

N.D.A.G. Letter to Mahoney (June 6, 1986)

June 6, 1986

Mr. John J. Mahoney
Oliver County State's Attorney
P.O. Box 355
Center, ND 58530

Dear Mr. Mahoney:

Thank you for your letter of February 4, 1986, asking whether one person may run for both a part-time state's attorney position and a seat in the North Dakota Legislature at the same election and, if ultimately elected to both, whether one may serve in both positions.

I understand that the question you have posed is now moot given a change of circumstances. However, we have received a number of inquiries as to whether an individual may run for more than one office at the same election. Due to the number of inquiries and the amount of confusion on this subject, we believe it is necessary to set forth guidelines for candidates who wish to seek election to more than one office at the same election.

In addition, I feel it is incumbent upon me to express my apologies for the delay in responding to your letter. This matter is a controversial one which is not readily answerable by a review of North Dakota statutes and case law. As there are differing viewpoints involved, I have attempted to analyze this matter as closely as possible resulting in this delayed response.

The question we receive most often in this office is phrased in terms of whether one may "run" for more than one office at the same election. The use of the term "run" is unfortunate as it is not altogether clear as to its significance or scope. I know of no North Dakota statute which prohibits one from "running" for more than one office. However, I am aware of the prohibition contained within N.D.C.C. § 16.1-12-03 which states, in part, as follows:

16.1-12-03. CERTIFICATE OF NOMINATION TO CONTAIN ONLY
ONE NAME -- PERSON TO PARTICIPATE IN ONLY ONE NOMINATION. .
. . no person shall accept a nomination to more than office.

Therefore, the essential question is not whether one may run for more than one office, but whether one may accept a nomination to more than one office. This statute clearly states that one may not accept a nomination to more than one office. However, we must determine when does one accept a nomination to an office.

In reviewing the election laws of our state, I conclude that one is able to seek election to a public office through the nomination process principally by either one of two means: either a person presents to the appropriate election official a certificate of endorsement signed by the district chairman of any legally recognized political party, or a person presents a petition containing signatures and other information. N.D.C.C. §§ 16.1-11-06, 16.1-11-11.

Upon receipt of either a petition or certificate of endorsement, containing the statutorily required information, the appropriate election official shall place the applicant's name upon the primary election ballot. N.D.C.C. §§16.1-11-10, 16.1-11-12. Where the appropriate election official has placed the applicant's name on the primary election ballot as a result of the receipt of either the petition or certificate of endorsement, it is my opinion that the person named within either the petition or the certificate of endorsement has accepted a nomination to a public office.

A word should be mentioned as to a third method to accept a nomination to a public office. N.D.C.C. §16.1-11-35 provides for nominations by write-in votes occurring at the primary election. Obviously, where persons are nominated as a result of sufficient votes received at the primary election following the writing in of their names, they have then accepted the nomination for that office.

In summary, the important sentence of N.D.C.C. §16.1-12-03 (" . . . and no person shall accept a nomination to more than one office. . . ") refers to a different event depending upon the nature of the office sought. For partisan offices, a person accepts a nomination where he presents to the appropriate election official the certificate of endorsement and the official in return places the name of the applicant upon the primary election ballot. For persons seeking nonpartisan public offices, those persons accept a nomination for a public office when they present to the appropriate election official a petition causing their name to be placed upon the primary election ballot. Finally, with respect to persons who may be nominated by a write-in campaign, they accept a nomination when they receive their certificate of nomination following the primary election.

Based upon these conclusions, the prohibition against a person accepting a nomination to more than one office prohibits a person from the following actions:

1. Submitting more than one certificate of endorsement to the appropriate election official resulting in their names being placed upon the ballot for more than one office.
2. Submitting more than one petition to the appropriate election official resulting in their names being placed upon the ballot for more than one office.
3. Submitting a certificate of endorsement for one office and a petition for another office to the appropriate election official resulting in their names being placed upon the ballot for more than one office.

4. Successfully completing the nomination process by the petition or certificate of endorsement method for one office and receiving a certificate of nomination as a result of a write-in campaign for yet a separate office.

Your letter also poses a related issue as to whether a part-time state's attorney may hold office as such and as a state legislator at the same time. It is true that each house of the Legislature is the judge of the election returns and qualifications of its own members. N.D. Const. Art. IV, § 26. However, this provision does not prohibit this office nor any court of law from reviewing the applicable constitutional provisions and statutes on the issue and from rendering its opinion thereon. State ex rel., Olson v. Bakken, 329 N.W.2d 575 (N.D. 1983).

Article IV, §13 of the North Dakota Constitution prohibits certain officers and persons holding any office for profit under the state from holding any office in either branch of the Legislative Assembly or from becoming a member thereof. Although the matter may be argued one way or the other, it would appear that the Office of State's Attorney, both part-time and full-time, would fall within the prohibition contained within N.D. Const. Art. IV, §13.

Thus, under current constitutional law, a state's attorney could not serve as state's attorney and as a member of the Legislative Assembly at the same time.

However, this conclusion is rather academic given the fact that a major constitutional change will occur to N.D. Const. Art. IV as of December 1, 1986. The new relevant provision of the constitution concerning qualifications of members of the Legislature will be known as N.D. Const. Art. IV, § 6 and will state, in part, as follows:

While serving in the legislative assembly, no member may hold any full-time appointive state office established by this constitution or designated by law.

It is clear that an elected state's attorney may serve in the Legislative Assembly without violating this particular constitutional provision.

Finally, where one concludes that, pursuant to the relevant constitutional provisions, a person may serve as state's attorney and as a member of the Legislative Assembly at the same time, the doctrine of incompatibility of offices must be reviewed. This doctrine, as announced by the North Dakota Supreme Court in Tarpo v. Bowman Public School Dist., 232 N.W.2d 67 (N.D. 1975) and State v. Lee, 50 N.W.2d 124 (N.D. 1951), concludes that the incompatibility of offices exists where there is a conflict in the duties of the offices so that the performance of the duties of one interferes with the performance of the duties of the other. The rationale behind the doctrine of incompatibility of offices rests upon the avoidance of antagonism and conflicts of interest which would occur where one person attempts to discharge faithfully, impartially, and efficiently the duties of both offices at the same time.

Whether it is incompatible for one person to serve in the Office of State's Attorney and in the Legislative Assembly at the same time is a question of fact rather than law which can only be addressed by a review of the facts and circumstances in each and every case.

Sincerely,
Nicholas J. Spaeth

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