LETTER OPINION
2004-L-02

January 12, 2004

Mr. Paul Murphy
Foster County State's Attorney
909 Main Street
Carrington, ND 58421

Dear Mr. Murphy:

Thank you for your letter asking whether a county director of tax equalization can be employed by a city as a city tax assessor without an agreement between the county and the city.

The county director of tax equalization is appointed by the board of county commissioners and may be employed on a full-time or part-time basis. N.D.C.C. §11-10.1-01. City assessors are also appointed. N.D.C.C. §§ 40-14-04, 40-15-05. "Any city . . . which does not employ its own assessor shall reimburse the county for the expenses incurred in assessing the property of that city . . . ." N.D.C.C. § 11-10.1-05(3).

In 1970, this office was asked whether a county director of tax equalization could also be a city assessor. The Attorney General's opinion concluded that these two offices were incompatible; thus, the county director of tax equalization could not also serve as a city assessor within the same county. N.D.A.G. 70-254. In 1973, N.D.C.C. § 11-10.1-07 was amended to add the following sentence:

> The governing boards of a county and a city may by agreement and resolutions of the respective boards, employ a joint county director of tax equalization and city assessor.

1973 N.D. Sess. Laws. ch. 88 (emphasis added). The language added superseded the 1970 Attorney General's opinion, making it permissible for a city and county to create a joint position and employ a joint city assessor and county director of tax equalization. N.D.A.G. Letter to Whitman (Apr. 23, 1990).

Although the 1990 letter overruled the result in N.D.A.G. 70-254 because the legislative change permitted creation of a joint position, it is not entirely dear that either the 1990 opinion or the legislative change were intended to overrule the underlying determination that the two offices are incompatible. Thus, it is still arguable that in instances where an agreement is not in place and a joint position is not created, the determination of the 1970

opinion about incompatible offices would survive and prevent the same individual from serving in the two capacities.

The 1970 opinion quoted language from State v. Lee, 50 N.W.2d 124 (N.D. 1951), which set out the general doctrine of incompatibility of offices, as follows:

> "Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the 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. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of the contrariety 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 an incumbent to retain both."

Id. at 126 (quoting 43 Am. Jur. Public Officers § 70, p. 935).

The 1970 Attorney General's opinion determined that the positions were incompatible because the county director of tax equalization had some oversight responsibility over city assessors. The opinion indicated that a city assessor was "subordinate" to the county director in the sense that the county director instructs and consults with the city assessors and spot checks their assessments, citing N.D.C.C. §§ 11-10.1-05 and 11-10.1-06. Id.

After further review, however, I believe the determination in the 1970 opinion that the two offices are incompatible is in error. The mere fact that the county director of tax equalization instructs, consults with, or spot checks assessments does not necessarily create a conflict in duties or interfere with the performance of the duties of the other position; nor are the positions inherently inconsistent, repugnant, or contrary and antagonistic to each other. Rather, if the county director of tax equalization is in a position to consult, instruct, and spot check assessments, the county director should likewise be able to perform the functions of a city assessor. Rather than the positions being contrary and antagonistic, it is more accurate to say that the functions and duties of the city assessor are included within those that a county director of tax equalization statutorily could perform. See N.D.C.C. §31-11-05(27) (the greater includes the lesser). If an individual is qualified to act as a county director of tax equalization, then a fortiori, that individual is qualified and able to perform the duties of a city assessor. Consequently, it is my opinion that the offices of a county director of tax equalization and a city assessor are not inherently incompatible, and that the determination to the contrary in N.D.A.G. 70-254 is in error.

While N.D.C.C. § 11-10.1-07 sets out one method by which two political subdivisions may hire the same person, nothing in its text indicates it is the exclusive way to do so. Nothing

in it precludes a political subdivision from employing an officer of another political subdivision. In my opinion, N.D.C.C. § 11-10.1-07 only requires an agreement when a county and a city seek to create a joint position. It is further my opinion that a city may employ the county director of tax equalization as the city assessor, without an agreement between the county and the city, if each acts independently.

It may be possible, however, for the county to limit the ability of its county director of tax equalization, and the city to limit the authority of its city assessor, to serve in the other office. This is especially true if either position is a salaried, full-time position and the primary employer reasonably expects its official to devote full attention to the duties and responsibilities of the position. As one noted author wrote:

> Many laws expressly provide that the officer shall give his or her entire time during office hours to the discharge of the duties appertaining to the office. However such a requirement may exist without express declaration. In any event, municipal officers may not pursue their business or professional practice in transactions where their own interest would conflict with the interest of the municipality. . . .
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> In order to prevent any impairment of the efficiency of its employees, a governmental employer may properly limit the number of weekly hours its employees are permitted to work on outside jobs, that is, to moonlight.

3 Eugene McQuillin, The Law of Municipal Corporations § 12.130 (3d ed. 2001).

A limitation may be accomplished by a policy of the county or city indicating such limitations on the employee. The policy should be based on legitimate concerns of the county or city. See, for example, N.D.A.G. Letter to Swanson (Nov. 3, 1987) (a person providing private security services may not possess any police type powers as a result of full or part-time employment with a law enforcement agency), N.D.A.G. 94-L-262 (a person licensed to provide private investigative or security services may not also become employed as a peace officer), N.D.A.G. 95-L-285 (a state employee can be prohibited from testifying in court as a paid expert witness, if that testimony would conflict with the interests of the state or the supervising agency).

Sincerely,

Wayne Stenehjem
Attorney General

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