STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-26

Date issued: August 24, 1994

Requested by: James T. Odegard
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- QUESTION PRESENTED -

Whether the Corrupt Practices Act, N.D.C.C. ch. 16.1-10, and more particularly N.D.C.C. ? 12.1-14-03(2), prohibit a candidate for elective public office from offering to return all or any part of the salary for the office sought, if elected.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the Corrupt Practices Act, N.D.C.C. ch. 16.1-10, and more particularly N.D.C.C. ? 12.1-14-03(2), generally do not apply to a candidate for public office who offers to return all or any part of the salary for that office, if elected.

- ANALYSIS -

Historically, the prevailing view of the courts in the United States was that the various state corrupt practices acts prohibited candidates for public office from offering to return all or part of the compensation of the office sought. The underlying rationale was that such a promise was a form of bribery or was otherwise in violation of public policy. See, e.g., cases cited in Annotation, Statement by Candidate Regarding Salary or Fees of Office as Violation of Corrupt Practice Acts or Bribery, 106 A.L.R. 493 (1937) (citing inter alia Diehl v. Totten, 155 N.W. 74 (N.D. 1915)), and Annotation, Validity and Effect of Agreement by Public Officer or Employee to Accept Less Than Compensation or Fees Fixed by Law, or of Acceptance of Reduced Amount, 160 A.L.R. 490 (1946).

In 1982, a formal opinion was issued by then Attorney General Robert O. Wefald to Richard A. Elkin, president of the Public Service Commission. In that opinion, it was determined that N.D.C.C. ch. 16.1-10, the Corrupt Practices Act, and

specifically N.D.C.C. ? 12.1-14-03(2),[1] applied to candidates for public office who return or offer to return part or all of the salary for the office. See 1982 N.D. Op. Att'y Gen. 157. In adhering to the historical majority view, the opinion primarily relied on the early North Dakota case of Diehl v. Totten, 155 N.W. 74 (N.D. 1915). The 1982 opinion noted that

> 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.[2]

However, in a later case construing the Corrupt Practices Act, not cited in 1982 N.D. Op. Att'y Gen. 157, the North Dakota Supreme Court indicated that the Corrupt Practices Act is penal in nature and should be strictly construed. Saefke v. Vande Walle, 279 N.W.2d 415, 417 (N.D. 1979). This, of course, is consistent with the view that criminal statutes, such as N.D.C.C. ? 12.1-14-03, are to be strictly construed against the State and in favor of the accused. E.g., State v. Rambousek, 479 N.W.2d 832, 834 (N.D. 1992). However, the construction of the Corrupt Practices Act, N.D.C.C. ch. 16.1-10, and specifically the conduct proscribed by N.D.C.C. ? 12.1-14-03(2) by 1982 N.D. Op. Att'y Gen. 157 and by the prior case law is an expansive interpretation rather than the

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[1]N.D.C.C. ? 16.1-10-01(2) provides that it is a corrupt practice for a person to engage in any of the practices prohibited by N.D.C.C. ? 12.1-14-03. N.D.C.C. ? 12.1-14-03(2) provides that a person is guilty of a class A misdemeanor in connection with an election if he "offers, gives, or agrees to give a thing of pecuniary value to another as consideration for the recipient's voting or withholding his vote or voting for or against any candidate or issue or for such conduct by another."

[2]A Corrupt Practices Act violation is no longer grounds for a civil election contest. Republican Com. v. Democrat Com., 466 N.W.2d 820, 827 (N.D. 1991).

narrow strict construction usually mandated for penal or criminal statutes.

In Brown v. Hartlage, 456 U.S. 45 (1982), a candidate running for a county commissioner office in Kentucky promised to lower the salary of the office if elected. After the challenger was informed that such a promise might violate a Kentucky election bribery statute, he retracted the promise and subsequently he was elected. Id. at 47-48. The defeated incumbent filed a state corrupt practices act suit seeking to have the election declared void. A state appellate court ultimately determined that the campaign promise in question violated the election bribery statute and that a new election should be ordered. It rejected the challenger's First Amendment free speech claims by noting that the state had a compelling interest in ensuring that elections be free of corruption and bribery. The state court also determined that the promise to reduce the salary of the office was an attempt to bribe the voters. Id. at 49-52. The U.S. Supreme Court accepted certiorari to review the First Amendment free speech claims of the challenger. Id. at 52-53. The Supreme Court in analyzing the campaign promise to reduce the salary for the office, if elected, 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. . . . The fact that some voters may find their self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment. We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare. So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one's ballot.

(Emphasis by the Court.) Id. at 55-56. As noted above, the

Kentucky court had characterized the candidate's promise to accept a reduced salary as constituting a bribe. The Supreme Court rejected that analogy. The Court noted:

> however persuasive that analogy might be as a matter of state law, there is no constitutional basis upon which Brown's pledge to reduce his salary might be equated with a candidate's promise to pay voters for their support from his own pocketbook. . . . Not only was the source of the promised benefit the public fisc, but that benefit was to extend beyond those voters who cast their ballots for Brown, to all taxpayers and citizens. Even if Brown's commitment could in some sense have been deemed an 'offer,' it scarcely contemplated a particularized acceptance or a quid pro quo arrangement. . . . 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.

(Emphasis by the Court.) Id. at 57-58.

As indicated in Brown, the speech inherent in a candidate's promise to reduce or accept a lower salary is protected by the First Amendment to the United States Constitution. Where such a campaign promise was made openly and for all the voters to consider it was not the kind of private or hidden quid pro quo arrangement to which election bribery statutes (such as N.D.C.C. ? 12.1-14-03) may be constitutionally applied.

Consequently, it is my opinion that N.D.C.C. ? 12.1-14-03(2) must be strictly construed and that it does not generally apply to statements made by candidates for public office who offer to return all or part of the salary for the office sought, if elected. To the extent that 1982 N.D. Op. Att'y Gen. 157 is inconsistent with this opinion, it is superseded by this opinion.

Finally, one possible harm noted by both the North Dakota Supreme Court and other courts which have considered this issue concerns the potential for such campaign promises by candidates for public office to result in a "bidding war" between candidates, particularly those of independent wealth, who could offer to reduce or return salary for the position in increasing amounts or in total. As noted by the North Dakota

court in Diehl v. Totten, 155 N.W. 74, 77 (N.D. 1915):

> 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 $1,000 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 Practice Act is also plain.

This interest of a state was noted in the Brown case, wherein the U.S. Supreme Court stated:

> The State might legitimately fear that such emphasis on free public service might result in persons of independent wealth but less ability being chosen over those who, though better qualified, could not afford to serve at a reduced salary. But if [the statute] was designed to further this interest, it chooses a means unacceptable under the First Amendment. . . . A State could address this concern by prohibiting the reduction of a public official's salary during his term of office, as Kentucky has done here. . . . Such a prohibition does not offend the First Amendment.

456 U.S. at 59-60.

Thus, to curtail this potential for harm a state could prohibit the reduction of the salary for a public officer during the actual term of office, but it cannot constitutionally punish protected election campaign speech made to the electorate generally by application of an election bribery statute.

- EFFECT -

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

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