

**OPINION
72-428**

December 6, 1972 (OPINION)

Mr. LeRoy H. Ernst
Executive Director
Governor's Council on Human Resources
State Capitol
Bismarck, North Dakota 58501

Dear Mr. Ernst:

This is in response to your letter in which you state the following:

"During a June 24, 1972, meeting of the North Dakota Commission on the Status of Women, the Commission voted to request that it be affiliated with the Governor's Council on Human Resources. This request was taken under advisement by Governor William L. Guy and subsequently granted on July 7, 1972. A copy of Governor Guy's directive is attached for your information.

"Authorization was also granted, in Governor Guy's directive, for the inclusion in the 1973 - 1975 budget request of the Governor's Council on Human Resources an appropriation for funding of the Commission on the Status of Women. Included in the budget request for the Commission are such items as: travel, postage, telephone, miscellaneous fees, supplies and printing.

"A review of immediate goals and priorities of the Commission on the Status of Women includes a plan of action that advocated the ratification of the Equal Rights Amendment by the 1973 Legislative Assembly.

"It has been brought to our attention that the Commission working for the passage of the Equal Rights Amendment in 1973 legislature possible could be construed as a state agency using public funds for advocating legislation of this type.

"The question arises, can the Commission on the Status of Women of the Governor's Council on Human Resources request funding for the 1973-1975 biennium while it is actively advocating the passage of legislation such as the Equal Rights Amendment? Your opinion on the interpretation of this question will be appreciated."

The basic question can be stated as follows: May the members of the Commission on the Status of Women in their official capacity, as members of the Governor's Council on Human Resources, advocate the passage of the Equal Rights Amendment by the 1973 Legislative Assembly by expending funds made available to the Council on Human Resources either by the state or federal government and if they did so advocate the passage of the constitutional amendment, would this in any way jeopardize the standing of the Governor's Council on Human Resources?

In answering this question, it is necessary to examine several constitutional provisions and statutes. We must also start from the premise that a governmental agency or body, commission, etc., has only such powers as are granted to them by either the Constitution or the statutes or as are necessarily implied from the grant.

We must also assume that the funding of the Governor's Council on Human Resources is at least in part funded by taxes levied by this state and by the federal government.

Section 175 of the North Dakota Constitution provides that no tax shall be levied except in pursuance of law and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied. The taxes levied for general government could be construed to include the objectives of the Governor's Council on Human Resources as that agency is established under the provisions of Chapter 50-26. None of the provisions of said chapter suggest even remotely any political activity including the advocating for passage of statutes or constitutional amendments. The appropriation does not reveal any funds appropriated for such purpose.

In this respect, we note that Section 186 of the North Dakota Constitution provides that all public monies be deposited in the State Treasury and shall be paid out and disbursed only pursuant to an appropriation first made by the Legislature (exceptions are made for certain state agencies which are considered to be engaged in business). Thus, without considering any other statute, we would have to conclude that there is no authority for the expenditure of any funds to promote the passage of the Equal Rights Amendment.

The Legislature has enacted numerous laws relating to the misappropriation of public funds. Section 12-10-01 prohibits any public officer or any person receiving any monies on behalf or on account of the state or for any fund created by law in which the state or the people thereof are interested directly or indirectly to appropriate it to his own use or to any person not entitled thereto without authority of law. Violation of this provision constitutes a felony. Section 12-10-02 makes it a felony for any public officer or employee to expend public funds or to cause them to be expended contrary to law.

It would reasonably follow that where taxes have not been levied and where no funds have been appropriated for the purpose of promoting the passage of the Equal Rights Amendment (without considering whether or not the state would have such authority) it would be a violation of law to expend public funds for such purpose.

In addition to the foregoing, Section 54-16-03 also provides that any funds expended for which no appropriation was made and for which authority from the Emergency Commission had not been obtained, does not constitute a valid expenditure and any debt or deficit created as a result of such action is void.

The Legislature has in a number of instances enacted laws making it unlawful for public officials and corporations to engage in political activity. In this respect, under Section 39-01-03 it makes it

unlawful for any person, officer or employee of the state or in any of its departments or bureaus to use or drive a state owned vehicle for engaging in any political activity. Section 39-01-04 defines political activity.

Section 39-01-05 even provides that any state officer or employee who drives a privately owned vehicle and if engaged in political activity shall not be entitled to collect any portion of the trip for the day on which such officer or employee engaged in any political activity.

Similarly, the Legislature, by Section 16-20-08, made it unlawful for any corporation or cooperative to give money or anything of value to aid political parties or candidates or to influence legislation of any kind.

The Legislature also prohibited by Section 54-23-52 any member or officer of the board to subject any officer or an employee of an institution subject to its control to solicit or otherwise influence such employee in favor of a particular view, candidate for office, or for any election purpose.

The provisions of these statutes clearly illustrate the efforts made by the Legislature to prevent the expenditure of public funds and to curtail public officers and employees from engaging in political activity on the job or through the position or office such person may hold.

In addition to state legislation, the Congress of the United States has enacted what is now codified as 5 USC 1501 and 5 USC 1502. The latter is specific in prohibiting a state or local officer from engaging in political activity. Under the enactments, a state or local officer or employee is one who is financed in whole or in part by loans or grants made by the United States or federal agency.

5 USC 1503 permits nonpartisan political activity and the last unnumbered paragraph states as follows:

"For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party."

This last provision addresses itself only to the political activity and does not apply to the expenditure of public funds. This section does not authorize the expenditure of public funds for such purpose.

While there may be other provisions of law which could be cited, there is no need to further search the Code because these amply illustrate that the expenditure of public funds for political purposes is in violation of law.

You may recall that even where the Legislature had appropriated funds for explaining a new Constitution, questions were raised as to whether or not the explanations were advocating the adoption of the new Constitution. Reference to this is made only for the purposes of bringing out the historic disapproval of expending public funds for

political purposes in either advocating for or against a candidate, or a law as the case may be, whether it is in the form of a statute or constitutional amendment.

Serious doubt exists as to the legality of creating a committee, or the making of an existing nongovernmental committee a part of state government where such committee acknowledgedly proposes to expend or actually expends public funds to engage in political activity in the form of lobbying for or against certain measures or any other form.

However, if a nongovernmental committee were created and complied with the existing laws pertaining to lobbying, etc., and otherwise complied with the law, no legal objections would be raised.

Even if a member of a nongovernmental committee were appointed to the Governor's Council, it would not prevent such individual from promoting or advocating his own political philosophies if it is done as an individual and not as a member of the commission and if no public funds are expended. Care, however, must be taken that the individual does not speak either as an official or as a representative of the Governor's Council on Human Resources.

Any political activity as a member of the Council or as a member of the Commission on the Status of Women, if public funds are expended, would constitute an unauthorized expenditure and would in all probability constitute a violation of state law. In addition to this, it could well jeopardize any federal grants that may have been available from the United States government and in an extreme situation might even require the state to repay such funds expended for such purposes.

Thus, in direct response to your question, it is our opinion that the Commission on the Status of Women as an integral part of the Governor's Council on Human Resources, would be acting contrary to law if it were in such position advocating the passage of the Equal Rights Amendment and thereby expending public funds and at the same time request funding for the 1973-1975 biennium.

It is our further opinion that any individual member of either the Governor's Council on Human Resources or a member of the Commission on the Status of Women could, as an individual but not in the capacity as a member of the Council, express his or her views on matters which could be considered political, provided no public funds are expended. In so doing, precaution should be exercised to avoid jeopardizing the meritorious program of the Governor's Council on Human Resources.

Sincerely yours,

HELGI JOHANNESON

Attorney General