

LETTER OPINION
2000-L-125

July 7, 2000

Mr. Terence P. Devine
Nelson County State's Attorney
PO Box 428
Lakota, ND 58344-0428

Dear Mr. Devine:

Thank you for your letter asking whether the same individual may serve as a teacher employed by a multidistrict special education unit and as an elected member of a school district board which is a member of that same multidistrict special education unit.

Although there is no statute that prohibits the holding of these two offices by one person, it is a well-settled rule of common law that a person may not hold two offices at the same time which are incompatible. State v. Lee, 50 N.W.2d 124 (N.D. 1951). It has been held that there is no constitutionally protected right to hold incompatible offices or employments, and the rule against holding incompatible offices or positions does not result in an unconstitutional infringement of personal and political rights. Tarpo v. Bowman Public School Dist. No. 1, 232 N.W.2d 67 (N.D. 1975).

In the Tarpo case, the Supreme Court determined that two offices or positions are incompatible when one has the power of appointment to the other or the power to remove the other, and if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties, and obligations to the public to exercise independent judgment. Tarpo, 232 N.W.2d at 71.

School districts may be organized into multidistrict special education programs for purposes of planning and coordinating special education and related services. N.D.C.C. § 15-59.2-01. An organizational plan for a multidistrict special education unit must be submitted to the Superintendent of Public Instruction for approval and it must include the number of members on the multidistrict special education board, how each district will be represented, selection of officers, terms of office, meeting times, requirements for a quorum, and such other items as may be required by regulation of the Superintendent of Public Instruction. N.D.C.C. § 15-59.2-02. That section also provides that representatives on the multidistrict board must be appointed by the school boards of the participating districts.

A multidistrict special education board has the powers listed in N.D.C.C. § 15-59.2-05 which include planning for each district in the unit for the provision of special education and related services,

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distribution to each member district of state and federal funds received by the special education unit, and employment of personnel to carry out itinerant instruction and related services. This section also provides that the multidistrict special education board may contract with school districts within and without the multidistrict area to provide special education and related services. N.D.C.C. § 15-59.2-05(1), (2), (3), and (5).

In some circumstances involving incompatible offices the conflicts are relatively clear. See Letter from Attorney General Allen Olson to A. S. Benson (Feb. 7, 1979) (county superintendent of schools cannot also be school district superintendent in the same county because the county superintendent has too much review authority over school districts); 1993 N.D. Op. Att'y Gen. L-214 (June 28 to Mark Scallon) (county auditor cannot be appointed as county superintendent of schools because both serve on the county board of appraisers). However, in other circumstances the incompatibility is much less clear and becomes a difficult fact question. See 1993 N.D. Op. Att'y Gen. L-235 (Aug. 23 to Diane Alm) (park board member also serving as coach or official for activities undertaken in the member's park district).

In prior opinions, the distinctions have turned on the supervision and control aspects of the two positions (e.g., Tarpo case) or on conflicting membership duties or review of one's own decisions due to holding two conflicting offices. In the circumstances you present, the school board member certainly would be interested in matters occurring in the special education unit affecting her employment in that multidistrict special education unit. But, she does not work for the same board of which she is a member such as the circumstance in the Tarpo case. She works for a board one member of which is selected by the multi-member school board of which she is a member. The extent of influence the school board member can exert over the multidistrict special education board member selected by her school board and over the remainder of the multidistrict special education board selected by other school districts with respect to her employment is debatable and a question of fact for the respective boards.

Concerning incompatible offices, the North Dakota Supreme Court said:

It is hard, and the courts have hesitated to form a general definition of what constitutes incompatibility. Each case is discussed and decided upon its particular facts. The functions and duties of the offices are determinative of whether they are incompatible or not.

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[M]ere physical inability to perform the duties of both offices personally does not constitute incompatibility. It is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them. Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of one interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time.

State v. Lee, 50 N.W.2d 124, 126 (N.D. 1951). The court also stated that offices are generally considered incompatible where duties and functions of the offices are "inherently inconsistent and repugnant so that, because of the contrariness and antagonism which would result from the attempt of one person to discharge faithfully, impartially and efficiently the duties of both offices, considerations of public policy render it improper" for a person to retain both offices. Id.

In the scenario you relate, whether there are inherent inconsistencies between the two positions potentially held by the same person and whether any such inconsistencies would affect the faithful and impartial conduct of both positions are questions of fact. It is apparent that there is no direct employer-employee relationship such as in the Tarpo case, and no statute appears to require membership by holders of both positions on any other board provided by law. The resolution of these fact questions is for the respective boards to make. 1993 N.D. Op. Att'y Gen. L-232, L-238 (Aug. 19 to Milton Kane).

Sincerely,

Heidi Heitkamp
Attorney General

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