

**N.D.A.G. Letter to Freed (Feb. 14, 1990)**

February 14, 1990

Mr. Robert A. Freed  
Assistant State's Attorney  
Stutsman County State's Attorney's Office  
511 Second Avenue Se  
Jamestown, ND 58401

Dear Mr. Freed:

Thank you for your January 30, 1990, letter concerning the effect the enactment of N.D.C.C. § 34-11.1-02 had on the common law doctrine of incompatible offices.

The doctrine of incompatible offices, as announced by our North Dakota Supreme Court in Tarpo v. Bowman Public Sch. Dist. No. 1, 232 N.W.2d 67 (N.D. 1975), provides that two offices or positions are incompatible and may not be held by the same person when one office has the power of appointment to the other or the power to remove the other. The same result occurs if there are many potential conflicts of interest between the two offices, such as salary negotiations, supervision, and control of duties and obligations to the public to exercise independent judgment. Id. at 71.

In Tarpo, an issue resolved by the court was whether the adoption of a conflict of interest statute for school board officers abrogated the common law doctrine against the holding of incompatible offices. The court held that the adoption of this statute in no way abrogated the common law doctrine and applied that doctrine to the facts of that case. Id. at 71.

N.D.C.C. § 34-11.1-02 provides as follows:

34-11.1-02. Political activities. Except when on duty or acting in an official capacity and except as otherwise provided by state or federal law, no employee may be prohibited from engaging in political activity or be denied the right to refrain from engaging in such activity.

Concededly, this statute is not easily understood. I interpret this statute to state that a public employee may be prohibited from engaging in political activity when that employee is on duty, acts in an official capacity, or where state or federal law prohibits an employee from engaging in such activity.

N.D.C.C. § 34-11.1-02 was enacted by the 1985 Legislative Assembly. 1985 N.D. Sess. Laws ch. 380, § 2. The primary sponsor, Senator Holmberg, testified before the Senate State and Federal Government Committee that the primary intent of this bill was to spell out basic rights, responsibilities, and duties of public employees.

This bill places into law concepts which should be a part of our employee-employer relationship. In SB 2352 we are saying that no employee can be involved in any political activity during working hours or while acting in an official capacity. We are saying no employee may be forced to be politically active. We are saying that an employee can affiliate with whatever group of employees he wishes.

Hearing on S. 2352 Before the Senate State and Federal Government Comm., 49th N.D. Leg. (January 29, 1985) (statement of Senator Holmberg).

Based upon the literal words of N.D.C.C. § 34-11.1-02, and the legislative history surrounding its enactment, I do not believe that this statute abrogates the common law rule against holding incompatible positions announced by our court in Tarpo. N.D.C.C. § 34-11.1-02 is a limit on those situations during which a public employee may engage in political activity. It does not address the eligibility of those employees to hold multiple public offices.

Therefore, in resolving the question of whether a county employee may run for the board of county commissioners of that county, I believe you are correct in reviewing and applying the doctrine of incompatible offices announced by the North Dakota Supreme Court in Tarpo.

I hope this discussion is helpful for you.

Sincerely,

Nicholas J. Spaeth

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