

**OPINION
70-194**

July 15, 1970 (OPINION)

Mr. Austin Engel

North Dakota Indian Affairs Commission

State Capitol

RE: Legislature - Indian Affairs Commissioner - Eligibility to Serve

This is in response to your request for an opinion on the following question:

Under the laws of North Dakota, is it possible for an employee of the N.D. Indian Affairs Commission to be a candidate for the N.D. Legislature and, if elected, to serve in that body and still continue as an employee of the N.D. Indian Affairs Commission?"

A somewhat similar question arose in 1966. Enclosed is a copy of an opinion addressed to Kenneth Raschke, commissioner of higher education, dated December 14, 1966. Many of the observations made therein would have application here except the reference to Section 54-03-21 of the North Dakota Century Code which has been declared unconstitutional by the North Dakota Supreme Court in Melland v. Johanneson, 160 N.W.2d. 107.

Section 37 of the North Dakota Constitution provides as follows:

No judge or clerk of any court, secretary of state, attorney general, register of deeds, sheriff or person holding any office of profit under this state, except in the militia or the office of attorney at law, notary public or justice of the peace, and no person holding any office of profit or honor under any foreign government, or under the government of the United States, except postmasters whose annual compensation does not exceed the sum of \$300, shall hold any office in either branch of the legislative assembly or become a member thereof."

This section prohibits the holder of certain office from holding an office in either branch of the legislative assembly. Neither Section 37 nor the statutes of the state of North Dakota define what constitutes an office or what constitutes an officer. The distinction between an officer and employee is sometimes difficult to determine. However, the main distinction between an officer and an employee is that an officer is entrusted with performing or exercising some portion of the sovereign power of the state, whereas an employee does not have such function. All officers can be classified as employees but not every employee is an officer. The necessity of an oath or the securing and the filing of a bond are matters to be considered. An office is generally created by law and if it is so created, the person filling such position or office is an officer.

In your letter you do not state what the function or position of the employee is. You merely mention an employee of the North Dakota Indian Affairs Commission. If your question relates to clerical employees or some similar position the answer could well be that such person is not an officer, depending on the duties, etc. However, if you are referring to an executive director the result would be different.

Section 54-36-02 provides as follows:

EMPLOYEES - DUTIES - COMPENSATION. The commission may employ an executive director who shall not be a member of the commission and such other clerical, professional and technical personnel, as it deems necessary, and shall prescribe their duties and fix their compensation."

The language of the statute, "the commission may employ an executive director," is not necessarily controlling. This does not in itself designate the director as an employee. The legislature specifically created the office and authorized and directed the commission to employ an executive director. Thus the legislature has created the office. The duties are to be prescribed by the commission. The commission was created by the legislature under Section 54-36-01. The commission is a governing body. The term executive director implies that the director will carry out the decisions and wishes of the commission in accordance with the duties and the powers imposed upon the commission. In this respect the executive director is an official.

If the compensation for the office is such that the individual profits from such office, it would be an office which would preclude such individual from serving or holding an office in either branch of the legislative assembly. It becomes exceedingly difficult to further elaborate on the question without having further specific details which may be pertinent to the answer. The executive director of the Indian Affairs Commission being classified as an officer under the general tests, it would necessarily follow that if such person were elected it would be questionable whether or not he could hold an office in either branch of the legislative assembly without resigning his position as executive director.

The ultimate question would be resolved by the proper branch of legislative assembly under Section 47 of the North Dakota Constitution which provides as follows:

Each house shall be the judge of the election returns and the qualifications of its own members."

HELGI JOHANNESON

Attorney General