

N.D.A.G. Letter to Mahoney (Dec. 30, 1992)

December 30, 1992

Mr. John J. Mahoney
Oliver County State's Attorney
P.O. Box 355
Center, ND 58530-0355

Dear Mr. Mahoney:

Thank you for your December 2, 1992, letter asking whether a county employee may serve as a county commissioner.

Although various statutes prohibit a member of a city governing body from holding another position of remuneration in the employment of the city (i.e., N.D.C.C. §§ 40-04.1-04, 40-08-09, and 40-09-17), there are no similar statutes specifically prohibiting members of a county governing body from holding another position of remuneration in the employment of the county.

There are various statutes, however, that address the issue of county commissioners having an interest in contracts with the county. N.D.C.C. § 11-09-47 provides:

11-09-47. Interest in contracts by officers and employees prohibited. No member of the board of county commissioners or other officer or employee of a county which has adopted any form of county managership, and no person receiving a salary or compensation from funds appropriated by the county, shall be interested, directly or indirectly, in any contract to which the county is a party, either as principal, surety, or otherwise. No such officer or employee or his partner, agent, servant, employee, or the firm of which he is a member, shall purchase from or sell to the county any real or personal property, nor shall he be interested, directly or indirectly, in any work or service to be performed for the county or in its behalf. Any contract made in violation of the provisions of this section shall be void.

N.D.C.C. § 11-09-47 applies only to the county managership form of county government. See Letter from Attorney General Spaeth to Hugh P. Seaworth (April 7, 1987). N.D.C.C. § 48-02-12 provides:

48-02-12. Officers must not be interested in contract. No governing board, nor any member, employee, or appointee thereof, shall be pecuniarily interested or concerned directly or indirectly in any public contract, either verbal or written, that may be entered into by any such board or officer.

N.D.C.C. § 48-02-12 applies only to public contracts relating to construction, alteration, or repair of public buildings covered by chapter 48-02. See Letter from Attorney General Spaeth to Hugh P. Seaworth (April 7, 1987); Letter from Attorney General Spaeth to Robert E. Alexander (July 29, 1985); N.D.C.C. §§ 48-02-01 and 48-02-02. N.D.C.C. § 12.1-13-03 provides:

12.1-13-03. Public servant's interest in public contracts.

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.

While N.D.C.C. § 12.1-13-03 has broader applicability, it does not prevent a county employee from being a county commissioner. It does, however, cover situations in which any commissioner may face a conflict.

Even though no statute prohibits a county employee from serving as a county commissioner, depending upon the position the employee holds the offices may be incompatible. "It 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), quoting 62 C.J.S., Municipal Corporations, § 485, c., page 924. "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 Pub. Schl. Dist. #1, 232 N.W.2d 67, 71 (N.D. 1975). However, in the end "[i]t is hard, and the courts have hesitated to form a general definition of what constitutes incompatibility. Each case is discussed and decided upon its [own] particular facts." Id. quoting State v. Lee, 50 N.W.2d

124, 126 (N.D. 1951).

Unless the county offices or positions are incompatible, a county employee may serve as a county commissioner. Whether any particular offices are incompatible is a question of fact which this office may not determine. A county commissioner occupies a position of public trust and is obligated to refrain from using the position to obtain personal and private gain. Thus, if a circumstance arises where the county commission will vote on a matter in which a county commissioner has a personal interest, as a county employee, the county commissioner should refrain from voting on that matter. See 1970 N.D. Op. Att'y Gen. 32.

Sincerely,

Nicholas J. Spaeth