

N.D.A.G. Letter to Tallackson (Sep. 18, 1985)

September 18, 1985

Honorable Harvey D. Tallackson
State Senate
District 16
Grafton, ND 58237

Dear Harvey:

Thank you for your letter of August 29, 1985, in which you requested an Attorney General's opinion as to whether or not a member of the North Dakota Legislative Assembly may be appointed to a state or civil office while serving as a member of the North Dakota Legislative Assembly. In addition, you wish to know whether a member of the North Dakota Legislative Assembly may resign from that body and accept a subsequent appointment to state or civil office without violating the North Dakota constitution.

Article IV, §17 of the North Dakota Constitution provides as follows:

Section 17. No member of the legislative assembly shall, during the term for which he was elected, be appointed or elected to any civil office in this state, which shall have been created, or the emoluments of which shall have been increased during the term for which he was elected; nor shall any member receive any civil appointment from the governor, or governor and senate, during the term for which he shall have been elected.

This language clearly states that a member of the Legislative Assembly of North Dakota may not accept a state or civil appointment or elective office during the term for which he or she has been elected.

Article IV, §18 of the North Dakota Constitution provides as follows:

Section 18. The governor or any officer of this state, or any manager or executive head, or other person employed either directly or indirectly in any department, bureau, commission, institution, or industry of this state, or any member of any state board shall not appoint a member of the legislative assembly to any civil office or employment of any nature whatsoever, during the term for which said member of the legislative assembly shall have been elected. No member of the legislative assembly shall accept any such appointment to civil office or other employment during the term for which he was elected.

In an opinion to Larry Kruckenberg, Commissioner of Game and Fish, this office stated that employment exists where there is compensation given in return for work or services

provided. 1980 N.D. Op. Att'y Gen. 8. Applying this common sense definition to the last sentence of Art. IV, §18 of the North Dakota Constitution, it would appear that a member of the Legislative Assembly may not accept appointment as Commissioner of University and School Lands during the term for which he was elected.

In your letter, you refer to the case of State v. Stray, 281 N.W. 83 (N.D. 1938). In that case, the court held that the appointment of a member of the Legislative Assembly, legally made prior to the adoption of Art. IV, §17 of the North Dakota Constitution, was not rendered invalid by its subsequent adoption. Art. IV, §17 of the North Dakota Constitution was approved June 28, 1938. The key language in that case relates to the appointment of a member of the Legislative Assembly prior to the adoption of this section. Therefore, appointment of a member of the Legislative Assembly to serve as Commissioner of University and School Lands subsequent to June 28, 1938, appears to be violative of the North Dakota Constitution.

The interpretation of Art. IV, §18 of the North Dakota Constitution is basically the same as that of Art. IV, §17. In the case of Stray v. Baker, 281 N.W. 86 (N.D. 1938), the court held that a member of the Legislative Assembly, legally appointed by the Board of University and Schools Lands prior to the adoption of Art. IV, §18 of the North Dakota Constitution, was not rendered invalid by its adoption. As in the above cited example, the appointment was made prior to the adoption of the constitutional amendment and, as a result, was not rendered invalid or void.

You also refer in your letter to 1985 N.D. Sess. Laws 706, §6, and asked whether this section of the North Dakota Constitution would be violated if you were to accept appointment as Commissioner of University and School Lands. This section provides as follows:

Section 6. While serving in the legislative assembly, no member may hold any full-time appointive state office established by this constitution or designated by law. During the term for which elected, no member of the legislative assembly may be appointed to any full-time office which has been created, or to any office for which the compensation has been increased, by the legislative assembly during that term.

This section does not become effective until December 1, 1986. Until that time, Art. IV, §18 of the North Dakota Constitution states the applicable provisions for the acceptance of appointment by members of the Legislative Assembly. It may be possible for a member of the Legislative Assembly to resign and accept appointment to civil or state office as of December 1, 1986, provided that the office has not been created, or the compensation increased during the term for which the "member" has been elected.

Your final question is whether or not you may accept appointment to the office of Commissioner of University and School Lands if you were to resign your Senate seat. The language of Art. IV, §18, of the North Dakota Constitution appears to prohibit appointment of a member of the Legislative Assembly, not only while he or she is a member of that Assembly, but also during the term for which the "member" has been

elected. Thus, your resignation of your Senate seat would not affect your inability to accept this appointment.

Sincerely,

Nicholas J. Spaeth

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