

LETTER OPINION
95-L-285

December 5, 1995

The Honorable Donna Nalewaja
State Senate
1121 11th St N
Fargo, ND 58102

Dear Senator Nalewaja:

Thank you for your October 25, 1995, letter asking whether state employees can be disciplined for testifying in court as paid expert witnesses on their own time. It is my opinion that a state employee may testify in court as an expert witness, subject to leave restrictions and employer convenience. However, an employee can properly be prohibited from seeking the opportunity to testify, and from accepting any payment for testifying as an expert witness other than statutory witness fees and expenses, if that testimony would conflict with the interests of the state or the supervising agency. It is my further opinion that an employee's testimony in another jurisdiction could conflict with the interests of the state or the supervising agency.

Generally, employees in North Dakota may testify in court pursuant to a subpoena without fear of being fired, laid off, or otherwise penalized by their employer for doing so. N.D.C.C. § 27-09.1-17(1). "[T]he public policy of North Dakota prohibits an employer from discharging an employee for honoring a subpoena and for testifying truthfully." Ressler v. Humane Society of Grand Forks, 480 N.W.2d 429, 432 (N.D. 1992). This protection applies to at-will employees who could otherwise be terminated without cause. Id.¹

The power to discharge or otherwise discipline many state employees is even more limited. "Employment without a definite term is presumed to be at will." Rykowski v. Dickinson Public School District, 508 N.W.2d 348, 349 (N.D. 1993), citing N.D.C.C. § 34-03-01. However, many state employees are included in

¹ I will assume for the purpose of your question that the state employee would be testifying pursuant to a subpoena, despite being a paid expert witness, and that this statute therefore applies to the situation you describe.

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the system of classified service created in N.D.C.C. ch. 54-44.3. Under this system, a non-probationary² employee "may be disciplined only for cause." N.D. Admin. Code § 4-07-19-03. "Cause" is defined as "conduct related to the employee's job duties, job performance, or working relationships that is detrimental to the discipline and efficiency of the service in which the employee is or was engaged." N.D. Admin. Code § 4-07-19-02.

Examples of conduct that may be "cause" for discipline can be found in state statutes, decisions of the North Dakota Supreme Court, and the employee's terms of employment. Employees must "use great care and diligence" to protect the interests of the employer when employed at their own request and performing acts which are of more benefit to the employee than the employer. N.D.C.C. § 34-02-07. "An employee who has any business to transact on his own account similar to that entrusted to him by his employer shall give the latter the preference always." N.D.C.C. § 34-02-14. These sections have been construed to "require loyalty to the employer and to require that the employee not impair the employer's business for the benefit of the employee." Spectrum Emergency Care v. St. Joseph's Hospital and Health Center, 479 N.W.2d 848, 853 (N.D. 1992) (VandeWalle, concurring specially).

An employee also must obey the reasonable instructions of the employer. N.D.C.C. § 34-02-08. Failure to do so may be "cause" for terminating the employment of a state employee. Southeast Human Service Center v. Eiseman, 525 N.W.2d 664, 671 (N.D. 1994). Also, the employer-employee relationship does not terminate at the end of one working day and begin again on the next, but continues so long as the person is employed. See N.D.C.C. § 14-02.4-03 (employer may take disciplinary action against employee based on participation in lawful activity off employer's premises during nonworking hours if activity is in direct conflict with its essential business related interests). Thus, the duties and restrictions which may be imposed on employees under state law apply even when employees are on their own time.

Your letter specifically mentions employees of the state Department of Health (Health Department). I am advised that Health Department employees are included in the classified service, with few exceptions, and that a standard personnel policy applies to those employees. Consistent with the statutory duties explained above, this policy prohibits employees from holding any job or other position where an interest arising out of that position would conflict with the employee's duties to the Health Department. To

² A probationary employee may be separated from employment for any lawful reason at any time during the probationary period. N.D. Admin. Code § 4-07-06-05.

enforce this prohibition, the policy establishes a minimum standard requiring approval by the employee's section chief or division director before any outside employment is accepted. This policy is binding on the employee as a reasonable instruction from an employer to its employee concerning the employment. N.D.C.C. § 32-02-08.

A situation could easily arise where the expert testimony of a Health Department employee might conflict with the interests of the Department, even if the Department is not a party to the litigation. It is logical to assume that the employee's qualifications and testimony as an "expert" witness will usually relate to the same expertise or type of work the employee performs for the Health Department. Where that work could require the employee to testify in court on behalf of the Health Department, previous testimony of the employee on the same subject matter could potentially be used against the employee, and thus damage the Health Department's position in that litigation. See N.D.R. Evid. 613. This possibility may be less likely when the employee testifies in another jurisdiction, but relevant inconsistent testimony in a Minnesota case is admissible to impeach the employee's testimony in a North Dakota case. Id. Even if the employee would be unlikely to testify on behalf of the Health Department in the future, any relationship between the Health Department and the party the employee testifies against as an expert might also be damaged by that testimony.

In summary, Health Department employees generally may not engage in outside activities or accept outside employment that conflicts with the interests of the Health Department. Testifying as an expert witness could easily conflict with those interests. Thus, unless otherwise prohibited by law, the Health Department could properly prohibit its employees from seeking the opportunity to testify or accepting employment as an expert witness if that testimony or employment conflicts with its interests, even on the employee's own time. Compare N.D.C.C. § 34-11.1-05(4) (after-hours statements on matters of public concern may not be restricted). A violation of this prohibition would be "detrimental to the discipline and efficiency" of the Health Department and be "cause" for discipline under N.D. Admin. Code ch. 4-07-19.

There is some tension between this authority to prohibit detrimental or conflicting outside activities or employment and the protection in N.D.C.C. § 27-09.1-17(1) for testifying pursuant to a subpoena. Under this statute, the fact that an employee obeys a subpoena and testifies in court by itself cannot be "cause" for disciplining that employee, even if the testimony conflicts with the interests of the employer. To conclude otherwise would ignore the plain meaning of

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N.D.C.C. § 27-09.1-17(1) and require employees to choose between losing their employment or committing a criminal offense. See N.D.C.C. §§ 12.1-10-02, 12.1-10-03 (violating lawful order to appear or testify in official proceeding is class A misdemeanor).

However, N.D.C.C. § 27-09.1-17(1) only protects employees from being punished or coerced for testifying pursuant to a subpoena. It does not protect the act of voluntarily seeking the opportunity to testify or accepting outside employment as an expert witness when that testimony or employment conflicts with the employer's interests. While employees must be allowed to comply with a subpoena and testify honestly without concern for the employer's interests, it is something quite different for employees to encourage such an opportunity or accept outside employment at the expense of the employer's interests.

In the situation you describe, the employee is doing more than simply fulfilling the employee's civic duty to testify as a witness if subpoenaed. The employee has voluntarily accepted a retainer or other payment in exchange for testimony as an expert. By prohibiting outside "employment" that is adverse to its interests, the Health Department's policy prohibits the employee from receiving any retainer or payment for testifying other than the witness fees and expenses authorized in N.D.C.C. § 31-01-16. This prohibition would not be a penalty under N.D.C.C. § 27-09.1-17(1) because the employee would be no worse off after testifying than before. Rather, the Health Department has removed the financial reward for accepting outside employment or engaging in other outside activities that conflicts with its interests. This policy does not interfere with the employee's obligation to testify pursuant to a subpoena and is therefore not prohibited by N.D.C.C. § 27-09.1-17(1). Further, this prohibition is consistent with the employee's duties under N.D.C.C. ch. 34-02 to be loyal to the employer and place the employer's interests above the employee's.

In conclusion, while a state employee may testify as an expert witness pursuant to a subpoena without fear of being disciplined, it is my opinion that an employer can properly prohibit its employees from seeking opportunities to testify, and accepting any payment for testifying as an expert witness other than statutory witness fees and expenses, when that testimony would conflict with the employer's interests. Any employee in the state classified service who violates this type of prohibition could be subject to discipline.

Sincerely,

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Heidi Heitkamp
ATTORNEY GENERAL

jcf/vkk