

**OPINION
71-48**

February 11, 1971 (OPINION)

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RE: Cities - Special Assessment Commission - City Policeman as Membe

This is in reply to your letter of February 4, 1971, with regard to a problem arising out of your functions as city attorney in connection with a Water and Sanitary Sewer project, involving issuance of special improvement warrants, a portion of which will be repaid by special assessment procedures.

Your question is stated as whether a man presently serving as the city policeman under a city council and mayor form of city government can act as a member of the special assessment commission.

You call our attention to that portion of Section 40-23-02 of the North Dakota Century Code providing that:

" * * * No member of the commission shall hold any other
municipal office while serving as such member. * * * "

You call our attention to the fact that Section 40-14-04 of the North Dakota Century Code listing certain appointive officers in a council city does not include police chief or policemen. You mention further, however, that Section 40-15-05 of the North Dakota Century Code in listing the appointive officers in commission cities includes the chief of police and policemen. You mention further that Section 40-08-27 of the North Dakota Century Code does provide for appointment of policemen by a comparable procedure.

Your letter calls attention to the fact that the Special Assessment Commission has done no work as yet, and the general principle of law that "substantial compliance" may be sufficient after an act has been completed but strict compliance is generally required prior to the taking of action.

You are undoubtedly familiar with the references in Chapter 40-20 of the North Dakota Century Code to "police officers" and to the provisions of Sections 29-05-10 and 12-01-04 of the North Dakota Century Code indicating that policemen are "peace officers."

We have checked further Volume 29 Words and Phrases, Permanent Edition under Officers, police officers, marshal, or other peace officer, and under Office, municipal office, in both basic volume and 1970 cumulative annual pocket part. The numerical majority of cases there cited do appear to hold a policeman is an "officer" holding an "office" under the city government. Some of the cases there cited indicate that a policeman was not an "officer" at common law, but that statutes or ordinances have created the office of policeman or have made policemen, officers. Others indicate that provisions for

"officers" do include policemen as such was the common meaning of the terms. Others reach their conclusions on other bases. We note none of the cases there cited, as considering questions of statutory or common law incompatibility of office.

We are enclosing herewith a xerox copy of a published opinion of this office taken from the July 1, 1962 to June 30, 1964 report of the Attorney General of this state, holding that a policeman is a village officer.

On such basis, while we recognize that there may be some question on the matter, it is our opinion that policemen are holding "municipal office" within the meaning of that phrase as used in Section 40-23-02 of the North Dakota Century Code, and are therefore forbidden to serve as members of the Special Assessment Commission.

We thus agree with your conclusion that it would be advisable to find some other person to either act as policeman or sit on the Special Assessment Commission.

HELGI JOHANNESON

Attorney General