

LETTER OPINION
2004-L-49

July 23, 2004

Ms. Nicole E. Foster
Williams County State's Attorney
PO Box 2047
Williston, ND 58802-2047

Dear Ms. Foster:

Thank you for your letter asking whether there is a conflict of interest when the same individual simultaneously holds the positions of Williams County auditor and the secretary and treasurer of the Williams County Water Board. Whether a conflict actually exists involves making factual determinations regarding the extent to which two positions or offices are incompatible. Since this office cannot issue an opinion resolving factual issues, I must decline to opine whether simultaneously holding the positions of county auditor and secretary and treasurer for the same county's water resource board presents a conflict of interest.

ANALYSIS

The phrase "conflict of interest" "speaks of a situation in which regard for one duty tends to lead to the disregard of another." N.D.A.G. Letter to Rohrich (Apr. 14, 1983). The North Dakota Supreme Court has stated, "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). Although there does not appear to be a specific determination of what constitutes "incompatible" offices, "[e]ach case is discussed and decided upon its particular facts." Id.

"[Incompatibility of offices] is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them. Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. They are generally considered incompatible where such duties and

functions are inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both.”

Id. (quoting 42 Am. Jur. Public Officers § 70).

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 Public School District #1, 232 N.W.2d 67, 71 (N.D. 1975).

There is no general state statute prohibiting the county auditor from holding more than one office. Cf. N.D.A.G. 93-L-214; N.D.A.G. Letter to Mahoney (Dec. 30, 1992) (although various statutes prohibit a member of a city governing body from holding another paid city position, no similar statutes specifically prohibit members of a county governing body from holding another paid county position). While the statutory provisions found in N.D.C.C. chs. 61-16 and 61-16.1 (dealing with county water resource boards) do not appear to necessarily create any conflicts or incompatibility for a county auditor to also serve as secretary/treasurer of a county water resource board, there may be situations that arise among the county auditor, the county commission (whose members appoint water resource board members), and the water resource board that would factually result in a conflict between the two offices. The resolution of whether a conflict actually exists therefore necessarily involves making factual determinations regarding the extent to which two positions or offices are incompatible, which is an issue that should be resolved at the local level. N.D.A.G. 99-L-59; N.D.A.G. 94-L-327; Lee at 126. Since this office cannot issue an opinion resolving factual issues, see, e.g., N.D.A.G. 2002-F-07 and N.D.A.G. 94-L-327, I must decline to opine whether simultaneously holding the positions of county auditor and secretary and treasurer for the same county's water resource board presents a conflict of interest.

You also noted in your letter that a portion of the county water resource board duties are “conducted during the usual office hours for the Auditor’s office, and from the same office [used] for her Auditor duties.” As I noted recently in N.D.A.G. 2004-L-02 in discussing whether a county director of tax equalization could also serve as a city assessor:

It may be possible, however, for the county to limit the ability of its county director of tax equalization, and the city to limit the authority of its city assessor, to serve in the other office. This is especially true if either position is a salaried, full-time position and the primary employer reasonably expects its official to devote full attention to the duties and responsibilities of the position. As one noted author wrote:

Many laws expressly provide that the officer shall give his or her entire time during office hours to the discharge of the duties appertaining to the office. However such a requirement may exist without express declaration. In any event, municipal officers may not pursue their business or professional practice in transactions where their own interest would conflict with the interest of the municipality. . . .

Id. (quoting 3 Eugene McQuillin, The Law of Municipal Corporations § 12.130 (3d ed. 2001)).

Thus, it would be up to the county commission to determine if the county auditor's performance of county water resource board duties in the manner you indicated conflicts with the interest of the county, and if any reasonable limitations need to be imposed by the county. See N.D.A.G. 2004-L-02; N.D.C.C. § 11-11-11(1) and (2).

Sincerely,

Wayne Stenehjem
Attorney General

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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. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).