Superseded by 94-F-26

Date Issued: July 2, 1982 (AGO 82-54)

Requested by: Richard A. Elkin, President
Public Service Commission

- QUESTIONS PRESENTED -

I.

Whether chapter 16.1-10 of the North Dakota Century Code applies to an elected public official who is a candidate for office and who offers to return or returns all or any part of the salary for the office held.

II.

Whether any law applies to an elected public official who is not a candidate for office and who offers to return or returns all or any party of the salary for the office held.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that chapter 16.1-10, of the N.D.C.C., applies to an elected public official who is a candidate for office and who offers to return or returns all or any part of the salary for that office.

II.

It is my further opinion that there is a law that applies to an elected public official who is a state or judicial officer and who is not a candidate for public office and who offers to return or returns all or any part of the salary for that office.

- ANALYSIS -

I.

The actions of elected public officials who are candidates for office are controlled by our Corrupt Practices Act, chapter 16.1-10, N.D.C.C. Pursuant to section 16.1-10-01, N.D.C.C., a person is guilty of a corrupt practice if he violates any of the provisions of section 12.1-14-03, N.D.C.C. Under section 12.1-14-03(2), N.D.C.C., a person is guilty of a class A misdemeanor if, in connection with any election, he "offers, gives, or agrees to give a thing of pecuniary value to another as consideration for the recipient's voting. . . ." For an incumbent candidate for public office to turn back any part of his salary or to offer to

turn back any part of his salary constitutes a thing of pecuniary value which constitutes consideration in the form of reducing the burden on the public treasury and thereby the burden on the taxpayers in exchange for the votes of those taxpayers.

It is important to note at the outset that this opinion is on abstract questions of law, and that the question of guilt or innocence is a question of fact which can only be determined by the trier of fact based on the particular facts in each case.

In the only North Dakota case on point, Diehl v. Totten, 155 N.W. 74 (N.D. 1915), our Supreme Court held that "the corrupt practices act should be liberally construed with a view to its enforcement for the public interest and the purity of elections." 155 N.W. 74, 77. In this case, our Supreme Court upheld the removal from office of the appellant judge who while campaigning for office stated in a political advertisement that he would turn back to the county treasury all of his salary above the amount of $1,500 per year. The Court put it quite clearly:

> While the amount involved is small, to approve it would utterly defeat the purposes of the corrupt practices act. If appellant offered his services to the county for $300 per year less than the legal salary, another person might offer to do the work for $1000 below the salary, and there would, in truth, be nothing to prevent some rich aspirant from offering to donate to the county treasurer huge sums of money and performing the services gratis. That this would be an evil is too plain for argument, and that such conduct was in the contemplation of the corrupt practices act is also plain. 155 N.W. 74, 77.

In that same political advertisement the appellant judge made the following statement:

In the situation existing in our county today, the first duty is to cut down expenses and save the people's money. All unnecessary expenditures should be stopped and rigid economy should be the watchword all along the line. The present heavy load upon the tax-burdened people of this county should be lightened and the public welfare made the first consideration. 155 N.W. 74, 74.

Following a liberal construction of our Corrupt Practices Act, it is my opinion that chapter 16.1-10, N.D.C.C., applies to an elected public official who is seeking office and who returns or offers to return part or all of his salary.

There are, however, significant First Amendment considerations. The United States Supreme Court has recently considered the First Amendment implications of the Kentucky Corrupt Practices Act in Brown v. Hartlage, 102 S. Ct. 1523 (1982). As a candidate for county commissioner, Brown, in a televised press conference, stated that as a county commissioner he would lower his salary. Four days after the press conference when he learned that this commitment arguably violated the Kentucky Corrupt Practices Act, he renounced it. After he was elected his opponent, Hartlage, sought to have the election declared void and Brown's office of county commissioner declared vacant for an alleged violation of the Kentucky Corrupt Practices Act. That statute prohibited a candidate from

promising a thing of value either directly or indirectly to any person in consideration for that person's vote and support. The Kentucky Court of Appeals ultimately determined that Brown had violated the law.

That decision, however, was reversed by the U.S. Supreme Court. In doing so, the Supreme Court acknowledged the interest of the state while nothing the First Amendment protections:

"States have a legitimate interest in preserving the integrity of their electoral processes. . . . But when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated. . . . The free exchange of ideas provides special vitality to the process traditionally at the heart of the American constitutional democracy - the political campaign. . . . The political candidate does not lose the protection of the First Amendment when he declares himself for public office." 102 S. Ct. 1523, 1528, 1529.

The Supreme Court found that:

> (the) State may surely prohibit a candidate from buying votes. No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter. And as a State may prohibit the giving of money or other things of value to a voter in exchange for his support, it may also declare unlawful an agreement embodying the intention to make such an exchange." 102 S. Ct. 1523, 1529.

The Court further noted that:

> It is thus plain that some kinds of promises made by a candidate to voters, and some kinds of promises elicited by voters from candidates, may be declared illegal without constitutional difficulty. But it is equally plain that there are constitutional limits on the State's power to prohibit candidates from making promises in the course of an election campaign." 102 S. Ct. 1523, 1530. (Emphasis contained in the opinion.)

The Court noted that some promises are appropriate and are necessary in an election process to help enhance the accountability of government officials to the people they represent. The Supreme Court found that there was no constitutional basis upon which Brown's promise could be considered a bribe. His promise was not an offer to return part of his salary unilaterally, but rather it was one to exercise the fiscal powers of the government office he sought.

Before any implicit monetary benefit to the individual taxpayer might have been realized, public officials - among them, of course, Brown himself - would have had to approve that benefit in accordance with the good faith exercise of their public duties. . . . Brown's statement can only be construed as an expression of his intention to exercise public power in a manner that he believed might be acceptable to some class of citizens. . . . Brown's

promise to reduce his salary cannot be deemed beyond the reach of the First Amendment, or considered as inviting the kind of corrupt arrangement the appearance of which a State may have a compelling interest in avoiding. 102 S. Ct. 1523, 1531.

The Court in its conclusion took particular note of Brown's conduct and sought to limit the effects of its decision.

> There has been no showing in this case that petitioner made the disputed statement other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard whether it was false or not. Moreover, petitioner retracted the statement promptly after discovering that it might have been false. Under these circumstances, nullifying petitioner's election victory was inconsistent with the atmosphere of robust political debate protected by the First Amendment. 102 S. Ct. 1523, 1533. (Emphasis supplied).

An offer to return one's salary is altogether different from exercising the power held by a member of a legislative body to vote in such a way as to fulfill a promise made regarding salaries. Necessarily, a judge or any member of the judicial branch of government cannot make such a promise because it cannot be fulfilled. Neither can a member of the executive branch of government except insofar as that person can recommend to the Legislature that a particular action be taken with respect to salaries. Only members of a legislative body can legitimately make that promise with an expectation of fulfilling it. The prohibited conduct is not the exercise of a legislative power; rather it is the offer to give a thing of value in order to induce the voters to elect the person making the offer. Insofar as our Corrupt Practices Act prohibits that form of conduct, it is not a violation of an individual's right of free speech under the First Amendment and is consistent with the decision of the Supreme Court in Brown v. Hartlage, supra.

Our North Dakota Supreme Court has also considered the First Amendment implications of a North Dakota Corrupt Practices Act. In State v. North Dakota Education Association, 262 N.W.2d. 731 (N.D. 1978), our Court considered our previous Corrupt Practices Act then found in chapter 16-20, N.D.C.C., finding that one provision thereof, specifically section 16-20-17.1, N.D.C.C., requiring a disclosure on political advertisements was unconstitutional being in violation of the First Amendment. While that issue is not the same as in the present case, the Court did take note of the First Amendment implications of the former Corrupt Practices Act. Our current Corrupt Practices Act is found in chapter 16.1-10, N.D.C.C. Since the issue is not the same, this North Dakota case is not instructive on this particular point other than for the fact that our Supreme Court has indeed recognized that there are circumstances in which the First Amendment guarantees must override even well-motivated statutes. Clearly, First Amendment considerations play an important part in the consideration of corrupt practice allegations. To the extent possible, however, our statutes will be construed so as to harmonize their provisions with the constitution to the end that they may be sustained. Additionally, enactments by the Legislature are presumed to be constitutional. Walker v. Omdahl, 242 N.W.2d. 649 (N.D. 1976).

II.

Elected public officials who offer to turn back or who actually turn back a part of their salary, expenses, or unvouchered expenses appropriated to them by the Legislature when those officials may not currently be candidates for public office or may not have announced their intentions to seek reelection are not subject to sections 16.1-10-01(1) and 16.1-10-01(2) of the Corrupt Practices Act. The Corrupt Practices Act, chapter 16.1-10, N.D.C.C., and our election provisions in the criminal code found in chapter 12.1-14, N.D.C.C., both deal with conduct that constitutes a corrupt practice during the course of elections. Necessarily the action of an elected public official under these circumstances could hardly be construed to be in violation, beyond a reasonable doubt, of the provisions of either of these two chapters which pertain to conduct during the course of an election contest.

Our Corrupt Practices Act, however, identifies conduct which is deemed by our society to be corrupt. Such conduct during the course of an election will subject the person engaged in that corrupt conduct to the sanctions of our Corrupt Practices Act. Although the conduct is only subject to sanctions under this law during the course of an election contest, it is arguably nonetheless corrupt in a nonelection context.

Article XI, Section 10 of the North Dakota Constitution provides that "The governor and other state and judicial officers . . . shall be liable to impeachment for . . . corrupt conduct . . . ." The public in this constitutional provision is holding elected public officials to high ethical standards of conduct. Furthermore, as to elected public officials who are judges, the Code of Judicial Conduct further restricts the conduct of a judge. Under Canon 2 a judge must avoid the appearance of judicial impropriety. Under Canon 7 a judge must refrain from political activity inappropriate to judicial office.

It may be argued that once elected, a public official may agree to serve in office for less than the full salary, expenses or unvouchered expenses set by law. While this view is apparently accepted in at least one jurisdiction, see, e.g., Gamble v. City of Sacramento, 110 P.2d. 530 (CA. 1941), the majority of the courts which have been presented with the question have determined that an agreement by a public official to serve in office for less than the full compensation set by law is void as being against public policy. See, e.g., Brown v. Department of Military Affairs, 191 N.W.2d. 347 (Mich. 1971); Grace v. County of Douglas, 134 N.W.2d. 818 (Neb. 1965). See also Annot. 160 A.L.R. 490 (1946).

In Brown v. Department of Military Affairs, Supra, the Supreme Court of Michigan held that Brown, who was an officer in the Department of Military Affairs, was entitled to have received the full salary set by law for his office which was greater than a new pay system implemented by the Quartermaster General to pay officers at a lesser rate of pay. The Supreme Court agreed with the trial court and the court of appeals in their conclusion that "the action of the quartermaster and the state military board in promulgating a different pay scale than that established by statute, was unauthorized and illegal." 191 N.W.2d. 347, 350. The Michigan Supreme Court found such an arrangement void as against public

policy. Salaries of public officers which are established by law are not determined by contract or agreement between the parties. The public employer cannot pay more than the law allows. The public employee cannot accept less.

A waiver of statutory salary by a public officer is void as against public policy. . . . There can be no waiver of statutory compensation by a public employee or officer. 191 N.W.2d. 347, 350, 351. (Citations omitted.)

The North Dakota Supreme Court has also taken the position public policy considerations require that public officials be paid the full amount of the salary set by law. In Ness v. City of Fargo, 251 N.W. 843 (N.D. 1933), the Court held that:

> The salary of a public official is an incident to the office, and the legal right to receive or enforce payment thereof goes with the legal title to the office. 251 N.W. 843, 844.

The Court also noted that:

The public policy means the public good. It is "that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good." . . . It is difficult to see where any public good can be subserved by the denial to a public officer of the right to that compensation which the law says he is legally entitled to receive. . . . 251 N.W. 843, 845.

It should be noted that all of these cases dealt with suits by public officials to recover the money they claimed was due and not with allegations of corrupt conduct. From these cases it appears that a public officer who might accept a level of compensation less than that set by law could later successfully maintain a claim for back payment of the full amount of the compensation set by law. A contingent liability of the government for the full amount of the compensation unpaid would continue until the statute of limitations had run. In view of this public policy and following a liberal interpretation of our laws provided for in Diehl v. Totten, supra, it is my opinion that there is law that applies to an elected public official who is a state or judicial officer and who is not a candidate for public office who offers to return or returns all or any part of the salary for that office.

-EFFECT-

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the questions presented are decided by the courts.

ROBERT O. WEFALD
Attorney General