I told them it was improper for two reasons:

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- (1) It had editorial comments (italicized in quotation from ballot) that the current city administrator would not be affected by the measure, and that a no vote "would leave the elected city commissioners"; and
- (2) Worse, the editorial comment under "yes" was an inaccurate statement of the law.

I told the initiative sponsors that one city commission cannot bind a future one, any more than one session of the Legislative Assembly can bind a future one. (That issue came up occasionally in my days writing bills for the legislatures of Maryland and North Dakota, so I was familiar with it.)

Anyhow, I suggested to the sponsors that they contact the city auditor and you, and ask that the ballot description be changed to remove the editorial material. As far as I know, the sponsors did so, but their requests fell on deaf and indifferent ears. For that you should hang your head in shame.

You didn't have to take my or the sponsors' word for the legal analysis. If you had any doubts, surely you must know that, under NDCC §54-12-01(17), as city attorney, you could have asked for an Attorney General's opinion.

And even that wouldn't have been necessary. In 1987, Attorney General Nicholas Spaeth was presented with the very same issue - whether Fargo could hire a city administrator for a 3-year contract when the city commission members have 2-year terms. This is what Spaeth said about it:

In summary, the ability of a governing body to enter into a contract for services depends upon the nature of the contract. Where the contract involves the exercise of governmental powers, *the contract may not extend beyond the term of office of any member of the body in question.* However, with respect to a proprietary contract, this limitation does not apply and contracts may extend in the future. *Employment contracts for the rendering of professional services involving the governing of a municipality are clearly an exercise of a governmental power and are subject to the above limitation.*

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The proposed city administrator employment contract calls for the rendering of professional services for a period of three years despite the fact that the current membership of the city governing body may change during that time. If the membership of the governing body did change during the three-year period, the successor body may be bound by the terms of this employment contract executed by a predecessor body. To allow such a contract to occur under such circumstances would violate the general rule that a board does not have the power to enter into employment contracts for professional services which bind successor boards.

NDAG Letter Opinion, 1987-08-24, Spaeth to Schneider.

The improper ballot language wasn't the only problem with this election. I trust you are aware that NDCC §16.1-15-02, all ballots are to be counted at each precinct voting site except "in unusual and compelling circumstances." As I understand things, that was not done at several city precincts - and possibly at all of them. Rather, the ballots were counted en masse when they were brought to the courthouse. If my understanding of those facts is accurate, please describe precisely the unusual and compelling circumstances that justified this violation of election law.

Mr. Fitzner, my question of you now is what do you propose to do to repair the damage? At the recent election, two city commissioners were up for election. Thus their terms ended in 2008. Even if there has been no change in personnel, the reconstituted city commission is not the same as the one in office at the start of 2008. Thus, the contract with City Administrator Cameron is now void.

At a minimum, I suggest that you advise the City Commission that their contract with City Administrator Cameron became void as of the date the "up for election" commission member's terms of office expired in 2008. As previously noted, if you have the slightest doubt, why don't you ask Attorney General Stenehjem for an opinion. Are you afraid of what he'll tell you?

If you aren't willing to take those minimal steps, then all I can do is advise my clients to consider formal legal action, including among other things seeking declaratory relief on the

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issue of Cameron's contract, and seeking damages against the city and non-immune city officials for violation of their civil rights. Surely you will agree that the city officials were acting under color of state law in performing their actions, so that element of a civil rights claim won't be in dispute. You might also be well advised to inform the city's insurer of this potential claim.

Sincerely,

A handwritten signature in cursive script, appearing to read "John J. Gosbee".

John J. Gosbee

JJG:fc
ec: Drake, Hetland, Mindt, Neubauer