

**LETTER OPINION
2010-L-06**

March 22, 2010

Mr. Peter D. Welte
Grand Forks County State's Attorney
PO Box 5607
Grand Forks, ND 58206-5607

Dear Mr. Welte:

Thank you for your letter requesting my opinion on whether North Dakota law prohibits displaying nominating petitions in public offices owned or controlled by political subdivisions for the purpose of gathering signatures. For the reasons stated below, it is my opinion that North Dakota law does not prohibit displaying nominating petitions in public offices owned or controlled by political subdivisions for the purpose of gathering signatures, provided that the practice is permitted by the governing body of the political subdivision controlling the building, the opportunity is equally available to any candidate seeking signatures on a nominating petition, and the nominating petitions are not actively attended to by any public employee while on duty or in uniform or while otherwise acting in an official capacity.

ANALYSIS

Unlike initiative, referral, or recall petitions,¹ the statutes dealing with nominating petitions for candidates for public office do not specify under what circumstances such petitions must be signed.² Although your letter indicates you are primarily concerned with whether the North Dakota Corrupt Practices Act, N.D.C.C. ch. 16.1-10 ("CPA" or "Corrupt Practices Act"), prohibits the practice of leaving nominating petitions in political subdivision buildings, other statutes are also applicable, as discussed below.

¹ Under state law, initiative and referendum petitions, as well as recall petitions, must be signed by qualified electors in the presence of the petition circulator. N.D.C.C. §§ 16.1-01-09(3) and (4) and 16.1-01-09.1(3).

² See N.D.C.C. §§ 16.1-11-06, 16.1-11-11, 16.1-11-16, 16.1-12-02, and 40-21-07; see also N.D.A.G. 94-L-54.

The Corrupt Practices Act provides in pertinent part that:

A person is guilty of corrupt practice within the meaning of this chapter if the person willfully engages in any of the following:

. . . .

3. Is guilty of the use of state services or property or the services or property of a political subdivision of the state for political purposes.³

Likewise:

No person may use any property belonging to or leased by, or any service which is provided to or carried on by, either directly or by contract, the state or any agency, department, bureau, board, commission, or political subdivision thereof, for any political purpose.⁴

“Political purpose” is defined as “any activity undertaken in support of or in opposition to the election or nomination of a candidate to public office”⁵ “Property” is defined to include

motor vehicles, telephones, typewriters, adding machines, postage or postage meters, funds of money, and buildings. However, nothing in this section may be construed to prohibit any candidate, political party, committee, or organization from using any public building for such political meetings as may be required by law, or to prohibit such candidate, party, committee, or organization from hiring the use of any public building for any political purpose if such lease or hiring is otherwise permitted by law.⁶

And finally, “services” are defined as including “the use of employees during regular working hours for which such employees have not taken annual or sick leave or other compensatory leave.”⁷ General criminal penalties⁸ apply to violations of the CPA, and if a candidate is found guilty of a corrupt practice, the person’s nomination or election must be declared void.⁹

³ N.D.C.C. § 16.1-10-01.

⁴ N.D.C.C. § 16.1-10-02(1).

⁵ N.D.C.C. § 16.1-10-02(2)(a).

⁶ N.D.C.C. § 16.1-10-02(2)(b).

⁷ N.D.C.C. § 16.1-10-02(2)(c).

⁸ See N.D.C.C. § 16.1-10-08.

⁹ See N.D.C.C. § 16.1-10-07.

The CPA only applied to state services or property prior to 2001. In that year, the Legislature amended the CPA to expressly prohibit the use of political subdivision property or services for political purposes.¹⁰ Questions regarding political subdivisions which were similar to the one you raised were addressed in prior letters issued by this office.¹¹ However, these letters were issued before the CPA expressly prohibited the use of political subdivision property or services for political purposes. Not surprisingly, these letters determined that such use of political subdivision property was not prohibited under the predecessor provisions of the North Dakota CPA.¹² The pertinent provisions and definitions in the CPA dealing with the use of state services or property for political purposes are essentially the same as today, other than the fact that the CPA now covers political use of property or services belonging to political subdivisions.¹³ Therefore, supreme court and attorney general opinions addressing the use of state property or services for political purposes would provide guidance on the use of a political subdivision's property or services for political purposes under the present Corrupt Practices Act.

The previous version of the CPA, N.D.C.C. ch. 16-20, was construed by the North Dakota Supreme Court to disregard frivolous or trivial uses of public funds or property in 1979.¹⁴ In deciding that a candidate for the state supreme court did not violate the CPA by being photographed presenting a campaign talk to the voters while seated at the bench in the supreme court wearing a judicial robe, the court reasoned that:

[I]t was the primary intent of the legislature that there should not be a misuse of public funds or a financial misuse of public property for political purposes. It would be frivolous to argue there was wear and tear of the bench. There was no evidence presented as to the electricity consumed, if any, while the short 30-second video tape was taken. But assuming there was, the trial court aptly described such use as "miniscule." We have a maxim in the North Dakota Code that the law should disregard trifles. Section 31-11-05(24) North Dakota Century Code.

....

We hold there was not a violation of the Corrupt Practices Act.¹⁵

¹⁰ N.D.C.C. §§ 16.1-10-01(3) and 16.1-10-02 were amended in 2001. See 2001 N.D. Sess. Laws ch. 203, §§ 3 and 4.

¹¹ See N.D.A.G. 96-F-12 and N.D.A.G. 94-L-54.

¹² See N.D.A.G. 94-L-54 (construing N.D.C.C. ch. 16.1-10).

¹³ A change to the definition of "political purpose" was made in 2007, but that change is not relevant to this question. See 2007 N.D. Sess. Laws ch. 193, § 3.

¹⁴ See Saefke v. Vande Walle, 279 N.W.2d 415 (N.D. 1979).

¹⁵ Id.

Based in part on this supreme court case, a subsequent opinion issued by this office determined that mere presence on the state capitol grounds or in a capitol building for a political purpose would not violate the CPA.¹⁶ This opinion noted that the statute does not prohibit trivial uses of state property which would include mere presence in a state building.¹⁷ The circulation of election petitions was determined to be a political purpose, but the opinion noted that a circulator's presence "is not likely to be found to constitute a prohibited 'use' of state property unless a circulator uses state property or resources in some more identifiable or consumable way."¹⁸

I have no reason to believe that the supreme court would view a miniscule or trivial use of political subdivision property any differently than the use of state property for political purposes. Although it would be difficult to see how leaving a nominating petition on a counter in a courthouse or city hall would constitute more than a miniscule or trivial use of political subdivision property, the determination of what is miniscule or trivial is a determination of fact and not within my authority to make.¹⁹

Even if the usage of the property or services of a political subdivision for political purposes is, in fact, miniscule or trivial, and thus not a violation of the CPA, other provisions of state law may be applicable. For example, public employees may not engage in political activity while on duty or in uniform.²⁰ Stated another way in a different statute, public employees generally may not be prohibited from engaging in political activity or be denied the right to refrain from engaging in this activity except when on duty or acting in an official capacity.²¹ Thus, it would be unlawful for a public employee while on duty or in uniform or otherwise acting in an official capacity to attend to nominating petitions displayed in a public building or to invite members of the public or other employees to review or sign such petitions. If the petitions were merely placed unattended in a public building, these particular laws would not be implicated.

Finally, state law authorizes a governing body of any county, city, or township to permit the use of a public building or any part of a public building under its charge for any legal purpose and to make reasonable rules and restrictions on the use of such building as may

¹⁶ See N.D.A.G. 96-F-12.

¹⁷ Id.

¹⁸ Id.

¹⁹ N.D.A.G. 2009-L-18; N.D.A.G. 2002-L-17.

²⁰ See N.D.C.C. § 44-08-19. This statute borrows the definition of political activities contained in N.D.C.C. § 39-01-04 which provides that political activities include any form of campaigning or electioneering and any other form of political work usually and ordinarily engaged in by state officers and employees during primary and general election campaigns.

²¹ See N.D.C.C. § 34-11.1-02.

be necessary.²² Thus, ultimately it is up to the governing body of a political subdivision to determine whether the activity of leaving unattended nominating petitions out in a public area in such a public building is permissible. However, if that practice is permitted, the law also requires that equal opportunity be given to all persons.²³ Consequently, if any candidate circulating nominating petitions is permitted to leave petitions unattended in a public building, any other candidate must be permitted to do the same.²⁴

For the foregoing reasons, it is my opinion that North Dakota law does not prohibit displaying nominating petitions in public offices owned or controlled by political subdivisions for the purpose of gathering signatures, provided that the practice is permitted by the governing body of the political subdivision controlling the building, the opportunity is equally available to any candidate seeking signatures on a nominating petition, and the nominating petitions are not actively attended to by any public employee while on duty or in uniform or while otherwise acting in an official capacity.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²⁵

²² See N.D.C.C. § 48-08-06.

²³ Id.

²⁴ Id.

²⁵ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).