

**LETTER OPINION  
2010-L-10**

May 25, 2010

Ms. Rozanna C. Larson  
Ward County State's Attorney  
PO Box 5005  
Minot, ND 58702-5005

Dear Ms. Larson:

Thank you for your letter asking whether a non-incumbent candidate for sheriff may appear in election campaign photographs wearing his deputy sheriff's uniform, provided no image of the state seal is discernible in the photos. For the reasons indicated below, it is my opinion that it is not unlawful for a non-incumbent candidate for sheriff to appear in election campaign photographs wearing his deputy sheriff's uniform, provided any image of the state seal is not discernible in the photographs.

ANALYSIS

In your letter, you indicate there are several candidates for the office of the sheriff in the upcoming election. You state that one of the candidates is a current deputy in the sheriff's department and he has been photographed wearing his deputy sheriff's uniform for election campaign materials. You further indicate the photograph of the deputy's badge containing the state seal has been altered to make the image of the state seal indiscernible.

In your letter, you quote N.D.A.G. 2010-L-06 as follows:

[I]t 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.<sup>1</sup>

Id. at 4. You indicate a complaint has been made based on this passage.

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<sup>1</sup> N.D.A.G. 2010-L-06 at 4.

The point of that discussion in my prior opinion was to draw attention to N.D.C.C. §§ 44-08-19 and 39-01-04, which make it unlawful for a public employee who is in uniform or otherwise acting in an official capacity to engage in political activities.<sup>2</sup> Political activities, for the purpose of N.D.C.C. § 44-08-19, are defined in N.D.C.C. § 39-01-04<sup>3</sup> to refer to any form of campaigning or electioneering such as attending political meetings, distributing campaign materials, or soliciting campaign funds and other forms of political work usually and ordinarily engaged in by state officers and employees during primary and general election campaigns.<sup>4</sup> However, in this instance you indicate the candidate for sheriff is not actually campaigning or electioneering while in uniform or on duty.

In your letter, you also refer to a North Dakota Supreme Court decision discussed in N.D.A.G. 2010-L-06 concerning a campaign ad for a sitting Supreme Court justice who was a candidate for that office.<sup>5</sup> In that case, the Supreme Court noted:

It was not untruthful or deceptive. . . . It is a common practice for a judge to wear a robe in campaign photographs. It is like a sheriff who wears a uniform and badge while campaigning for reelection. It is not wrong for a candidate to thus inform the voters that he already occupies the office to which he seeks reelection.<sup>6</sup>

Those statements were made in the context of determining that voters were not misled or unduly influenced by the fact that the previously appointed candidate for Supreme Court justice was photographed wearing his judicial robe and seated at the bench in the Supreme Court courtroom.<sup>7</sup>

In view of this issue, you question whether it is unlawful for a non-incumbent candidate for sheriff to be photographed wearing his official deputy sheriff's uniform for use in his campaign materials. In my opinion, it is immaterial whether a candidate is a current

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<sup>2</sup> Id.; see also N.D.C.C. § 34-11.1-02. This part of the opinion was not discussing the state's Corrupt Practices Act, N.D.C.C. ch. 16.1-10.

<sup>3</sup> N.D.C.C. § 44-08-19(2).

<sup>4</sup> N.D.C.C. § 39-01-04.

<sup>5</sup> Saefke v. Vande Walle, 279 N.W.2d 415, 417 (N.D. 1979).

<sup>6</sup> Id. As you note, the court offered the example of a sheriff who wears a uniform and is on duty while campaigning for reelection. However, the court did not discuss the applicability of N.D.C.C. §§ 44-08-19 or 39-01-04 to such activities, but was only addressing campaigning through advertisements.

<sup>7</sup> Id. The court also determined that use of the courtroom for taking the photograph was a "miniscule" activity which did not constitute a misuse of public funds or property and was not a violation of the Corrupt Practices Act.

officeholder or, in this case, a non-incumbent deputy sheriff.<sup>8</sup> Given the court's analysis and conclusion in Saefke, it seems very unlikely it would view campaign photographs showing a candidate for sheriff wearing a law enforcement uniform, without more, as a misuse of public funds or property within the meaning of the Corrupt Practices Act. The analysis of whether such activity violates the Corrupt Practices Act would very likely be the same, whether it concerned the wearing of judicial robes or a deputy sheriff's uniform in campaign photographs.

The more pertinent inquiry here is whether the candidate for sheriff is, in fact, engaging in campaigning or electioneering while wearing a law enforcement uniform, not whether the candidate is an incumbent. The definition of political activities in N.D.C.C. § 39-01-04 generally refers to active campaigning and situations in which a candidate in uniform might appear to the public to be campaigning during working hours even if the candidate was actually on leave. And as indicated above, the candidate in this instance is not actively campaigning while in uniform or on duty. Thus, under these circumstances, there would be no violation of N.D.C.C. §§ 44-08-19 and 39-01-04 for a candidate to use a photograph of himself or herself in uniform in campaign materials.

Finally, you raise the issue of use of the state seal in campaign photographs and cite to N.D.A.G. 93-L-182. In that opinion, it was determined that use of the state's great seal in the letterhead of campaign-related correspondence would constitute a violation of the state's Corrupt Practices Act. Id. Moreover, N.D.C.C. § 54-02-01 makes it a criminal offense for any person to:

Place or cause to be placed the great seal, or any reproduction of the great seal, on any political badge, button, insignia, pamphlet, folder, display card, sign, poster, billboard, or on any other public advertisement, or to otherwise use the great seal for any political purpose, as defined in section 16.1-10-02.<sup>9</sup>

Although you indicate the state seal would normally appear on the deputy sheriff's badge, in this instance the image of the great seal was made indiscernible. Consequently, there would be no misuse of the great seal.

For the reasons indicated above, it is my opinion that the fact that a non-incumbent candidate for sheriff appears in election campaign photographs wearing his deputy

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<sup>8</sup> C.f. CA FPPC Adv. I-90-221 (Cal. Fair. Political Practices Comm.), 1990 WL 692798 (Lieutenant in Sheriff's office may wear uniform in campaign brochure while running for sheriff).

<sup>9</sup> N.D.C.C. § 54-02-01(2).

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sheriff's uniform is not unlawful, provided any image of the state seal is not discernible in the photographs.

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.<sup>10</sup>

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<sup>10</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).