OPINION
78-138

December 29, 1978 (OPINION)

Mr. Nevin Van de Streek
Assistant City Attorney
312 Midwest Federal Savings and
Loan Building
Minot, ND 58701

Dear Mr. Van de Streek:

This is in reply to your letter of November 9, 1978, requesting an opinion from this office concerning an apparent conflict between the provisions of North Dakota Century Code Section 44-08-19 and certain provisions of 5 USC 1501 et seq. In your letter you state the following facts and questions:

> I am writing to you as Assistant City Attorney for the City of Minot with respect to a question which has arisen concerning the interaction between N.D.C.C. 44-08-19, which statute (sic) relates to political activities by public employees, and the Federal "Little Hatch Act", which is found in Title 5 of the U.S. Code, Sections 1501 through 1508, inclusive.
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> Some years ago the City of Minot enacted an ordinance which restricted the political activities of its employees. The restriction in the City of Minot Code of ordinances are more severe than those set forth in the N.D.C.C. 44-08-19, so the City Council requested this office to draft an ordinance which would amend our existing ordinance to bring it into closer conformity with the provisions of state law.
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> In the course of doing so it occurred to me that some of the activities seemingly permitted under 40-08-19 may be prohibited under the "Little Hatch Act". (I realize that the Federal law applies only to a few municipal employees whereas the state statute applies to all municipal employees. For the purpose of this letter, I am assuming that the activities of which I speak are performed by a municipal employee who is in fact covered by the "Little Hatch Act.")
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> N.D.C.C. 44-08-19 in pertinent part states: . . "Nothing in this section shall prevent any ›public! employee . . . from seeking or accepting election or appointment to office . . ."
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> On the other hand, 5 USC states in pertinent part: "(a) a state or local officer or employee may not . . . (3) be a candidate for elective office." (5 USC 1503 excepts nonpartisan (sic) elections from the prohibition set forth in 5 USC 1502). 5 USC 1501, as indicated earlier, provides for a special definition of "state or local officer or employee" which has the effect of very substantially limiting the number of municipal employees who fall within the prohibition of 5 USC 1502.

> Finally it should be noted that the "Little Hatch Act" does not purport to provide for criminal sanctions against those persons who are covered by the Act and who violates its prohibitions. Rather the Act contemplates that the employee who violates the Act will be discharged from his employment by his employer, and if this does not occur the employer will suffer monetary sanctions by the withholding of Federal funds. See Sections 1505 and 1506 of Title 5 USC
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> In view of the foregoing provisions of law I have two specific questions to direct to you.
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> 1) Does N.D.C.C. 44-08-19 authorize, or at least fail to prohibit, actions which are prohibited by the "Little Hatch Act" (assuming that such actions are performed by persons falling within the definitions set forth in 5 USC 1501)?
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> 2) Can the City of Minot as a Home Rule City enact an ordinance restricting the political activities of its employees in accordance with the provisions of the "Little Hatch Act" as opposed to the provisions of 44-08-19?

An examination of 5 USC 1502 and North Dakota Century Code Section 44-08-19 reveals the language you have set forth in your letter. Because we believe that there may be at least an apparent conflict between the provisions of this portion of the federal law and Section 44-08-19, we feel that an examination of the history of both the federal and the state laws may be instructive in determining the existence of any actual conflict and the manner in which the state law is to be interpreted and applied.

Initially, we note that the federal law to which you refer was passed in 1939 as the Hatch Political Activities Act (hereinafter "Hatch Act" or "Act") (P.L. 252, 53 Stat. 1147). As originally enacted the Act contained no restrictions on the political activities of public employees of agencies of states or political subdivisions receiving federal funds. The 1940 amendments to the Act (P.L. 753, 54 Stat. 767) added Section 12 of the Act, which provided that:

> No officer or employee of any state or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants from the United States or by a federal agency shall . . . take any active part in political management or in political campaigns.

Section 12 then went on to spell out the duties of the United States Civil Service Commission to hold hearings on possible violations of this prohibition and, in the vent that the commission found a violation, to order the federal agency administering the loan or grant to withhold from its loan or grant an amount equal to two years of the compensation for the employee involved. This specific prohibition has remained essentially unchanged since the passage of the Act into its current form and style in 1966 (P.L. 89-554), 80 Stat. 378, 5 USC Section 1501 et seq.), with the exception of the 1974 amendments (P.L. 93-443, 88 Stat. 1263) (effective January 1, 1975) to Section 1502(a)(3) of 5 USC, which you note in your letter, which amendments changed Section 1502 (a)(3) from the language quoted

above to language specifying than an employee may not ". . . be a candidate for public office."

Many states, including North Dakota, after the passage of the Hatch Act enacted original or amended laws, so called "Little Hatch Acts", creating restrictions on political activities of certain state or municipal employees, or laws allowing municipalities to enact ordinances containing such restrictions. North Dakota Century Code Section 40-33-09 originally provided as follows:

> 40-44-09. ORDINANCE PROVIDING FOR CIVIL SERVICE SHALL PROHIBIT POLITICAL ACTIVITIES OF PERSONS UNDER SYSTEM. Any ordinance adopted by the governing body of any city under the provisions of this chapter shall provide that no person holding an office or place in any department placed under a civil service system under the provisions of this chapter by the governing body shall:
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> 1. Seek or accept election, nomination, or appointment as an officer of a political club or organization;
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> 2. Take an active part in any county or municipal political campaign;
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> 3. Serve as a member of a committee of any political club or organization;
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> 4. Seek signatures to any petition provided for by any law;
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> 5. Act as a worker at the polls at or during any election; or
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> 6. Distribute badges, pamphlets, dodgers, or handbills of any kind favoring or opposing any candidate for election or for nomination to a public office, whether state, county, or municipal.
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> Nothing in this section or in this chapter, however shall prevent any such officer or employee from becoming or continuing to be a member of a political club or organization, from attendance at a political meeting, from enjoying entire freedom from all interference in casting his vote, or from seeking or accepting election or appointment to public office.

Apparently, numerous problems arose under this section. In 1975, the Forty-fourth Legislative Assembly approved Senate Concurrent Resolution #4063 directing the Legislative Council to study state labor laws, especially those relating to public employees. As part of the study, the Industry, Business and Labor Committee "C" of the Legislative Council examined the problems that arose between conflicts with outdated state laws and the modern version of the Hatch Act. The 1977 Report of the Legislative Council shows the following resulted of the study on page 117:

> Recent amendments to the Federal Hatch Act have greatly expanded the types of political activities in which federal

> employees and state and local employees in federally aided programs may engage. However, state and local lows - so-called little Hatch Acts - which establish stricter prohibitions on state and local employees remain in effect.
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> The committee examined state laws affecting the political activities of public employees, especially in regard to safeguard prohibiting the use of state-owned property for political purposes. Although these laws were viewed as reform legislation when they were enacted, they have remained substantially unchanged for many years, and in many instances the legislation was overbroad or no longer addressed modern problems of public employment since much of this legislation was enacted in response to the original Federal Hatch Act. Moreover, many of these laws are to restrictive and do not accomplish, the purposes for which they were enacted.
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> The committee recommends a bill to prohibit all public employees from engaging in political activities while on duty or in uniform. Political activities are defined, and state officers and employees are allowed to collect expenses only while engaged in state activities but may not collect such expenses while engaged in political activities. The bill also repeals miscellaneous sections of law prohibiting special employee groups from engaging in political activities which conflict with the general prohibition upon public employees from engaging in political activities while on duty or in uniform.

As a result of the study, the Legislative Council recommended, and the Legislative Assembly subsequently approved, Senate Bill 2046 repealing Section 40-44-09 and enacting Section 44-08-19 (S.L. 1977, Ch. 420 Section 1). The legislative history of Senate Bill 2046 in its consideration in the standing committees of the Forty-fifth Legislative Assembly, as well as the history of the bill development by the Legislative Council, clearly shows that the intention of the Legislative Assembly was to conform state law to the provisions of the Hatch Act. We believe that the language of Section 44-08-19 is for the most part consistent with this interpretation, for the state law provides that "nothing in this section" is intended to prohibit the acts in question. By this language, the Legislative Assembly only intended that state law not prevent the political activities in question, but that federal law was to be considered controlling.

Because of such a clear intention appearing from the history of Section 44-08-19, certain limitations appearing in that section are at least puzzling, the foremost of these being that the governing body of a political subdivision is empowered to enact ordinances regulating political activities of employees "while such employees are on duty or in uniform" No such limitation appears in the federal law. Rather, 5 USC 1501(a)(3) clearly purports to apply to "all state or local officers or employees" without limitation and thus appears to cover all such employees falling within the definition contained in 5 USC 1501(4), whether or not those employees are "on duty or in uniform".

While another, more genuine although narrower, conflict thus appears

to exist between the provisions of the Hatch Act and Section 44-08-19, we do not feel it warrants further discussion here, as we believe your question concerning the city's authority to enact an ordinance in accordance with provisions of the Hatch Act is likely resolved by those constitutional and statutory provisions peculiar to home rule cities. Section 130 of the North Dakota State Constitution provides, in part as follows:

> The legislative assembly shall provide by law for the establishment of home rule in cities and villages. It may authorize such cities and villages to exercise all or a portion of any power or function which the legislative assembly has power to devolve upon a nonhome rule city or village, not denied to such city or village by its own home rule charter and which is not denied to all home rule cities and villages by statute. The legislative assembly shall not be restricted in granting of home rule powers to home rule cities and villages by section 183 of this constitution.

Under this section of the Constitution, the Legislative Assembly has acted to authorize home rule cities to adopt ordinances on specific subjects. Section 40-05.1-06 of the North Dakota Century Code provides in part:

> 40-05.1-06. POWERS. From and after the filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this chapter, such city, and the citizens thereof, shall, if included in the charter and implemented through ordinances, have the following powers set out in this chapter:
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> 4. To provide for city officers, agencies, and employees, their selection, terms, powers, duties, qualifications, and compensation.
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> 7. To provide for the adoption, amendment, and repeal of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare, and penalties for a violation thereof.
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> It is the intention of this chapter to grant and confirm to the people of all cities coming within its provisions the full right of self-government in both local and city matters within the powers enumerated herein. The statutes of the state of North Dakota, so far as applicable, shall continue to apply to home rule cities, except in so far as superseded by the charters of such cities or by ordinances passed pursuant to such charters.

Under Section 130 of the North Dakota State Constitution, and the

language of the above Code section, a home rule city may enact any ordinance falling within the subjects specified in Section 40-05.1-06, and which the home city's charter does not prohibit, and which "is not denied to all home rule cities by statute." While we have not been furnished with the exact language of the ordinance which you propose, it appears highly likely that the above language authorizing the adoption of ordinances relating to qualifications of city employees would, in fact, authorize the adoption of the proposed ordinance. Likewise, we have not been furnished with a copy of the Minot Home Rule Charter, but we assume for the purposes of this opinion that such charter does not prohibit the adoption of the ordinance which you have in mind.

As to the third area of inquiry under Section 130 0f the Constitution, we can find no law which specifically purports to deny a home rule city the authority to promulgate the contemplated ordinance concerning political activities by city employees whose employment is connected with an activity financed by the Unites States or a federal agency. While Section 44-08-19 may contain some unclear provisions on this point, we believe, as discussed above, that the intention of the Legislative Assembly in enacting that section was not only not to restrict the authority of cities from complying with the terms of the Hatch Act, but was, in fact, to authorize such compliance. For this reason, we do not believe Section 44-08-19 should be construed as the statutory limitation upon home rule cities contemplated by Section 130 of the State Constitution. To the extent that there are any conflicts otherwise appearing between the provisions of the Hatch Act and North Dakota Century Code Section 44-08-91, we believe that the adopted ordinance, otherwise authorized by law, would prevail. City of Fargo v. Fahrlander, 199 N.W.2d. 30 (N.D. 1972).

We would add, finally, as a guide to any other cities contemplating the adoption of ordinances containing prohibitions similar to those of the Hatch Act, that it is, in the instances of home rule cities, those principles of home rule law referred to above which we believe to be controlling in this case: the degree of conflict apparent between the Hatch Act and Section 44-08-19 is of little significance if a home rule city desiring to follow the provisions of the Hatch Act may enact ordinances contrary to Section 44-08-19, in accordance with our opinion expressed above. If otherwise consistent with the principles of home rule law referred to above, the prohibitions contained in the Hatch Act may properly be made conditions of public employment. Likewise, a municipality wishing to make violations of such substantive prohibitions criminal, would in all probability not be prevented from doing so by reason of North Dakota Century Code Section 12.1-01-05, as the state has not declared any such violations to be a criminal offense. A more difficult question arises in regard to nonhome rule cities, or home rule cities desiring to enact ordinances at variance with the provisions of the Hatch Act. While these issues are not directly before us in the questions you have presented, we note that the substance of 5 USC Section 1502 appears to have been the subject of a number of serious constitutional challenges and has emerged unscathed. See, State of Oklahoma v. U.S. Civil Service Commission, 330 U.S. 127 (1947); Fishkin v. U.S. Civil Service Commission, 309 F. Supp. 40, appeal dismissed 396 U.S. 278, rehearing denied 397 U.S. 958 (1970); Englehardt v. U.S. Civil

Service Commission, 197 F. Supp. 806 (1961), affirmed 304 F. 2d. 882 (1962); United Public Workers of America (C.I.O.) v. Mitchell, 56 F. Supp. 621 affirmed 330 U.S. 75 (1947); Neustein v. Mitchel, 52 F. Supp. 531 (1943).

In direct answer to your questions regarding the application of the Hatch Act and Section 44-08-19 to the city of Minot, we believe that state law does not prohibit a state or municipal employee from being a candidate for public office, and that the city of Minot as a home rule city may enact ordinances restricting the political activities of its employees in accordance with the provisions of the Hatch Act (5 USC Section 1501, et seq.).

We trust that the foregoing adequately answers your questions.

Sincerely,

ALLEN I. OLSON

Attorney General