Attorney General Opinions related to Land Surveying

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Nebraska Attorney General Opinions
March 10, 2010

OPINION NO. 77099 (1977)
R. J. Barnica
Attorney General of Nebraska Ä Opinion
DATE: May 18, 1977

SUBJECT: COUNTY RESPONSIBILITY FOR COSTS OF REESTABLISHING AND PERPETUATING SURVEY CORNERS

REQUESTED BY: R. J. Barnica, Morrill County Attorney, Bridgeport, Nebraska.

WRITTEN BY: Paul L. Douglas, Attorney General, Randall E. Sims, Assistant Attorney General.

Is Morrill County responsible for the costs of reestablishing and perpetuating survey corners in surveys requested by private individuals in the following situations:

a. Reestablishing and perpetuating a corner which seemingly was never perpetuated in an original survey and there have been no supplemental surveys?

b. Reestablishing and perpetuating a lost corner, where the original corner has been lost and the original survey does not contain reliable measurements to find same?

c. Reestablishing and perpetuating a corner which was originally established, lost, reestablished and now lost again?

No, in all three instances, unless within the purview of existing specific statutes.

Specific statutes referred to above as placing a responsibility upon county boards are Sections 23-301 to 23-303, R.R.S. 1943, which, by majority vote of the people, provide for a partial or whole county resurvey to reestablish the original corners of the United States survey, and Sections 39-1410 and 39-1708, R.R.S. 1943, which are highway statutes dealing with perpetuation of corners.

The costs of a county resurvey under the provisions of Sections 23-301 to 23-303, R.R.S. 1943 are payable by the county, either out of the county general fund if money is there available for that purpose or by bond issue or special tax levy if approved by the voters. The resurvey is made through the State Board of Educational Lands and Funds by a competent deputy state surveyor assisted by the county surveyor. Payment to the county surveyor would be made under the provisions of Section 33-116, R.R.S. 1943, the statute providing for compensation of county surveyors. Payment to the deputy state surveyor would be made in

accordance with Section 84-409, R.R.S. 1943, the statute concerned with State Surveyor survey fees.

Section 39-1410, R.R.S. 1943, requires the county board to cause existing government corners along section lines on which public roads have been opened to be perpetuated and to locate lost or obliterated on such lines. Section 39-1708, R.R.S. 1943, requires the county board to cause to be perpetuated the existing corners of land surveys along the public roads and highways where such corners are liable to destruction, either by public travel or construction or maintenance. In both cases, the county surveyor would be entitled to compensation for work done under these statutes in accordance with the provisions of Section 33-116, R.R.S. 1943.

Said Section 33-116, supra, is regarded as applicable in situations where the county board has requested the county surveyor to perform services or where a statutory duty has been imposed upon the board. It sets forth the costs payable for services rendered to the county. As stated before, services are rendered to the county only at its request, or when required by specific statute.

OPINION NO. 85594 (1985)
William J. Bailey, Jr.
Attorney General of Nebraska Ä Opinion
DATE: April 2, 1985

REQUESTED BY: William J. Bailey, Jr. Assistant Director, Nebraska Game and
Parks Commission, 2200 North 33rd Street, Lincoln, NE 68503

BY: Robert M. Spire, Attorney General; Timothy E. Divis, Assistant Attorney General, 2115 State Capitol, Lincoln, NE 68509

Does an individual, under the laws, of Nebraska, have the right to use without permission of the landowner, those riparian lands below the high-water line for the purpose of hunting, fishing, boating (beaching or tying craft to shore) and other recreation activities?

An individual does not have such a right, except to portage or otherwise transport a non-powered vessel around a fence or obstruction in the river.

You have requested our opinion regarding the right of the public to utilize, without the permission of the landowner, those riparian lands below the high water line for the purpose of hunting, fishing, and boating (beaching or tying craft to shore) and other recreation activities. It is our opinion that the public has no right to utilize the banks of the Missouri River without the permission of the landowners except to portage or otherwise transport a nonpowered vessel around a fence or obstruction in the river.

Nearly 79 years ago, the Nebraska Supreme Court, in the case of Kinkead v. Turgeon, 74 Neb. 580, 109 N.W. 744 (1906), found that whatever right and title the United States had in the bed of a navigable stream passed to the state government, and that the local law of each state determines the question of whether the bed of such a stream belongs to the state or to the riparian owner. The Court went on to find that the common law, not being inconsistent with any statutory law, determined such ownership rights. The Court found that the common law, as it applies to the navigable rivers of the State of Nebraska, grants exclusive right and title to the riparian owner to the bed of the river to the mid-point of the stream, subject to the public's right to navigation or right of passage.

The Court noted that, in some instances, the courts of a state lying upon one side of a navigable stream uphold and enforce the rule of the common law, while on the other side of the same river, the courts of another state declare that the riparian owner only takes to the high or low water mark, as the case may be. Such is the difference between the states of Nebraska and Iowa. The fact that the Iowa law allows the public

access to the banks of the Missouri River to the high water mark without the landowner's permission has no effect upon Nebraska law, which grants the riparian landowner title to the mid-point of the stream.

Neb.Rev.Stat. 28-522 (Reissue 1979) provides that necessary portage of a non-powered vessel in any stream or river of this state is an affirmative defense to an action in criminal trespass. To the extent that it would be necessary to portage a non-powered vessel around a fence or obstruction in the Missouri River, the public would have a right to go upon the banks of the river.

We would note that our opinion as to the public's right to go upon the banks of a navigable stream without the permission of the landowner most likely applies to nonnavigable streams in the state. While the Nebraska Supreme Court has not ruled on the matter, a reading of the case law from other western states with similar statutes and constitutional provisions regarding the public's right to the use of the waters of the state would indicate that the public has the right to use the waters for purposes of transportation, but that they have no right to go upon the banks of such streams without the owner's permission unless it is for the purposes of necessary portage (See Nebraska Water Law and Administration, Richard Harnesberger and Norman Thorson, Butterworth Legal Publishers, St. Paul, 1984).

Should you have any additional questions regarding this matter, feel free to contact the undersigned assistant attorney general.

Sincerely,

ROBERT M. SPIRE Attorney General

Timothy E. Divis Assistant Attorney General

OPINION NO. 83047 (1983)
Mark L. Eurek
Attorney General of Nebraska Ä Opinion
DATE: March 11, 1983

SUBJECT: Control by board of county supervisors of highway employees.

REQUESTED BY: Mark L. Eurek,
Sherman County Attorney,
P.O. Box 621, Loup City,
Nebraska, 68853.

WRITTEN BY: Paul L. Douglas,
Attorney General;
Warren D. Lichty, Jr.,
Assistant Attorney General.

1. To what extent can a county board regulate the salaries and the hiring and firing of road employees in a county which is under the township system without a county road unit plan?

2. If the county has a county highway superintendent, is he required to be in charge of the hiring and firing of the road employees?

3. The county surveyor presently acts as county highway superintendent. If he retires, must the county hire a new county highway superintendent if they are under the township plan without a county road unit system? If they do not have a county superintendent, can the duties of the county highway superintendent be assumed by the county board?

4. What procedure must the county board go through in order to fire a road employee in a county road unit plan where the county has a policy that the county board shall be in charge of hiring, firing, disciplining, setting salaries and they presently have an acting highway superintendent?

1. It depends. Who is the employer of such employees?

2. Assuming that township type counties are authorized to have them, county highway superintendents are employees and not officers of the county, and the county board, to the extent of its jurisdiction, can authorize him to have employees which he may be authorized to hire and fire.

3. There is no requirement that a county have a county highway superintendent.

4. Since the county highway superintendent is an employee, and not an officer of the county, he is subject to discipline.

A township is an ancient form of government which is still recognized in our code. Neb.Rev.Stat. 23-224 and 23-228 (Reissue 1977) repose considerable powers in the electors at their annual town meeting. Goes v. Gage County, 67 Neb. 616, (1903), refers to these statutes. It concludes:

> . . . The whole matter of township governments is committed to the town boards, or the electors of the township, as the case may be. . . .

This case makes clear that a county, and a township within such county are separate entities, and that either may have exclusive authority over certain roads.

For an analysis of the status of the county highway superintendent as an employee rather than as an officer of the county, please refer to our Opinion No. 16 dated January 31, 1983. The county highway superintendent being an employee of the county, it is therefore considered unlikely that he has any authority over employees of the township. Conversely, however, it would appear to be well within the authority of the board to authorize the superintendent to employ such persons as are deemed necessary for county purposes, and to give him such authority over them as the board should see fit.

As to your third question, the county surveyor is a county official with a term of office and all that that implies. The county highway superintendent is only an employee of the county, and there would appear to be no requirement that the county have such an office filled. Neb.Rev.Stat. 39-1504 (Reissue 1978) would appear to make it clear, even in commissioner type counties, that a county highway superintendent is not required, despite the provisions of 39-1502. This lack would, however, prevent the receiving of incentive payments as provided in Nebraska Revised Statutes, Chapter 39, Art. 25.

To the extent that a `road employee' is an employee of the county highway superintendent, the board would appear to have such authority because the highway superintendent is a county employee, subject only to such restrictions as apply to firing all public employees. If the `road employee' is an employee of a county officer, such as the county surveyor, or of a township within the county, the county board's authority to fire would appear quite doubtful in any circumstance. This would appear to apply to hiring, disciplining and setting salaries, as well.

Very truly yours, PAUL L. DOUGLAS Attorney General Warren D. Lichty, Jr. Assistant Attorney General Approved: Paul L. Douglas Attorney General

OPINION NO. 83016 (1983)
Richard T. Smith
Attorney General of Nebraska Ä Opinion
DATE: January 27, 1983

SUBJECT: County Highway Superintendent status.

REQUESTED BY: Richard T. Smith,
Gage County Attorney,
Room 21, Courthouse,
Beatrice, NE, 68310.

WRITTEN BY: Paul L. Douglas,
Attorney General;
Randall E. Sims,
Assistant Attorney General.

1. Is the Gage County Highway Engineer-Superintendent a county officer for purposes of Neb.Rev.Stat. 23-146 (Reissue 1977)?

2. If the Gage County Highway Engineer-Superintendent is a county officer for purposes of Neb.Rev.Stat. 23-146 (Reissue 1977), would a renegotiation of his contract to include the performance of a Road and Bridge Study of Gage County at an added expense of over $10,000.00 be in violation of section 23-146 or Neb.Rev.Stat. 39-1506 (Supp. 1982)?

1. No.

2. The matter is considered moot in view of the negative answer to the preceding question, but a negative response would also be given here for a non-county officer.

Neb.Rev.Stat. 23-146 (Reissue 1977) states as follows:

> "No county officer or county surveyor shall in any manner, either directly or indirectly, be pecuniarily interested in or receive the benefit of any contracts executed by the county for the furnishing of supplies or any other purpose when the consideration of the same is in an amount in excess of five thousand dollars in any one year, and no contract may be divided for the purpose of evading the requirements of this section. No county officer or county surveyor shall furnish any supplies for the county on order of the county board, without contract. It shall be unlawful for any person, firm, or corporation to enter into any contract or agreement with any county board for any article, service, public improvement, material, or labor, where such person is a member of such county board, or when any member of such county board is an agent, official, or employee of such firm or corporation

> if such contract or agreement is in violation of the limitation above set forth. All contracts or agreements in violation of the limitations above set forth are hereby declared unlawful and shall be wholly void as an obligation against the county."

As you will note, this section applies to county officers, county surveyors and county board members. A county highway superintendent is obviously not one of the latter two (he could be both county engineer and surveyor in counties over 50,000 population by virtue of Neb.Rev.Stat. 23-1901 (Supp. 1982); he could not be a county board member because of the prohibition contained in Neb.Rev.Stat. 39-1506 (Supp. 1982)), therefore, the question remaining is whether he is a county officer. In this regard, Article IX, Sec. 4 of the Nebraska Constitution states, in pertinent part:

> "The Legislature shall provided by law for the election of such county and township officers as may be necessary. . ."

There is no statute providing for the election of a County Highway Superintendent, nor are there any statutory provisions for serving a term or setting a specific salary. Conversely, the pertinent statutes, Neb.Rev.Stat. 39-1501(2), 39-1502, and 39-1506 all speak in terms of appointment by the county board. Still, it is a close question, i.e. whether the highway superintendent is a county officer, in view of the holding in State, ex rel. O'Connor v. Tusa, 130 Neb. 528, (1936), wherein a County Manager was held to be a county officer, even though appointed by and serving at the pleasure of the county board. The Court said then that, `The almost universal rule is that, in order to indicate office, the duties must partake in some degree of the sovereign powers of the state.' It found that the County Manager had the power to appoint `officers' such as the Register of Deeds, or to hold such `offices' himself in addition to being County Manager. Such would not appear to be the case with a County Highway Superintendent. (Neb.Rev.Stat. 39-1503 and 39-1505, relative to duties of the Superintendent, place primary responsibility on the county board.)

The Court noted further that `the words `office' and `officer' are terms of vague and variable import, the meaning of which necessarily varies with the connection in which they are used, and, to determine it correctly in a particular instance, regard must be had to the intention of the statute and the subject matter in reference to which the terms are used.' (Citing State v. Kiichli, 53 Minn. 147, 54 N.W. 1069.)

In conclusion, in the context of the above tests, it is considered that the County Highway Superintendent is a county employee but not a county officer within the meaning of Neb.Rev.Stat. 23-146.

As to your second question, it is considered that were the County Highway Superintendent deemed to be a county officer, a change of contract as described would be impermissible as being in violation of Art. III, Section 19 of the Nebraska Constitution which prohibits increasing or decreasing the compensation of a public officer during his

term of office. Contrarily, there is no known provision prohibiting increasing or decreasing the pay of a public employee.

Very truly yours, PAUL L. DOUGLAS Attorney General Randall E. Sims Assistant Attorney General Approved: Paul L. Douglas Attorney General

OPINION NO. 82294 (1982)
William L. Howland
Attorney General of Nebraska Ä Opinion
DATE: December 20, 1982

SUBJECT: Surveyor Registration Exemption under Neb.Rev.Stat. 81-8,126 (Reissue 1981).

REQUESTED BY: William L. Howland, Dawes County Attorney, P.O. Box 1140, 342 Main Street, Chadron, Nebraska, 69337.

WRITTEN BY: Paul L. Douglas, Attorney General; Randall E. Sims, Assistant Attorney General.

Is a person who is not a full time employee of the United States government, but rather is a `contract' surveyor, exempted from Nebraska statutory registration requirements?

No.

On the assumption that the person in question is, in fact, an independent contractor, it is not considered that he would be exempted from the provisions of Neb.Rev.Stat. 81-8,108 to 81-8,127 (Reissue 1981), the act dealing with surveyors. Section 81-8,108 of that act states:

> `In order to safeguard life, health, and property, and person practicing or offering to practice land surveying in this state shall hereafter be required to submit evidence that he is qualified so to practice and shall be registered as provided in sections 81-8,108 to 81-8,127; and after January 1, 1958, it shall be unlawful for any person to practice or to offer to practice land surveying in this state unless such person has been duly registered under the provisions of sections 81-8,108 to 81-8,127.'

Neb.Rev.Stat. 81-8,126 (Reissue 1981) states:

> `Sections 81-8,108 to 81-8,127 shall not apply to any land surveyor working for the United States government, while performing his duties as an employee of said government, nor to any person employed as an assistant to a land surveyor registered under the provisions of sections 81-8,108 to 81-8,127.'

A surveyor who is an employee of the U.S. government would be exempt from Nebraska statutory requirements while doing work for the U.S. government. While an independent contractor could be deemed to be doing work for the United States government, it is not considered that he would

meet the second test of `performing his duties as an employee of said government'.

It is admitted that determination of independent contractor status is often difficult to do. A reading of the case of Showers v. Land, 123 Neb. 56, 242 N.W. 258 (1932) is recommended in this regard. Essentially, that case held that the major test in determining independent contractor status was whether the employment relationship could be terminated without liability. If not, the person would be considered an independent contractor.

There is one further area to explore, namely, whether the person in question is practicing or offering to practice surveying as defined in Neb.Rev.Stat., 81-8,109(4) (Reissue 1981). That sub-section states:

> `Land surveying shall mean and include the surveying of areas for their correct determination and description and for conveyancing, or for the establishment or reestablishment of land monuments and boundaries and the platting of lands and subdivisions thereof.'

If the work the person in question is doing is not within the purview of that section, it would not be considered that registration would be required.

Very truly yours,

PAUL L. DOUGLAS Attorney General

Randall E. Sims Assistant Attorney General

Approved:

Paul L. Douglas Attorney General

OPINION NO. 82293 (1982)
Randy R. Stoll
Attorney General of Nebraska Ä Opinion
DATE: December 16, 1982

SUBJECT: Qualifications of County Surveyor in counties under 50,000 population.

REQUESTED BY: Randy R. Stoll, Seward County Attorney, Seward, Nebraska, 68434.

WRITTEN BY: Paul L. Douglas, Attorney General;
Randall E. Sims, Assistant Attorney General.

1. As applied to a county under 50,000 population, does the term `qualified surveyor' as used in Neb.Rev.Stat. 23-1901.01 (1982 Supp.) refer to a licensed or registered land surveyor, or can a non-licensed or registered elected surveyor take office provided he hires qualified licensed surveyors to actually conduct surveys?

2. If there is no qualified surveyor within a county who will accept the office of County Surveyor, is the County Board required to appoint a competent surveyor to assume the office, either on a full or part time basis?

1. The term `qualified surveyor' means a person duly registered to practice land surveying under the provisions of Neb.Rev.Stat. 81-8,108, et seq. (Reissue 1981). This would preclude a non-registered person from serving as a County Surveyor.

2. Yes, for the full term of office.

In commenting on both questions 1 and 2, it is noted that Article IX, Section 4 of the Nebraska Constitution provides in pertinent part that, `the Legislature shall provide by law for the election of such county and township officers as may be necessary'. This provision has been implemented as regards County Surveyors by Neb.Rev.Stat. 32-308(3) (1982 Supp.), which states in pertinent part:

> `When there is a qualified surveyor within a county who will accept the office of county surveyor if elected, a county surveyor on either a full-time or part-time basis, as determined by the county board, shall be elected in each county at the general election in 1982 and every fourth year thereafter; . . .'

It is considered that the above statutory section sets a qualification for the elective office, namely that of being a `qualified surveyor'. Under the provisions of Neb.Rev.Stat., 81-8,108:

> `. . . it shall be unlawful for any person to practice or to offer to practice land surveying in this state unless such person has been duly registered under the provisions of sections 81-8,108 to 81-8,127.'
>
> Under the provisions of Neb.Rev.Stat. 23-1901 (1982 Supp.):
>
> `It shall be the duty of the county surveyor to make or cause to be made all surveys within his or her county that he or she may be called upon to make and record the same as hereinafter provided.'

It is considered that this places basic responsibility on the County Surveyor, even though he might act through an agent, and as such, he still must be qualified.

Finally, it is considered that the provisions of Neb.Rev.Stat. 32-308(3) (1982 Supp.) and of Neb.Rev.Stat. 23-1901.01 (1982 Supp.) must be read in para materia, with the conclusions drawn that under the first named section, there must be a qualified County Surveyor, either elected or employed, and under the second section, that if employed, he or she must be `competent', which is considered the equivalent of `qualified', and that he or she may be employed either on a full-time or part-time basis, but in either case, to serve the same term as that of an elected surveyor.

Very truly yours,

PAUL L. DOUGLAS Attorney General

Randall E. Sims Assistant Attorney General

Approved:

Paul L. Douglas Attorney General

OPINION NO. 82279 (1982)
Senator Emil E. Beyer, Jr.
Attorney General of Nebraska Ä Opinion
DATE: September 24, 1982

REQUESTED BY: Senator Emil E. Beyer, Jr.
Nebraska State Legislature
State Capitol
Lincoln, NE 68509

Dear Senator Beyer:

You have asked for a definition of the term `full time surveyor' as that term is used in Neb.Rev.Stat. 32-308 (1982 Supp.), in order to determine if corrective legislation is necessary, to allow county surveyors to retain fees for work done after normal courthouse hours. Although that term has not been defined by statute, `full time' has been defined by the Nebraska Supreme Court in litigation involving `full time' deputy sheriffs. In Grace v. County of Douglas, 178 Neb. 690, 134 N.W.2d 818 (1965), the court states on page 694 as follows:

> Websters New International Dictionary (2d Ed.), p. 1018, defines `full time' as follows: `The amount of time considered the normal or standard amount for working during a given period, as a day, week, or month.' It is evident that the ordinary meaning of the term and the one we can assume to be embraced within the legislative intent would be the usual working day for the performance of the duties of the particular office.

In the case of county surveyors, full time would be that amount of time considered to be the usual, normal, or standard work day of a county officer. `Full time' therefore, would not include work performed during hours after a standard or normal work day. Presumably, this would exclude work performed during hours other than normal courthouse hours.

You have further inquired about the retention of fees received by the county surveyor for work performed for individuals after normal courthouse hours. Absent agreement with the county board to the contrary, such fees may be retained by the county surveyor.

Neb.Rev.Stat. 23-1901.01 (1982 Supp.) provides in pertinent part:

> When there is no qualified surveyor within a county who will accept the office of county surveyor, the county board of such county may employ a competent surveyor either on a full-time or part-time basis from any other county of the State of Nebraska to such office. In making such employment, the county

> board shall negotiate a contract with the surveyor, such contract to specify the terms and conditions of the appointment or employment, including the compensation of the surveyor, which compensation shall not be subject to the provisions of section 33-116.

Because a county surveyor hired by the county board is hired pursuant to contract, it is possible that a term or condition of that employment contract could involve `after hours' employment and the retention of fees for such employment. In such a case, retention of fees for `after hours' work would be governed by the employment contract.

You have inquired about the need for legislation permitting the filing of surveys with the county clerk, when the county surveyor's office is several miles remote from the county courthouse. Currently, surveys of a registered land surveyor must be filed with the survey record repository if the county surveyor does not maintain a regular office in the county courthouse.

Neb.Rev.Stat. 81-8,122.01 (1982 Supp.) provides in pertinent part:

> If no regular office is maintained in the county courthouse for the county surveyor, it shall be filed in the survey record repository.

The repository must, within thirty (30) days of receipt of a survey, transmit a copy of the same to the county. Neb.Rev.Stat. 84-413(2) (1982 Supp.) provides that the survey record repository shall:

> (2) Provide a copy of survey records to the county in which the survey was conducted. Such copy shall be transmitted to the county within thirty days of its receipt by the repository and at no cost to the county; . . .

A copy of a survey transmitted to the county by the repository must be placed on file in the office of the county clerk, if the county surveyor does not maintain an office in the county courthouse. Neb.Rev.Stat. 81-8,122 (1982 Supp.) provides:

> When the county shall receive an official copy of a survey from a registered land surveyor or from the survey record repository established pursuant to section 84-412, such copy shall be placed on file in the office of the county surveyor in the county where the land is located. If no regular office is maintained in the county courthouse for the county surveyor, it shall be placed on file in the office of the county clerk.

Because surveys must be filed with the county clerk after they are filed with the survey record repository under the situation that you

describe, we are of the opinion that no problem exists regarding whether such surveys should be `allowed' to be so filed.

Very truly yours, PAUL L. DOUGLAS Attorney General John E. Brown Assistant Attorney General

OPINION NO. 82225 (1982)
Senator Rex Haberman
Attorney General of Nebraska Ä Opinion
DATE: March 23, 1982

REQUESTED BY: Senator Rex Haberman
Member of the Legislature
1110 State Capitol
Lincoln, Nebraska 68509

Dear Senator Haberman:

This is in reply to your inquiry concerning LB 127, final reading draft.

You inquire whether or not the State Surveyor could use his office, office staff and his own time necessary to operate the record repository created by LB 127.

Assuming the State Surveyor's office is operated solely by general fund appropriations, as you indicate in your letter, he would not be able to do so.

This is because Section 18 of LB 127 specifically provides: `No expense for developing or maintaining the survey record repository shall be paid for by funds from the General Fund.'

Section 17 of said bill also provides that the State Surveyor receive and account for all money received from operating the record repository and pay such to the State Treasurer who shall keep such money in a separate fund to be known as the Survey Record Repository Fund. Such fees are established by Section 16(4) of said act.

In light of the specific requirements of Section 17 for paying the fees over to the state treasury, and the specific limitation of Section 18 that no funds from the general fund be used to develop or maintain the survey record repository, it would, in our opinion, be a misuse of funds if personnel or other items supported by the general fund in the State Surveyor's office, or any other office supported by the general fund, were loaned or used to establish and maintain the survey record repository.

Respectfully submitted,

PAUL L. DOUGLAS Attorney General

Mel Kammerlohr Assistant Attorney General

OPINION NO. 82186 (1982)
Robert G. Simmons, Jr.
Attorney General of Nebraska Ä Opinion
DATE: January 29, 1982

SUBJECT: County surveyor employment status under the provisions of Neb.Rev.Stat. 23-1901.01 (Supp. 1980).

REQUESTED BY: Robert G. Simmons, Jr., Banner County Attorney, 1620 Avenue A, Scottsbluff, Nebraska, 69361.

WRITTEN BY: Paul L. Douglas, Attorney General;
Randall E. Sims, Assistant Attorney General.

1. Is the county surveyor employed under the provisions of Neb.Rev.Stat. 23-1901.01 (Supp. 1980), an employee of the county, covered by workmen's compensation, and other benefits provided to all other county employees?

2. Can the county surveyor, under these circumstances, be an independent contractor?

3. Can the county pay the county surveyor so engaged on a piecework basis, or must it be on a salary basis?

4. Assuming that the surveyor needs assistants, can these assistants be his employees and not employees, etc., of the county?

1. Yes.

2. No.

3. Payment must be a salary based on time, plus statutory fees.

4. Necessary assistants would be considered employees of the county.

1. Neb.Rev.Stat. 23-1901.01 (Supp. 1980) reads as follows:

> When there is no qualified surveyor within a county who will accept the office of county surveyor, the county board of such county may employ a competent surveyor either on a full-time or part time basis from any other county of the State of Nebraska to such office.
>
> A surveyor employed under this section shall serve the same term as that of an elected surveyor and is not required to reside in the county of employment.

Neb.Rev.Stat. 48-115 (Reissue 1978) terms employee and workman as interchangeable and defines them to include, with certain specified

exceptions not applicable here, `(1) Every person in the service of the state or of any governmental agency created by it. . .'

Section 23-1901.01, supra, uses the terms `employ' and `employed' and in its second paragraph places the employed surveyor in the shoes of an elected county surveyor.

The net effect seems clear that the employed county surveyor is both an employee and officer of the county. As such, he would be entitled to workmen's compensation benefits under the provisions of Neb.Rev.Stat. 48-106 (Reissue 1978), which states in pertinent part: `(1) The provisions of this act shall apply to the State of Nebraska and every governmental agency created by it. . . .' This conclusion is supported in the case of Steward v. Deuel County, 137 Neb. 516, 289 N.W. 877 (1940).

2. This question is believed to have been answered in the conclusion to question 1. This is not to imply that a county does not have implied power in given situations to contract with independent contractors under Neb.Rev.Stat. 23-104 and 23-106, (Supp. 1980), when not prohibited by other statutes. (See Thiles v. County Board of Sarpy County, 189 Neb. 1, 200 N.W.2d 13 (1972) for general discussion of the matter.) Section 23.1901.01 may not be considered as strictly prohibitive, but it is certainly directive to the point of being considered controlling under the situation you describe.

3. The authorizing statute, Section 23-1901.01, supra, states that the surveyor may be employed `either on a full-time or part-time basis'. The plain meaning of the statute is considered to be that a salary be paid on any time basis agreed upon. In addition, it is considered that the county surveyor would also be entitled to receive fees as set forth under Neb.Rev.Stat. 33-116 (Supp. 1981), there being no distinction made therein between elected and employed county surveyors. As stated in Opinion of the Attorney General No. 92, dated April 17, 1979, the salary could be the amount of the fees, assuming agreement of the parties, but not less than the fees.

4. Neb.Rev.Stat. 33-116 (Supp. 1981) authorizes the employment of surveyor assistants, at least by implication. It states, in pertinent part, `All expense of necessary assistants . . . shall be paid for by the county.' It is not helpful in determining who employs them, their employment status, their rates of pay and method of payment, or the necessity for their employment. Presumably, the county surveyor would be the activating authority, subject to ratification by the county Board. It might be conjectured, from the general nature of the statute as covering fees and expenses of the county surveyor, that some sort of claim for reimbursement procedure might have been envisaged, but the statute does not so state. Therefore, we can only try to be logical, and, as the Nebraska Supreme Court said in the case of Showers v. Lund, 123 Neb. 56, 242 N.W. 258 (1932), when attempting to sort out the differences between employees and independent contractors, to be consistent in our own decisions. Our conclusion is that the county surveyor would employ such assistants on behalf of the county and as they would be paid by the county they should be classified as employees of the county.

Very truly yours,

PAUL L. DOUGLAS Attorney General

Randall E. Sims Assistant Attorney General

Approved:

Paul L. Douglas Attorney General

OPINION NO. 81120 (1981)
James L. Brown
Attorney General of Nebraska Ä Opinion
DATE: June 9, 1981

SUBJECT: Surveying definition.

REQUESTED BY: James L. Brown, Secretary, State Board of Examiners for Land Surveyors, P.O. Box 94663, State Office Building, Lincoln, Nebraska, 68509.

WRITTEN BY: Paul L. Douglas, Attorney General; Randall E. Sims, Assistant Attorney General.

May a registered land surveyor draw a plat showing the location of improvements on a property and make a determination of property lines without conforming to the requirements of Neb.Rev.Stat. 81-8,122.01 (Reissue 1976) if the surveyor states on the face of the plat that the plat is not a survey?

No.

A registered surveyor, by the very act of acquiring that status, is considered to be in the position of `holding out' to the public his qualifications. As such, he is bound by the statutes applicable to work as a surveyor, and disclaimers would not be considered as relieving him from his responsibilities as a registered surveyor.

The policy of the State has been declared by the legislature in enacting Neb.Rev.Stat. 81-8,108 (Reissue 1976), which, in requiring registration of surveyors, states the reason as being `to safeguard life, health, and property. . . .' Obviously, the legislature wanted the public to be protected. A lessening of standards in any respect would not be considered as contributing to that protection.

If there are apparent abuses of the law as it exists which are not correctable by the Board of Examiners for Land Surveyors on proper complaint, then certainly an appeal could properly be made to the legislature for corrective legislation. One problem area was previously pointed out in Opinion No. 166 of the Attorney General dated October 30, 1979, namely, the definition of surveying.

You state further in your letter that persons who are not licensed surveyors are making determinations of property lines. It should be pointed out, in amplification of Opinion No. 166, that if such determinations include any of the data set forth in Neb.Rev.Stat. 81-8,122.01, (1), (2), (3), (4), (5), (6) and (7) (1976) for the purposes set forth in Neb.Rev.Stat. 81-8,109(4) (Reissue 1976), it would be considered to constitute the unlawful practice of surveying under Neb.Rev.Stat. 81-8,127 (Reissue 1976).

Very truly yours, PAUL L. DOUGLAS Attorney General Randall E. Sims Assistant Attorney General Approved: Paul L. Douglas Attorney General

OPINION NO. 80224 (1980)
Bernard L. McNary
Attorney General of Nebraska Ä Opinion
DATE: February 11, 1980

SUBJECT: OPENING OF COUNTY ROADS

REQUESTED BY: Bernard L. McNary, Boone County Attorney, Box 26, Albion, Nebraska, 68620.

WRITTEN BY: Paul L. Douglas, Attorney General;
John E. Brown, Assistant Attorney General.

1. What is the county's responsibility to reestablish lost government corners, if requested to do so by a land developer?

2. What, if any, obligation does the county have to build a road system for the developer?

3. Can the developer alone or in conjunction with others force the county to build the roads for him? How? Can the county refuse to build such a road system or require the developer and/or his purchasers to pay for any such roads construed by the county? What would be the legal grounds and authority for the county's action in such cases?

4. What if the developer sells off various strategic pieces of land and has the new owners petition the County Board for roads as isolated landowners? What are the county's rights and responsibilities in such instances?

5. Is a person an isolated landowner if his land abuts an unopened county road?

6. How much land must an isolated landowner own before the county is required to provide him a road?

1. The county's responsibility to reestablish lost government corners under the circumstances that you describe is fixed by section 23-1909, R.R.S. 1943.

2. The county has no responsibility to build and finance a road system for the developer under the circumstances that you describe.

3. No.

4. Under the circumstances that you describe, the developer could not create an isolated tract of land. The developer or a purchaser from that developer or a purchaser from that developer would retain an implied easement to a public road.

5. An `unopened' county road has no status as a road whatsoever in determining whether a tract of land is isolated.

6. The isolated tract should be large enough to be at least equal in value to the cost of the construction of the road and the resultant damage to abutting property.

You have related a situation wherein a developer has purchased a large ranch and in order to facilitate the sale of component 40 acre tracts of that ranch, has requested that the county survey his property to reestablish lost section corners. The developer could, by virtue of 23-1909 R.R.S. 1943, petition the county surveyor to make or cause to be made such a survey.

We can find no statute which requires the county to build such a road system under the circumstances that you describe. Section 39-1410 R.R.S. 1943 allows the county to open section line roads whenever the public good requires such a road. Under the circumstances you present, the roads to be opened would be of little or no value to the general public and could, in fact, present the county with a near ruinous financial obligation. The county's obligation to open and develop roads must be based on the promotion of the general welfare of the public. Section 39-2115 R.R.S. 1943, requiring the county to file a six year plan, provides as follows:

> ". . . each county . . . shall develop and file with the Board of Classifications and Standards a long range, six-year plan of highway, road, and street improvements based upon priority of needs and calculated to contribute to the orderly development of an integrated statewide system of highways, roads and streets." (Emphasis supplied.)

The priority of need assigned to a road system which would benefit so few people, would arguably be very low, and hence, the obligation on the County Board to open such a road would be slight.

> "In Howard v. Board of Supervisors, 54 Neb. 443, it was held: `The propriety or necessity of opening and working a section line road is committed to the discretion of the county board, and its decision is not subject to review'. In Otto v. Conroy, 76 Neb. 517, it was held that the action of the county board in their decision of the expediency of establishing a public road was not subject to judicial review. Although both cases cited apply the rule to public roads established upon section lines, the rule is equally applicable to any proposed road, and the courts have no more right to interfere by injunction than by an appeal from the decision of the county board."

The developer could attempt to form a Rural Road Improvement District as authorized by 39-1640 et seq., R.R.S. 1943. The ultimate decision to establish such a road system, however, would be vested in the discretion of the County Board, there being no mandatory ministerial duty

to establish new roads, even upon petition. State ex rel. Stansbery v. Schwasinger, ___ Neb. ___, ___N.W.2d ___.

The County Board has adequate legal grounds to support its decision to refuse to open the roads that you describe. If the costs of such an undertaking would be disproportionate to the benefits to be derived, and the unavailability of funds could cause a disruption in the financial ability of the county to adequately care for the public road system already in existence, in our opinion, the discretion of the Board, in its decision not to open the roads, could not be reversed by legal action.

If the County Board decided to allow the formation of the Rural Road Improvement District, the Board could place at least a portion of the cost of the road on the developer and his purchasers. Section 39-1647 R.R.S. 1943 allows the county to specially assess property within the improvement district `for the amount that it is specially benefited'.

Under the circumstances that you describe, we are of the opinion that the developer could not create an isolated tract of land and thereby force the county to build a public road to that tract.

Section 39-1713 R.R.S. 1943 provides as follows:

> "When any person shall present to the county board an affidavit satisfying it (1) that he is the owner of the real estate described therein located within the county, (2) that the same is shut out from all public roads, other than a waterway, by being surrounded on all sides by real estate belonging to other persons, or by such real estate and by water, (3) that he is unable to purchase from any of such persons the right-of-way over or through the same to a public road or that it cannot be purchased except at an exorbitant price, stating the lowest price for which the same can be purchased by him, and (4) asking that a public road be laid out in accordance with section 39-1716, the county board shall appoint a time and place for hearing the matter, which hearing shall be not less than ten days nor more than thirty days after the receipt of such affidavit. The application for such road may be included in a separate petition instead of in such affidavit."

The developer, in the situation that you pose, or a purchaser of a strategic tract of land from the developer would not meet the requirements of paragraph 2 of section 39-1713 because they would have access to a public way. The developer or his purchaser would have an implied easement over the surrounding land.

> "A way of necessity is an easement founded on an implied grant or implied reservation. It arises where there is a conveyance of a part of a tract of land of such nature and extent that either the part conveyed or the part retained is shut off from access to a road to the outer world by the land from which it is severed or

> by this land and the land of strangers. In such a situation there is an implied grant of a way across the grantor's remaining land to the part conveyed, or conversely, an implied reservation of a way to the grantor's remaining land across the portion of the land conveyed. The order in which two parcels of lands are conveyed makes no difference in determining whether there is a right of way by necessity appurtenant to either." 25 Am.Jur.2d 447, Easements and Licenses, 34.
>
> "Where a conveyance is made of realty separated from the highway by other realty of the grantor or surrounded by his realty, or by his and that of third persons, there arises by implication, in favor of the grantee, a way of necessity across the said premises of the grantor to the highway." Hansen v. Smikahl, 173 Neb. 309, 113 N.W.2d 210 (1962).

The county has no responsibility to provide either the developer or a purchaser from the developer a public road unless in the opinion of the County Board, such a road would be of benefit to the public.

In answering your question number five, we assume that the land in question does not abut a public road in another direction. We are of the opinion that an unopened county road is not a public road as that term is used in section 39-1713 et seq. R.R.S. 1943, in fact, that an `unopened county road' has no status as a road whatsoever in determining whether a tract of land is isolated. `Road' is defined by section 39-1302(21) R.R.S. 1943 as follows:

> "Road shall mean a public way for the purposes of vehicular travel, including the entire area within the right-of-way. . ."

An `unopened' county road could not fall within this definition.

Sections 39-1713 et seq. R.R.S. 1943, provides no guidance as to the size of the land necessary to require construction of a public access road.

> "In construing a statute, the courts must look to the object to be accomplished, the evils and mischief sought to be remedied or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than defeat it." State v. Goham, 191 Neb. 639, 216 N.W.2d 869 (1974).

Reasonably interpreting 39-1713, R.R.S. 1943, it would seem that the land in question should be large enough to be at least equal in value to the cost of the road and the resulting damage to abutting property. The requisite size of such an isolated tract would thereby vary according to its location, the difficulty and hence expense of constructing an access road, and the value of the surrounding property through which the access road would pass.

OPINION NO. 79182 (1979)
Thomas P. McNally
Attorney General of Nebraska Ä Opinion
DATE: December 13, 1979

SUBJECT: SURVEY BY CORPS OF ENGINEERS IN HARLAN COUNTY

REQUESTED BY: Thomas P. McNally, Harlan County Attorney.

WRITTEN BY: Paul L. Douglas, Attorney General;
G. Roderic Anderson, Assistant Attorney General.

Are lost or obliterated sectional corners reestablished by a Registered Land Surveyor in the process of surveying a land owner's property void when there is no duly elected or acting County Surveyor available to reestablish the corners?

No.

Section 23-1908, R.R.S. 1943 reads in pertinent part as follows:

> "The boundaries of the public lands established by the duly appointed government surveyors, when approved by the Surveyor General and accepted by the government, are unchangeable, and the corners established thereon by them shall be held and considered as the true corners which they were intended to represent, . . ."

Where a dispute exists regarding reestablishment of the sectional corners lost or obliterated, and regarding boundary lines established pursuant thereto, the objective is determination of the location of the original government monuments, corners, and boundary lines, irrespective of where the field notes indicate the corners should have been located. Peterson v. Skjelver, 43 Neb. 663, 62 N.W. 43 (1895); Knoll v. Randolph, 3 Neb. Unof. 599, 92 N.W. 195 (1902); Runkle v. Welty, 86 Neb. 680, 126 N.W. 139 (1910); McShane v. Murray, 106 Neb. 512, 184 N.W. 147 (1921).

It is the duty of the County Surveyor in surveys made by him to perpetuate all original corners not at the time well marked. 23-1907, R.R.S. 1943. Further, the County Surveyor is authorized to restore lost and obliterated corners of original surveys. 23-1908, R.R.S. 1943. In those counties where there is no qualified surveyor within the county who will accept the office of County Surveyor, the County Board of such county may appoint a competent surveyor from any other county of the State of Nebraska to such office. 23-1901.01, R.R.S. 1943. Effective March 7, 1979, this statute specified that the appointed surveyor shall serve the same term as that of an elected surveyor and is not required to reside in the county of employment. 23-1901.01, R.S.Supp., 1979.

The certificate of the County Surveyor of any surveyor made by him of any lands in his county shall be presumptive evidence of the facts stated therein. 23-1904, R.R.S. 1943. The presumption of correctness of a County Surveyor's determination as to the location of original government corners or boundaries is rebuttable by evidence to the contrary. Dancer v. Meyers, 103 Neb. 856, 174 N.W. 845 (1919); McShane v. Murray, 106 Neb. 512, 184 N.W. 147 (1921). Accord, United States v. Hudspeth, 384 F.2d 683, 688 N. 7 (9th Circuit 1967).

Any Registered Land Surveyor registered pursuant to the Nebraska statutes is authorized to establish any corner not monumented in the original government surveys. 23-1908, R.R.S. 1943. The record of a survey filed in accordance with law by a Registered Land Surveyor becomes an official record of survey and is presumptive evidence of the facts stated therein. 81-8,122.01, R.R.S. 1943.

A dispute between surveyors or between property owners as the result of a survey may be submitted to the State Surveyor for resolution upon payment of statutory fees pursuant to section 84-410, R.R.S. 1943. As an alternative, the parties may bring an action in ejectment or to quiet title to resolve the dispute. Whitney v. Wyatt, 111 Neb. 328, 196 N.W. 322 (1923); Kittell v. Jensen, 37 Neb. 685, 56 N.W. 487 (1893).

The determination of the location of sectional corners lost or obliterated is a factual question to be decided by a jury. Runkle v. Welty, 86 Neb. 680, 126 N.W. 139 (1910); Whitney v. Wyatt, 111 Neb. 328, 196 N.W. 322 (1923); McShane v. Murray, 106 Neb. 512, 184 N.W. 147 (1921).

It is our conclusion that where a county has no County Surveyor, and the County Board of that county has not taken action pursuant to 23-1901.01 to appoint a competent surveyor to such office, then a Registered Land Surveyor performing his functions pursuant to statutes may reestablish lost or obliterated sectional corners necessary to the completion of the survey he is conducting.

If a dispute arises based upon these reestablished corners or the property boundaries resulting therefrom, this dispute may be submitted to the State Surveyor for resolution or to the courts of this state pursuant to statutes for a determination as to the true and correct location of the original sectional corners lost or obliterated.

OPINION NO. 79166 (1979)
James L. Brown
Attorney General of Nebraska Ä Opinion
DATE: October 30, 1979

SUBJECT: DEFINITION OF SURVEYING

REQUESTED BY: James L. Brown, Secretary, State Board of Examiners For Land
Surveyors, P.O. Box 94663, State Office Building, Lincoln, Nebraska 68509.

WRITTEN BY: Paul L. Douglas, Attorney General;
Randall E. Sims, Assistant Attorney General.

Does the determination of property lines for the purpose of showing the location of improvements constitute surveying as defined in section 81-8,109, R.R.S. 1943?

No, unless the person so doing holds himself out to be a surveyor.

You have asked whether or not the determination of property lines for the purpose of showing the location of improvements constitute `surveying' as defined in section 81-8,109, R.R.S. 1943. Generally speaking, it is considered that the mere act of locating improvements on property would not be `surveying' as intended by the legislature in sections 81-8,108 to 81-8,127. However, there may be circumstances where this activity would constitute `surveying'.

To begin with, the definition of `land surveyor' and `land surveying' are not at all clear from a reading of section 81-8,109.

The definition of `land surveyor' in subsection (2) of this section states:

> "Land surveyor shall mean a person who engages in the practice of land surveying as hereafter defined;"

`land surveying' is supposedly defined in subsection (4) of this section as follows:

> "Land surveying shall mean and include the surveying of areas for their correct determination and description and for conveyancing, or for the establishment or reestablishment of land monuments and boundaries and the platting of lands and subdivisions thereof."

The legislature uses the word `surveying' to define `land surveying', which, in turn, is used to define `land surveyor', and the legislature made no other attempt to define what `surveying' is.

As `surveying' is used in subsection 81-8,109(4) it seems that the legislature may have meant that the word was to be used interchangeably with a term like `measuring', but when the act regarding the Board of Examiners for Land Surveyors is read as a whole, a more limited definition of `surveying' appears to have been intended.

Section 81-8,122 requires that whenever a survey is executed by a land surveyor, a copy of that plat and field notes from that survey be filed in the office of the county surveyor where the land is located. The record of survey that is to be filed pursuant to section 81-8,122.01 must consist of minimum data which includes: the plat of the tract surveyed, a legal description of the tract, description of all corners found, description of corners set, ties to any corners found or set, distances and field measurements, and the date of completion of the survey. From these sections, it appears that the legislature intended that a `survey' is more than just having someone who is an uncertified surveyor making measurements.

Since the legislature appears to have limited its definition of `survey' to only mean a survey that complies with statutory requirements as set forth in the sections of this act, it is probably safe to assume `surveying' is the action required to make a survey as required by this act. Therefore, the determination of property lines for the purpose of finding the location of improvements would not be surveying as the term is used in section 81-8,109 since it is not intended to be part of a `survey' as required by sections 81-8,122 and 81-8,122.01.

We have also examined the case law on definitions of survey, surveying and surveyor, but could not find any cases in this jurisdiction or others where `surveying' was used in the same context as in Nebraska's statutes and as defined by the courts. The United States Supreme Court, in a different fact situation, interpreted the meaning of `survey' as used in a federal statute in Cox v. Hart, 260 U.S. 427, 67 L.Ed. 332, 43 S.Ct. 154 (1922) as:

> "Hence, the running of lines in the field and the laying out and platting of townships, sections, and legal subdivisions are not alone sufficient to constitute a survey. Until all conditions as to filing in the proper land office and all requirements as to approval have been complied with, the lands are to be regarded as unsurveyed, and not subject to disposal as surveyed lands. . . ." 260 U.S. at 436.

The court's definition in Cox v. Hart tends to support the proposition that a survey, or surveying is more than mere measuring, but is meant to mean an official survey, and that surveying is the taking part in making an official survey.

Even though the determination of property lines to locate improvements by itself probably do not constitute surveying, there are conditions under which the determination of property lines would bring that person within the scope of this act.

If the persons doing this measuring were offering their services to others as `surveying', or `making surveys', or called themselves `surveyors', they would have to be registered under the provisions of section 81-8,108 to 81-8,127. The clear intent behind passing sections 81-8,108 to 81-8,127 was to make sure that `surveyors' were qualified, so that the public, and the courts, could rely on their surveys as being accurate.

If an uncertified surveyor in determining the locations of improvements, claims that his or her measurements are `as good as a surveyor's', he or she would probably also fall within the scope of those sections since they are `practicing or offering to practice land surveying', (81-8,109). Any measurements taken by an uncertified person would not be as good as those taken by a surveyor, and a client could not rely on any measurements taken, if they were disputed in court.

In conclusion, if a person is determining boundaries and locating improvements for a client who is aware that the person is not a certified surveyor, and is aware that the measurements taken are not as reliable as those taken by a certified surveyor, that person would probably not have to be certified to take those measurements. However, if that person making the measurements holds himself or herself out as a surveyor, or if a person who makes measurements claims that his work is like that of a surveyor and as good as a surveyor, then he would probably be violating section 81-8,127, and would be liable for criminal sanctions under this section.

OPINION NO. 79154 (1979)
William L. Andrews
Attorney General of Nebraska Ä Opinion
DATE: October 2, 1979

SUBJECT: DUTY OF COUNTY BOARD RELATIVE TO ORDERING SURVEY OF PRIVATELY
OWNED LAND

REQUESTED BY: William L. Andrews, Keya Paha County Attorney, P.O. Box 127,
Springview, Nebraska 68778.

WRITTEN BY: Paul L. Douglas, Attorney General,
Randall E. Sims, Assistant Attorney General.

Does a County Board have a duty to require the County Surveyor to enter on and survey privately owned land at the request of the owner?

No.

You relate a situation wherein a title holder of record of a quarter section of land not deemed to be an irregular tract succeeded in a quiet title action against a user of said land who now refuses to allow the owner to have the land surveyed.

No statute is found which would require the County Board to take any action in the matter. The situation does not come within the purview of either sections 23-301 et seq., R.R.S. 1943, relative to Resurvey of County or sections 23-304 et seq., R.R.S. 1943, relative to Special Survey of Irregular Tracts. Nor do the facts indicate that the situation would involve the application of section 39-1410, R.R.S. 1943, or section 39-1704 et seq., R.R.S. 1943, dealing with surveys in connection with public roads.

Of course, if the County Board considers the matter to be of official concern, it can request the County Surveyor to make a survey.

OPINION NO. 79144 (1979)
Robert H. Sindt
Attorney General of Nebraska Ä Opinion
DATE: September 4, 1979

SUBJECT: WATERS AND WATERCOURSES

REQUESTED BY: Robert H. Sindt, Buffalo County Attorney, P.O. Box 67, Kearney, Nebraska, 68847.

WRITTEN BY: Paul L. Douglas, Attorney General;
Warren D. Lichty, Jr., Assistant Attorney General.

When a county road intersects a natural watercourse, and after damming of the watercourse by abutting landowners, the culvert or tube is removed from the county road, does the county have a duty to replace the culvert when the upper landowner removes the dam?

Yes.

The general rule is stated in Wilson Concrete Co. v. County of Sarpy, 189 Neb. 312, 202 N.W.2d 597, which held:

> "It is the duty of those who build structures in a natural watercourse to provide for the passage through such obstruction of all waters which may reasonably be anticipated to flow or be carried therein and this is a continuing duty. What private proprietors may not do neither may the public authorities except in the exercise of eminent domain."

The fact of the upper landowner damming the watercourse and then subsequently removing the dam is, we think, covered by In Re Drainage Dist. No. 5 of Dawson County, 179 Neb. 80, 136 N.W.2d 364, which holds:

> "The diversion of seepage and flood waters by an irrigation canal built across a natural drain carries with it no right on the part of lower landowners to insist on the continuance of such artificial condition in the absence of evidence affording a basis for an equitable estoppel.
>
> "An upper riparian owner constructing and maintaining an artificial structure diverting the flow of seepage and flood water for a purpose advantageous to it is not obligated by mere lapse of time to maintain the structure and the conditions produced thereby, although it incidentally benefits lower landowners."

With regard to the question of estoppel, the court, on page 89, states:

> "Plaintiff to acquire any rights would have to show that it improved its property with reference to the diversion and in reliance on a continuance thereof. . . ."

This gives rise to a factual question whether the lower-lying landowner has leveled his land or otherwise acted in reliance upon the continued existence of the upper landowner's dam, and gives rise to further questions, whether such improvement was in reliance thereon, and, whether he had a right or reason to rely thereon. A case subsequent to the Drainage District No. 5 case, indicating that the burden of proof for an estoppel is going to be very difficult is Kiwanis Club Foundation Inc. v. Yost, 179 Neb. 598, 139 N.W.2d 359, which held:

> "Where a dam has been built for the private convenience and advantage of the owner, he is not required to maintain and operate it for the benefit of an upper riparian proprietor who obtained advantages from its existence; and the construction and maintenance of such a dam does not create any reciprocal rights in upstream riparian proprietors based on prescription, dedication, or estoppel."

In this case, it was the upper riparian owner who was interested in the lake which resulted from the maintenance of the dam.

The court went on to state that a dam was not `permanent', the court said:

> "Aside from cases resting on contract, mutual consent, or grant, the theories upon which courts have sustained the right of upper riparian owners to continuation of conditions established by dams below them on the stream have varied widely. Some courts take the position that the original artificial condition has become the natural permanent condition. . . . Others proceed on the theory that the upper owner acquires a reciprocal prescriptive right. . . . Still others proceed upon the theory of estoppel. . . .
>
> "Cases representing the view denying the claims of upstream owners are likewise diverse. The largest group holds that `property rules' are predominant and that the upper owners cannot obtain any prescriptive rights because adverse user is an essential element in the acquisition of prescriptive rights, and is not present in such cases. Others base the decision on the ground that the owner of the dam was not estopped from changing or destroying the improvement. . . . * * *
>
> "A departure from the `rules of property' in cases such as this of necessity compels a judicial attempt to

> weigh and balance conflicting, interlocking, and equally appealing equities. * * * Under such circumstances, the rules affecting the title to real estate should prevail.
>
> "We hold that where a dam has been built for the private convenience and advantage of the owner, he is not required to maintain and operate it for the benefit of an upper riparian proprietor who obtains advantages from its existence; and that the construction and maintenance of such a dam does not create any reciprocal rights in upstream riparian proprietors based on prescription, dedication, or estoppel.
>
> "The owner of a dam and the prescriptive right to overflow the land of upper riparian owners may abandon has rights, and may also return the river to its natural state by removing or destroying the dam."

A recent case which, although not exactly on point, appears to indicate that lower-lying landowners have no better rights than those above an obstruction, is Nickman v. Kurshner, 202 Neb. 78, 273 N.W.2d 675, which allowed an upper landowner to replace and improve the efficiency of an artificial drainway which led to a natural drainway. The court said that the increased velocity and flow of water due to the increased efficiency of the new structure was a matter which the subservient estate must bear, and indicated that only in the case of negligence in the construction of the artificial drainway would a right to damages arise in the lower-lying landowner.

In conclusion, we can see no basis whatever for the county impounding the water in a natural drainage way, if the lower-lying landowner has not changed his position during the existence of the impoundment. Even if he has, in light of the general rule first stated above, we doubt that the county can continue to impound the water. It would appear that the lower-lying landowner has a duty to receive the water, and that if the county uses due care and avoids negligence in the releasing of the water and the installation of a culvert, it is unlikely that a basis for recovery of damages by the lower-lying landowner will become apparent.

The foregoing is conditioned upon our understanding that the upper landowner, by his construction and subsequent removal of the dam, has not substantially altered the natural drainage way or the amount of drainage he would cast upon subservient estates. If this is not established, then we believe Kuta v. Flynn, 182 Neb. 479, 155 N.W.2d 795, is authority for a conclusion that the upper landowner has no right to have the water released. It is essential that there be and have been a natural drainway running from the property of the upper-lying landowner to the lower-lying landowner. Thus, it also follows that the natural drainway entering the lower-lying land must be the same drainway through which the natural drainage formerly found its way. Nielsen v. Chappelear, 175 Neb. 381, 121 N.W.2d 809.

OPINION NO. 79092 (1979)
Gregory G. Jensen
Attorney General of Nebraska Ä Opinion
DATE: April 17, 1979

SUBJECT: COMPENSATION OF COUNTY SURVEYOR IN A CLASS 2 COUNTY

REQUESTED BY: Gregory G. Jensen, Deputy Valley County Attorney, P.O. Box 40,
Ord, Nebraska, 68862.

WRITTEN BY: Paul L. Douglas, Attorney General;
Randall E. Sims, Assistant Attorney General.

1. Does a Class 2 county have authority to pay a monthly salary to a county surveyor, or must it pay hourly or daily compensation?

2. Must the compensation for a county surveyor in a Class 2 county be set for the entire term of office sixty days prior to the deadline for filing application for the office?

3. If a county board in a Class 2 county has failed to set a salary for the current term of the county surveyor, may it now establish and pay the county surveyor a monthly salary?

1. Yes, it has authority to pay a monthly salary and must also pay daily compensation for services rendered the county or state.

2. Yes.

3. No, except as to daily fees and expenses and allowances.

1. You describe a situation wherein the candidate for county surveyor in a Class 2 county failed to pay a filing fee, was then elected, but the county board failed to set his salary sixty days before the closing of filings of certificates of nomination.

Section 23-1114, R.R.S. 1943 states, in pertinent part, as follows:

> "(1) The salaries of all elected officers of the county shall be fixed by the county board at least sixty days prior to the closing of filings of certificates of nomination to place names on the primary ballot for the respective offices, * * *."

No minimum or maximum salary is specified by statute for the office of county surveyor in a Class 2 county. In addition, Section 33-116, R.R.S. 1943, states, in pertinent part, as follows:

> "Each county surveyor shall be entitled to receive

> the following fees: (1) For all services rendered to the county or state, not to exceed the sum of forty dollars per day; * * *."

Both statutes are mandatory. Under normal circumstances, i.e., a timely setting of salary by the county board, the plain meaning of the above quoted statutes is considered to require a salary plus the payment of daily fees. The two could be identical but not less than the daily fee.

2. As already stated above, Section 23-1114 requires the county surveyor's salary to be set for the entire term of office sixty days prior to the deadline for filing application for the office. A late, untimely attempt to set a salary would violate the statute and would probably run afoul of the restrictions contained in Art. III, section 19 of the Nebraska Constitution which prohibits extra compensation to any public officer after the services have been rendered, or any increase or decrease in compensation of any public officer, including any officer whose compensation is fixed by the Legislature. This section has been held applicable to county officers. See Ramsey v. County of Gage, 153 Neb. 24, 43 N.W.2d 593.

3. While it is too late for the county board to exercise its authority and responsibility under Section 23-1114, the legislature had already set compensation for the county surveyor under Section 33-116, the same being $40.00 per day for services rendered the county or state, plus other specified expenses and allowances. Such being the case, it is considered that the county board could now fix the above as the salary for the county surveyor. It would amount to no more than a ministerial action, in effect carrying out a legislative edict, and would have the further effect of satisfying both statutes.

OPINION NO. 79082 (1979)
John W. Neuberger
Attorney General of Nebraska Ä Opinion
DATE: April 4, 1979

SUBJECT: DEFINITION OF A `NATURAL STREAM.'

REQUESTED BY: John W. Neuberger, Director, Nebraska Department of Water Resources.

WRITTEN BY: Paul L. Douglas, Attorney General;
Paul W. Snyder, Assistant Attorney General.

What is the legal definition of a `natural stream'?

To constitute a natural stream it is necessary that there be a permanent supply of water, in the sense that the same conditions will always produce a flow of water in the same channel and that such conditions recur with such a degree of regularity that there is running or live stream for considerable periods of time. However, in order to constitute a natural stream it is not necessary that there be a constant or continuous flow. The volume of flow may fluctuate. In fact, the channel may at times be entirely dry but the stream must have a well-defined and substantial existence.

You have requested of our office a legal definition of a natural stream as referred to in Chapter 46, Article 2 of the Nebraska Revised Statutes. You state that an increasing amount of water from underground wells is running off irrigated lands and entering Nebraska's streams, ravines and canyons. You have taken the position that such run-off and irrigation return flow is public water when it reaches a `natural flowing stream' and is therefore subject to regulation by the Department of Water Resources and to appropriation for irrigation.

The decision of the Nebraska Supreme Court in Drainage District No. 1 v. Suburban Irrigation District, 139 Neb. 460, 298 N.W. 131 (1941), clearly establishes the propositions that only the waters of natural streams are subject to appropriation and that diffused surface waters or seepage waters, as such, are not subject to appropriation. In that case it appears that the drainage district constructed and maintained certain artificial ditches for the purpose of draining off surface water from seep land which was otherwise too wet for farming. The irrigation district possessed an appropriation with an optional diversion permit, by virtue of which permit, the district sought to divert and appropriate for irrigation purposes the waters flowing in said drainage ditch. The Supreme Court held that such water was not subject to appropriation by the irrigation district, saying:

> "These drainage ditches are not natural streams or natural water-courses, and their inherent nature exclude

them from the class or kind of waters to which our laws of appropriation are not applicable. . . ."
(139 Neb. at 471.)

In order to resolve the question here under consideration it becomes necessary to first determine whether or not the stream, ravine, or canyon is a natural stream, and if so, whether the run-off from the irrigated lands entering into such streams renders such water subject to appropriation.

To constitute a natural stream it is necessary that there be permanent supply of water, in the sense that the same conditions will always produce a flow of water in the same channel and that such conditions recur with such a degree of regularity that there is running or live stream for considerable periods of time. However, in order to constitute a natural stream it is not necessary that there be a constant or continuous flow. The volume of flow may fluctuate. In fact, the channel may at times be entirely dry; but the stream must have a well-defined and substantial existence. See Mader v. Mettenbrink, 159 Neb. 118, 65 N.W.2d 334 (1954); Kinney on Irrigation and Water Rights, Second Ed., Volume 1, Section 307.

Furthermore, the Supreme Court of Nebraska has said in Rogers v. Petsch, 174 Neb. 313, 117 N.W.2d 771 (1962), with regard to waters flowing from springs that:

"Where the waters flowing from springs flow naturally in a well-defined channel in the course of drainage through other lands, the owner of the land upon which the springs are located does not have an exclusive right to control and use the waters to the injury of lower riparian owners or senior appropriators. [Citations omitted]. . . But where the waters flowing from springs do not form a watercourse or lake they are surface waters until they empty into and become part of a natural stream or lake. [Citations omitted]. . . The owner of land upon which surface waters arise may retain them for his own use and change their course upon his own land by ditch or embankment. [Citations omitted]. . ."
(174 Neb. at 319)

It is quite apparent from the above quotations and discussions of Nebraska case law that the legal definition of a natural stream is one that must be applied in a case-by-case basis. The particular facts of each case will ultimately be determinative of whether or not flowing water is a natural stream.

Once the determination has been made that the natural stream exists, seepage, return flow and spillage waters from canals and laterals or from underground pumping enter the channel of a natural stream within an irrigation project area, the Department does have the authority to regulate the use of such water. See our Opinion No. 112 of June 22, 1977. However, you state in your request that there exists in some circumstances a stretch of the drainage system where the ground water

well water leaves the irrigated lands of the property of origin and that point where it reaches the natural stream that gives you concern as to the necessity of permits to appropriate that water. We have said in our Opinion No. 100 of July 7, 1959, that where water is used for irrigation and the return flow and seepage escapes into a creek or waterway which is ordinarily dry but has not yet returned to a natural stream, the Department of Water Resources does not have the authority to regulate the use of such water. The theory that seepage and return flow water is not public water and not subject to regulation, unless it has been abandoned and returned to a stream or river was established by our Supreme Court in Drainage District No. 1 v. Suburban Irrigation District, supra, and more firmly established in United States v. Tilley, 124 F.2d 859 (8th Cir. 1942). In Tilley, supra, the federal court discussed the Drainage District No. 1 v. Suburban Irrigation District, supra, case wherein it was held that water in drainage ditches flowing from low lying lands was not subject to legal appropriation under the state irrigation laws. The federal court stated:

> "There is, however, nothing in the opinion in that case that in any way conflicts with the declaration in the Ramshorn case, or that raises the slightest doubt as to the correctness of the views there expressed. In fact, the court's decision is expressly predicated upon the premise that only the waters of natural streams are public waters a premise which also is the foundation of the decision in the Ramshorn and Ide cases. The opinion further applicably declares (298 N.W.2d at 136): `The drainage ditches of the plaintiff are strictly artificial creations. . . These drainage ditches are not natural streams or natural water courses, and their inherent nature exclude them from the class or kind of waters to which our laws of appropriation are not applicable.'"

It is fundamental that the Department of Water Resources can regulate only the use of water for which an appropriative right has been granted by it. If the owner of the property of origin of the ground water well run-off water wishes to recapture the water he may do so without regulation by the Department of Water Resources. However, as we have stated before, once the run-off water enters a natural stream those waters are subject to regulation by the Department of Water Resources, including authorized appropriation.

In conclusion, it is our opinion that the Department may lawfully take the position that run-off water from lands irrigated by wells must be controlled prior to its entering a natural stream if one wishes to avoid the numerous administrative activities required by the Department of Water Resources in obtaining approvals and permits. In the absence of control and when such run-off reaches a natural stream it becomes the water of a natural stream and as such it becomes `the property of the public and is dedicated to the use of the people of the state, subject to appropriation.'

OPINION NO. 79109 (1979)
Alan Curtiss
Attorney General of Nebraska Ä Opinion
DATE: May 8, 1979

SUBJECT: COUNTY TREASURER; RESIDENCE OF DEPUTY

REQUESTED BY: Alan Curtiss, Grant County Attorney, Hyannis, Nebraska.

WRITTEN BY: Paul L. Douglas, Attorney General;
Mel Kammerlohr, Assistant Attorney General.

Is a Deputy County Treasurer required to reside in the county of employment?

No.

The specific qualifications for state and county deputies is set forth in section 84-801, et seq., of the Nebraska Statutes. Section 84-801 provides:

> "The Auditor of Public Accounts, State Treasurer, and State Librarian respectively, and each county register of deeds, treasurer, sheriff, clerk and surveyor, may appoint a deputy, for whose acts he shall be responsible, which appointment shall be in writing and shall be revocable by writing under the principal's hand. The deputy for each of the state offices shall be bonded under the blanket surety bond required by section 11-201. A bond may be required from each of the deputies for each of the county offices. Both the appointment and revocation shall be filed and kept in the office of the county clerk in case of deputies for county officers, but in case of state officers they shall be filed and kept by the principals."

Section 84-802, R.R.S. 1943, provides that the deputy shall perform the duties of his principal in the absence or disability of the principal with certain exceptions.

Section 84-803, R.R.S. 1943, prohibits the county treasurer, sheriff, register of deeds, clerk or surveyor from appointing any of the others as his deputy.

Section 84-807, R.R.S. 1943, requires each deputy to take the same oath as his principal which shall be endorsed upon and filed with his certificate of appointment.

There is nothing in any of the statutory qualifications requiring a deputy county officer to reside in the same county as the one in which he

or she is employed. On the other hand, as above noted there are several specific statutory requirements for the appointment of a deputy. Under the general principle of statutory interpretation that the mention of one thing implies the exclusion of another, the enumeration of certain powers implies the exclusion of all others not fairly incidental to those enumerated. The same may reasonably be said of the enumeration of qualifications for office. This principle has been consistently followed by the Supreme Court of Nebraska. In Galstan v. School District of Omaha, 177 Neb. 319, 128 N.W.2d 790, the Court stated:

> ". . . a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the Legislature has plainly indicated a contrary purpose or intention."

This is also consistent with a previous opinion of this office concerning the residence of a deputy county attorney. See Opinion No. 70, September 13, 1971, Opinions of Attorney General.

For these reasons, it is our opinion that a deputy county treasurer is not required to reside in the same county for which he or she is appointed.

OPINION NO. 79011 (1979)
Patrick Kelly
Attorney General of Nebraska Ä Opinion
DATE: January 19, 1979

SUBJECT: COUNTY SURVEYORS

REQUESTED BY: Patrick Kelly, Sarpy County Attorney.

WRITTEN BY: Paul L. Douglas, Attorney General;
Warren D. Lichty, Jr., Assistant Attorney General.

Are the functions of the County Surveyor under section 23-1901, R.R.S. 1943, and those of the County Highway Superintendent under section 39-1501 in conflict?

Is the Highway Superintendent under the control of the County Surveyor?

No.

No.

The provision of section 23-1901 relative to the surveyor being ex officio county engineer in counties over 50,000 population has been substantially the same since 1905. It should be noted that his duties under section 23-1901 are in effect, limited to the practice of the profession engineering. The office, under the pre-1957 highway laws, was called County Highway Commissioner, and apparently contained some elements of both the present engineer and the present superintendent. For example, the 1952 reissue of the Revised Statutes of Nebraska, section 39-501 provided for the appointment of the county surveyor as the county highway commissioner in counties of less than 50,000, while section 39-502 provided that in counties of more than 50,000, the surveyor is ex officio highway commissioner. But the duties of the commissioner were much closer to those of the present superintendent. It would appear, therefore, that the various recodifications and amendments of these sections have caused the appearance of a conflict by reason of the fact that under present law, section 23-1901, R.R.S. 1943 continues the provision that the county surveyor shall be ex officio county engineer in counties with a population greater than 50,000, while section 39-1501, R.R.S. 1943, provides that the county board shall appoint and fix the salary of the county highway superintendent in counties having a population of less than 100,000 inhabitants.

There would appear to be a distinction between the two functions, however, under the current law. It should be noted that section 39-1501 deals with the duties and prerogatives of the county board, subsection 1 of which gives them general supervision over all the duties and responsibilities of the county highway superintendent with power to make

policy and regulations. Similarly, section 39-1507, R.R.S. 1943 provides that the superintendent shall have control, government and supervision of the public roads and bridges under the general supervision and control of the county board. And, under section 39-1508, R.R.S. 1943, the superintendent has responsibility for annual programs for proposed construction repair, maintenance, financing, and material purchases. These administrative duties appear to be consistent with the general administrative duties of the county board, and subsidiary thereto. As previously pointed out, the county engineer's duties are the practice of the engineering profession in connection with highway construction. The nearest thing to an actual conflict is provided by section 39-1511, R.R.S. 1943, which gives the superintendent superintendence over construction of roads. However, that section goes on to say that all bills for payment of work on county roads, bridges, culverts or ditches should be approved by the superintendent before being allowed by the county board, thus leading to the conclusion that the entire section deals not with the practice of engineering by the superintendent, but instead the performance of administrative functions.

It is therefore our conclusion that there is no conflict in the statutory provisions dealing with county surveyors and those dealing with county superintendents, since they are exercising separate and distinct functions. We do not believe, when the offices are filled by different persons, that the county highway superintendent is under the direction and control of the county surveyor-county engineer. The superintendent is clearly under the direction and control of the county board, and is in effect, their manager.

OPINION NO. 78295 (1978)
G. Peter Burger
Attorney General of Nebraska Ä Opinion
DATE: December 11, 1978

SUBJECT: COUNTY SURVEYORS

REQUESTED BY: G. Peter Burger, Jefferson County Attorney, Courthouse, Fairbury, Nebraska, 68352.

WRITTEN BY: Paul L. Douglas, Attorney General,
Warren D. Lichty, Jr., Assistant Attorney General.

Does the present or serving county surveyor removing himself from the jurisdiction and the failure of any candidates to file or run for the office at the general election in any way affect your opinion as expressed in Attorney General's Opinion No. 266?

When a vacancy occurs in a county office and there is no successor elected at a proper election, does this in any way affect the County Board's ability to set the compensation of the county official for the upcoming term? Specifically, can the County Board hire a county surveyor at a salary which is greater or less than that which was set last spring, pursuant to R.R.S. 23-1114, for the upcoming term to commence January 4, 1979?

No.

No.

In stating that the present county surveyor has removed himself from the jurisdiction, it would appear that you have stated the basis for a vacancy in office. Section 32-1037, R.R.S. 1943, provides, inter alia, that civil offices shall be vacant where the incumbent has removed from office, ceased to be a resident of the State, district, county, township, precinct, or ward in which the duties of his office are to be exercised, or upon failure to elect at a proper election, there being no incumbent to continue in office until his successor is elected and qualified. Thus, it appears that you have a vacancy in the office, notwithstanding the provisions of Section 23-1901.01, R.R.S. 1943, which authorizes the appointment of a county surveyor from another county.

Section 32-1040, R.S.Supp. 1978, provides that vacancies in office shall be filled, in county and precinct offices, by the county board, and states:

> "* * * Unless otherwise provided by law, all vacancies shall be filled within sixty days after the vacancy occurs, unless good cause is shown if this requirement imposes an undue burden."

As to the second question whether the county can hire a surveyor at a salary different than that which was set at least sixty days prior to the closing of filings of certificates of nomination to place names on the primary ballot, pursuant to Section 23-1114, R.R.S. 1943, Article III, Section 19 of the Constitution provides that the compensation of public officers shall not be increased or diminished during the term of office. It is our belief that a vacancy, or an appointment to fill an unexpired term does not alter the term of office which is set by Article XVII, Section 4 of the Constitution, and by Section 32-308, R.R.S. 1943, which makes it clear that the term of office for County Surveyors is four years. Therefore, the salary set pursuant to Section 23-1114 cannot be altered until such time as the statutory period for filings of certificates of nomination for that office again arrives.

OPINION NO. 78293 (1978)
Patrick Kelly
Attorney General of Nebraska Ä Opinion
DATE: November 7, 1978

SUBJECT: CONSTITUTIONALITY OF STATUTORY PROVISION PROHIBITING DEPUTY SHERIFFS IN COUNTIES HAVING A POPULATION IN EXCESS OF 40,000 INHABITANTS FROM ACTIVELY PARTICIPATING IN POLITICAL CAMPAIGNS

REQUESTED BY: Patrick Kelly, Sarpy County Attorney.

WRITTEN BY: Paul L. Douglas, Attorney General,
Terry R. Schaaf, Assistant Attorney General.

1. Is section 23-1736, R.R.S. 1943, prohibiting the deputy sheriffs in counties having in excess of 40,000 population from actively participating in political campaigns constitutional?

2. Is this prohibition enforceable under section 28-724, R.R.S. 1943, establishing a penalty for malfeasance of office?

1. Yes.

2. Probably.

Section 23-1736, R.R.S. 1943, provides as follows:

> "No person serving in the classified service under sections 23-1721 to 23-1737 shall actively participate in any campaign conducted by any candidate for public office."

The term `classified service' is defined in section 23-1726, R.R.S. 1943, as including all deputy sheriffs, jailers and matrons but not including civilian employees of the sheriff's office. You have asked whether or not in our opinion such a prohibition against deputy sheriffs covered by these provisions being prohibited against actively participating in political campaigns is constitutional. We believe that it is.

Generally speaking with few exceptions, courts have consistently upheld the authority of a state or the federal government to limit the political activity of public employees. See for example, United Public Workers of America v. Mitchell, 330 U.S. 75; Oklahoma v. United States Civil Service Commission, 330 U.S. 127; National Association of Letter Carriers, AFL-CIO, v. United States Civil Service Commission, 413 U.S. 534; and, Broadrick v. Oklahoma, 413 U.S. 601. More specifically, the City of Cleveland had an ordinance essentially the same as section 23-1736, supra, and the court in Mcnea v. Garey, 434 F. Supp. 95, after recognizing the City of Cleveland's interest in restricting political

conduct of its police officers and recognizing the necessity of maintaining the practice and appearance of impartial law enforcement, found such a restriction to be constitutional. While we are aware of no decisions of the Nebraska Supreme Court or any federal court in the State of Nebraska with reference to this section, we believe that in light of other decisions from other jurisdictions, that our statute would be upheld.

You also ask whether or not a deputy who violated this provision might be prosecuted under section 28-724, supra. This section provides in pertinent part:

> "Any clerk, sheriff, coroner, constable, county commissioner, recorder, county surveyor, county attorney or any ministerial officer, who shall be guilty of any palpable omission of duty or who shall willfully or corruptly be guilty of malfeasance or partiality in the discharge of his official duties, shall be fined in a sum not exceeding $200, and the court shall have the power to add to the judgment that any officer so convicted shall of section 23-1736 could be removed,"

It is clear that a sheriff is covered by the provisions of this section and the question would be whether or not a deputy sheriff is included within the term `sheriff' or in the alternative, whether or not a deputy sheriff is a `ministerial officer.'

At the outset, we believe that any deputy violating the provisions of section 23-1736 could be removed, suspended or reduced in either rank or grade by the sheriff pursuant to section 23-1734, R.R.S. 1943, and that such a procedure might be more appropriate than a criminal prosecution under the malfeasance section. However your direct question was whether or not a deputy could be so prosecuted and we are of the opinion that he could be. It is clear that a sheriff is a ministerial officer. State v. Loechner, 65 Neb. 874, 91 N.W. 874; State v. Buttner, 180 Neb. 529, 143 N.W.2d 907. It would also appear that the ministerial duties of a sheriff may be and are delegated to his deputy or other subordinate. See generally, 80 C.J.S. Sheriffs and Constables, 21, p. 187. We are therefore of the opinion that a duly appointed deputy sheriff is a ministerial officer within the meaning of that term as it is used in section 28-724 and that a prosecution could be had against him for malfeasance should it be alleged that he has violated the provisions of section 23-1736. It may be that it is a jury question whether or not such violation constitutes a `palpable omission of duty' or willful `malfeasance or partiality in the discharge of . . . official duties, ...' We do however in conclusion feel that a deputy sheriff is included within those persons covered by the provisions of section 28-724, supra.

OPINION NO. 78266 (1978)
Patrick M. Connealy
Attorney General of Nebraska Ä Opinion
DATE: July 3, 1978

SUBJECT: COUNTY SURVEYORS

REQUESTED BY: Patrick M. Connealy, Keya Paha County Attorney, P.O. Box 127,
Springview, Nebraska, 68778.

WRITTEN BY: Paul L. Douglas, Attorney General,
Warren D. Lichty, Jr., Assistant Attorney General.

Must the County Board appoint a licensed surveyor to act as the County Surveyor even though there is not an immediate need for such a surveyor?

May the County Board appoint a licensed surveyor to act as the County Surveyor on a case by case basis as the need arises?

Yes.

No.

Implicit in the first question are two other questions. The first is that there is a vacancy in the office of County Surveyor. For the purposes of this opinion, we assume there is. The second is whether or not the county may appoint someone not a registered land surveyor as County Surveyor. The answer is that it cannot. In Opinion No. 40 dated May 12, 1969 (Report of Attorney General 1969-1970, page 63) it was stated:

> "In our opinion, the mere fact that the office of County Surveyor is created and its duties prescribed by statute does not detract from the conclusion that any County Surveyor and ex officio County Engineer is engaged in the practice in each of those professions. Nor, as we have previously suggested, should County Surveyor and ex officio County Engineer be considered exempt simply because of his official status; no more so, for example, than should a County Attorney or County Physician being considered exempt from registration in their respective professions."

This brings us, then, to the question whether the county must appoint a County Surveyor. Section 32-308, R.R.S. 1943, provides in subsection 2 thereof that a County Surveyor shall be elected in each county. Section 32-1037, R.R.S. 1943, provides how a vacancy occurs in an office, and includes the resignation, death, or removal of an incumbent,

and failure to elect at a proper election with no incumbent to hold over, among other reasons. Section 32-1040, R.R.S. 1943, provides, in part:

> "Vacancies in office shall be filled in the following manner: * * * [I]n county and precinct offices including county supervisors, by the county board. . . ."

In our opinion of June 11, 1954 (Report of Attorney General, 1953-1954, page 414), in response to a request whether the County Board could abolish the office of County Surveyor, we said:

> "We conclude that the County Board does not have authority to abolish the office of County Surveyor."

We adhere to that opinion, and suggest that when a vacancy occurs in the office of County Surveyor, and the County Board fails to fill the vacancy, it has, in effect, abolished the office. This, it cannot do.

Your second question has to do with whether the County Board might appoint a licensed surveyor to act as County Surveyor on a case by case basis. We must presume that this question has to do with whether the county can pay the surveyor on a case by case basis rather than by monthly salary, since it is clear that once a qualified person is appointed County Surveyor, his status as such continues until a vacancy is created in the office.

The proper method of compensating the County Surveyor has been, for many years, controlled by the provisions of Section 33-116, R.R.S. 1943. This section has, on several occasions, been amended by the legislature and several previous opinions of this office have reflected different methods of paying the County Surveyor, based on several versions of Section 33-116. Section 33-116 was last interpreted by this office to determine the proper method of compensating the County Surveyor in Opinion No. 212 dated August 9, 1966 (Report of Attorney General, 1965-1966, page 341), wherein it was stated:

> "In conclusion, Section 33-116, R.S. Supp. 1965, pertains only to the monetary value of the services of the County Surveyor which is to be paid to the County Treasurer and not to the County Surveyor as compensation whereas, Section 23-1114, R. S. Supp. 1965, places the power of determining the salary of the County Surveyor on the County Board."

Since that time, Section 33-116 has been amended in several particulars, but relevant to the method of compensation, only by the addition of the following:

> "* * * Provided, that in any county with a population of less than 50,000, but more than 20,000, the County Board, may, in its discretion, allow the County Surveyor a salary of not to exceed $9,000 per annum, payable monthly, by a warrant drawn on the general fund of the county, and all fees received by surveyors so receiving

> a salary may, with the authorization of the County Board, be retained by the surveyor, but in the absence of such authorization all such fees shall be turned over to the County Treasurer monthly for credit to the county's general fund."

We therefore adhere to the aforesaid Opinion No. 212 of August 9, 1966, with the exception pertaining to counties of between 20,000 and 50,000 in population where the County Board has, by official action, provided for a salary and provided for disposition of the fees. Thus, subject to the exception noted, the County Board should set a salary for the County Surveyor, as his compensation.