

**LETTER OPINION
2011-L-07**

August 11, 2011

Mr. Lyle Schuchard
Chairman
Administrative Committee on Veterans Affairs
c/o Department of Veterans Affairs
PO Box 9003
Fargo, ND 58106-9003

Dear Mr. Schuchard:

Thank you for your letter asking whether it is a conflict of interest for a county veterans' service officer to serve on the Administrative Committee on Veterans Affairs ("ACOVA" or the "Administrative Committee"). For the reasons explained below, it is my opinion that the common law doctrine of incompatible offices applies to determine whether the performance of a public official's duties in one office or position interferes or conflicts with the public official's duties in a separate public position or office. It is my further opinion that the presence of county veterans' service officers on ACOVA and its subcommittees does not raise an obvious incompatibility, but their presence raises concerns justifying an analysis by the appointing authority of whether the offices are incompatible.

ANALYSIS

You have asked whether it is a "conflict of interest" for county veterans' service officers to serve on ACOVA.¹ The Administrative Committee on Veterans Affairs, otherwise known as the "Administrative Committee" or "ACOVA," is responsible for organization, policy, and general administration of all veterans' affairs in the state of North Dakota.² ACOVA is composed of 15 voting members appointed by the Governor from a list of nominees recommended by five veterans organizations: the American Legion; the Veterans of Foreign Wars ("VFW"); the Disabled American Veterans; Veterans of World War II, Korea,

¹ You indicate that there are currently three County Veterans' Service Officers serving on ACOVA.

² N.D.C.C. § 37-18.1-03.

and Vietnam (“AMVETS”); and Vietnam Veterans of America.³ The chairman and secretary of ACOVA must be appointed by the Governor from among the voting membership of the Committee.⁴

County veterans’ service officers are appointed, employed, and paid on a full or part-time basis by county commissioners under N.D.C.C. § 37-14-18. A county veterans’ service officer is a county employee whose salary is set by the board of county commissioners.⁵ The appointment of a county veterans’ service officer must be made with the prior advice of the Commissioner of Veterans Affairs.⁶ The duties of county veterans’ service officers include advising local veterans and their dependents of their rights and entitlement to benefits under various federal and state laws, counseling veterans and assisting them “in the presentation, proof, and establishment of [veterans] claims, privileges, and rights.”⁷ A county veterans’ service officer also must “actively cooperate with and . . . coordinate the activities of the state and federal agencies within the county which the officer serves”⁸

As previously stated, you have asked whether it is a conflict of interest for county veterans’ service officers to serve on ACOVA. “Conflict of interest” is a term used in connection with public officials and generally means “[a] real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties,”⁹ and “speaks of a situation in which regard for one duty tends to lead to the disregard of another.”¹⁰ Your letter did not give specific examples of any personal potential conflicts of interests and I am not aware of any statute that prohibits a county veterans’ service officer from being a member of ACOVA. Additionally, since you phrased the question in terms of whether a person’s simultaneous position as a member of ACOVA and county veterans’ service officer creates a conflict, as opposed to questioning whether a person’s private interests conflicts with a person’s public or fiduciary duties, a member of my staff consulted with you and explained that there is a more relevant and applicable legal doctrine described as the “incompatibility of office doctrine.”

³ N.D.C.C. § 37-18.1-01. There are also three ex officio members of the committee: the Adjutant General; the center director of the Fargo regional office of the U.S. Department of Veterans Affairs; and the executive director of Job Service North Dakota. Id.

⁴ N.D.C.C. § 37-18.1-02.

⁵ N.D.C.C. § 37-14-19; see also N.D.C.C. §§ 57-15-06.4 and 57-15-06.7(18) (each county may levy a tax not exceeding two mills to provide a fund for the payment of salary, traveling and office expenses of the county veterans’ service officer).

⁶ N.D.C.C. § 37-14-18.

⁷ Id.

⁸ Id.

⁹ Black’s Law Dictionary 295 (7th ed.1999).

¹⁰ N.D.A.G. Letter to Rohrich (Apr. 14, 1983).

“[T]he incompatibility doctrine prevents a person from, at the same time, holding two offices that are incompatible.”¹¹ The common law rule of incompatibility is the law of this state.¹² The North Dakota Supreme Court has explained that the functions and duties of offices determine whether or not two offices are incompatible:

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.¹³

Later, the North Dakota Supreme Court further explained:

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.¹⁴

Generally, there is not a specific determination of what constitutes incompatible offices, and in most cases the determination of what constitutes incompatible offices is a factual question to be made by the appointing authority.¹⁵ Although this office generally refrains

¹¹ N.D.A.G. 2006-L-36 (citing State v. Lee, 50 N.W.2d 124, 126 (N.D. 1951)); see also N.D.A.G. 2006-L-21; and N.D.A.G. 2004-L-49.

¹² Tarpo v. Bowman Pub. Sch. Dist. No. 1, 232 N.W.2d 67 (N.D. 1975).

¹³ State v. Lee, 50 N.W.2d 124, 126 (N.D. 1951).

¹⁴ Tarpo, 232 N.W.2d at 71.

¹⁵ See N.D.A.G. 2004-L-49 (“[t]he resolution of whether a conflict actually exists therefore necessarily involves making factual determinations regarding the extent to which two positions or offices are incompatible, which is an issue that should be resolved [by the appointing authority]”); see also N.D.A.G. 99-L-59; and N.D.A.G. 94-L-327 (whether a conflict actually exists involves making a factual determination); but see N.D.A.G. Letter to Rohrich (Apr. 14, 1983) (office of county director of tax equalization is incompatible with being a member of a city council within the county who may also sit on the city’s board of tax equalization).

from resolving factual issues, in 2006 I expressed my opinion that an incompatibility existed where a person's official positions were patently or obviously incompatible.¹⁶

Before the 2005 Legislative Session, the Commissioner was required to "assist, supervise, advise, and direct the work of county service officers"¹⁷ The 2005 Legislature replaced this language with "provide counties with recommended qualifications and standards for county veterans' service officers; to assist counties with training of county veterans' service officers; to provide county veterans' service officers with educational materials. . . ."¹⁸ The Commissioner is also required to assist county veterans' service officers in the performance of their duties.¹⁹ Therefore since 2005, the Commissioner's relationship with county veterans' service officers significantly changed from a supervisory role to an advisory role.

Although the Commissioner of Veterans Affairs is essentially an adviser to county veterans' service officers, such a relationship does not insulate the Commissioner from criticism or disagreement. It is possible a county veterans' service officer, and member of ACOVA, may be unsatisfied with the Commissioner's assistance or the officer may develop a personal or business related conflict with the Commissioner. A county commission could also appoint a veteran to be its county veterans' service officer, contrary to the advice of the Commissioner of Veterans affairs. These are two examples where uncomfortable conflict could arise, but since ACOVA is composed of 15 members, a county veterans' service officer would arguably not have any individual power over the Commissioner that might lead to the development of a conflict between the positions.

You indicate three county veterans' service officers currently serve on ACOVA,²⁰ but did not indicate on which of its subcommittees these officers serve. ACOVA is required to create a subcommittee which is responsible for supervision and government of the department of veterans' affairs and conducting an annual evaluation of the Commissioner.²¹ There could be greater potential for conflict and resulting incompatibility if ACOVA appointed a county veterans' service officer to serve on this subcommittee. By law, the Commissioner of Veterans Affairs supervises and controls the Department of Veterans Affairs and also serves as executive secretary for the subcommittee. It is possible, therefore, that the apparent overlapping duty of the Commissioner and ACOVA's subcommittee could generate its own contrariety and antagonism.²² Consequently, there

¹⁶ N.D.A.G. 2006-L-21.

¹⁷ 2005 N.D. Sess. Laws ch. 316, §4.

¹⁸ Id.

¹⁹ Id.

²⁰ See n.1.

²¹ N.D.C.C. § 37-18.1-03(2) and (5).

²² See Lee, 50 N.W.2d at 126.

LETTER OPINION 2011-L-07
August 11, 2011
Page 5

is a potential for incompatibility if a county veterans' service officer, who is supposed to be the recipient of the Commissioner's assistance, also sits on the subcommittee that evaluates the Commissioner.

Therefore, based upon the statutorily stated duties of the Commissioner of Veterans' Affairs, ACOVA, and county veterans' service officers, it is my opinion that the position of county veterans' service officer and the position of serving on ACOVA are not obviously incompatible, but that before appointing a county veterans' service officer to ACOVA, the appointing authority should conduct a further review of the relationship between county veterans' service officers, the Commissioner of Veterans Affairs, ACOVA, and its subcommittees, to determine whether the position of county veterans' service officer and serving on ACOVA are incompatible.

Sincerely,

Wayne Stenehjem
Attorney General

mjm/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.²³

²³ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).