

LETTER OPINION
96-L-235

December 13, 1996

Mr. J. Thomas Traynor
Devils Lake City Attorney
PO Box 1048
Devils Lake, ND 58301

Dear Mr. Traynor:

Thank you for your letter regarding conflicts of interest of city park board members who act as officials or coaches for various park district activities.

The facts provided in your letter indicate several possible scenarios, depending on the sport and whether a game is played as part of a tournament. For some sports, the park district contracts directly with a person for officiating or coaching services. For other sports, or for tournaments, the park district contracts with an organization for officiating services, which assigns a person to officiate each game. For some tournament games, the official is paid by the organization from funds the organization received from the park district. Otherwise, the official or coach is paid directly by the park district. In all cases, the official or coach is paid a per-game fee that is set by park district staff and is based on rates paid by other communities for similar services. Minimum qualifications are either recommended or required for each official, and it is frequently difficult to find a sufficient number of qualified officials. These officiating and coaching services are occasionally provided by city park district board members, and you ask whether this arrangement is permitted under North Dakota law.

The answer to your question is affected both by state statutes prohibiting conflicts of interest and by the common law doctrine of incompatibility of offices.

Two statutes prohibit park board members from having any interest in a park district contract. N.D.C.C. § 12.1-13-03 provides:

1. Every public servant authorized to sell or lease any property, or to make any contract in his official

capacity, alone or in conjunction with other public servants, who voluntarily becomes interested individually in the sale, lease, or contract, directly or indirectly, is guilty of a class A misdemeanor.

2. Subsection 1 shall not apply to:
 - a. Contracts of purchase or employment between a political subdivision and an officer of that subdivision, if the contracts are first unanimously approved by the other members at a meeting of the governing body of the political subdivision, and a unanimous finding is entered in the official minutes of that body that the contract is necessary because the services or property contracted for are not otherwise obtainable at equal cost.
 - b. Sales, leases, or contracts entered into between school boards and school board members or school officers.

(Emphasis added). N.D.C.C. § 40-49-10 provides:

The members of the board of park commissioners shall receive such compensation for their services as may be prescribed by the governing body of the municipality. No park board member may be directly or indirectly interested in any contract requiring the expenditure of park district funds unless the contract has been approved by two-thirds of the park board. Before the contract is approved, a motion must be made and approved that the service or property is not readily available elsewhere at equal cost. Regardless of this section, any park board, by resolution duly adopted, may contract with park board members for minor supplies or incidental expenses.

(Emphasis added). The interest prohibited under these sections is a self-interest of a board member that leads to a disregard of the interests of the park board on which the commissioner serves. See Thompson v. Lone Tree Township, 52 N.W.2d 840, 841-42 (N.D. 1952); State v. Robinson, 2 N.W.2d 183, 189-90 (N.D. 1942); 1995 N.D. Op. Att'y Gen. 21, 27; Letter from Attorney General Robert Wefald to F.C. Rohrich (April 14, 1983).

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A board member must disclose to the board any personal interest the member has in a contract or matter before the board. See N.D.C.C. §§ 40-13-05.1, 44-04-20. Whether a park board member is interested, directly or indirectly, in a contract of the park district is essentially a question of fact that this office cannot decide. See Letter from Assistant Attorney General Gerald VandeWalle to Richard Gallagher (December 31, 1974). However, assuming for the purpose of this opinion that the facts provided are true and not affected by other additional information, I can answer the question presented in your letter.

Under any of the scenarios presented in your letter, it appears that the park board, as the governing body of the park district, has ultimate control over how much each official or coach is paid. The park district either pays the coach or official directly or pays an organization an amount equal to the number of tournament games multiplied by the fee set by the park district for each game. In either case, the park district is the source of the funds. Thus, an individual park board member who officiates or coaches a game has a personal pecuniary interest in the amount set for each game by the park district. How a board member is assigned to each game and is paid determines whether the member's interest is indirect or direct. However, both interests are prohibited under the statutes quoted above unless the required approval is received and the necessary finding is made.

The two-thirds approval requirement in N.D.C.C. § 40-49-10 is inconsistent with the unanimous approval requirement N.D.C.C. § 12.1-13-03. A similar finding is required under either statute. Conflicting statutes should be harmonized to avoid the conflict whenever possible. However, a later-enacted statute will supersede an earlier statute when provisions in the statutes cannot be reconciled and are unavoidably repugnant. State v. Hagge, 224 N.W.2d 560 (N.D. 1974). In addition, a specific provision generally prevails in a conflict with a general provision. N.D.C.C. § 1-02-07.

In this situation, N.D.C.C. § 40-49-10 was amended in 1989 to allow a park board member to enter into a contract with the board if the contract is approved by two-thirds of the board and the required finding is made. See 1989 N.D. Sess. Laws. ch. 493, § 1. N.D.C.C. § 12.1-13-03 has not been changed since its enactment in 1973 and requires unanimous approval. These requirements are in clear conflict and cannot be reconciled. Therefore, because the two-thirds approval requirement in N.D.C.C. § 40-49-10 was enacted most recently and applies more specifically to this situation, it is my opinion

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that this section supersedes the unanimous approval requirement in N.D.C.C. § 12.1-13-03.

The term "contract" as used in the two sections quoted above "is not limited to written contracts but can also include oral contracts, or contracts evidenced only by entries on the minutes of the board." Letter from Assistant Attorney General John Adams to Marlene Knutson (October 1, 1970). Upon agreeing to act as coach or official for park district activities, it is my opinion that the board member becomes interested in a contract of the park district. Therefore, for the board member's interest not to be prohibited, two-thirds of the board must vote to approve the member's involvement upon the required finding that equivalent services are not available at equal cost. If locating a sufficient number of qualified officials or coaches is difficult, as you indicate, it may be reasonable for the park board to conclude that equivalent services are not available at equal cost.

In addition to the question of whether a board member's interest is prohibited by state statutes, there is also a question whether being paid by the park district for officiating or coaching a game violates the common law doctrine of incompatibility of offices.

"[I]t is a well settled rule of the common law that a person may not, at one and the same time, rightfully hold two offices which are incompatible." State v. Lee, 50 N.W.2d 124, 126 (N.D. 1951).

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 v. Bowman Public School Dist. No. 1, 232 N.W.2d 67, 71 (N.D. 1975). Each case must be analyzed on its facts, and the functions and duties of the positions determine whether the positions are incompatible. Id., quoting State v. Lee, 50 N.W.2d at 126; Letter from Attorney General Nicholas Spaeth to James Wold (July 22, 1987).

The number of conflicts that may exist when a board member acts as a coach or official for park district activities is difficult to determine. As discussed above, the board members would have some control over the amount of the fee the park district sets for each game. However, this is not a situation involving a full-time employee, as was the case in Tarpo. Instead, not only is it

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debatable whether an employer-employee relationship would exist between the park district and a board member who is coaching or officiating park district activities, but any such relationship would appear to be sporadic and far removed from the independent judgment a board member must exercise on behalf of the park district. As long as the board member receives the same fee as any other official or coach, and is not given disproportionate opportunities to earn the fee, the park board could conclude that the dual positions of board member and coach or official are sufficiently separate for the positions to be compatible. Again, this is a factual question that must be resolved by the park board.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jcf/vkk