

**OPINION
79-228**

February 7, 1979 (OPINION)

Mr. A. S. Benson
Bottineau County State's Attorney
Benson and Schell
Benson Building
616 Main Street
Bottineau, North Dakota 58318

Dear Mr. Benson:

This is in response to your letter of January 26, 1979, requesting an opinion from this office in regard to a conflict of interest between the positions of county superintendent of schools and school board member. In your letter you set forth the following facts and questions:

I have a matter before me in this County relative to the Superintendent of Schools. This matter involves a potential conflict of interest problem.

The facts are as follows: Mr. Robert Abrahamson, our present County Superintendent was appointed to the office of Superintendent of Schools on September 1, 1978. He served in this appointed position until the next general election, which was on November 7, 1978, at which time he was elected to a four-year term. He was duly qualified for this position. Mr. Abrahamson was also elected to the school board of the Bottineau Public School System two or three years ago and is continuing to serve in that capacity.

My question is: Is it proper for a County Superintendent of Schools to serve as a school board member in the area to which he is elected, namely Bottineau County?

I can give you a perfect example where there would be a conflict of interest in this position. The County Superintendent, State's Attorney and County Judge serve on the Tuition Appeals Committee and let us suppose that an appeal came from the Bottineau District or an adjoining district for a person wanting to attend a school outside the Bottineau District or to come into the District. Would the County Superintendent of Schools be in a position to decide with the other members of the board to allow or disallow the appeal, or is his interest such that he would not be a unbiased member of the board? If the Superintendent disqualified himself from acting in a case of this type that would leave two members on the board, namely the State's Attorney and the County Judge. Carrying this a little further, let us suppose that the County Judge voted to allow the appeal and the State's Attorney voted to disallow the appeal, no decision would be forthcoming, as I don't find any provision where the deadlock can be broken.

Mr. Abrahamson is doing a fine job as County Superintendent, as

well as serving on the school board. However, I feel that his position can become very embarrassing to himself, where he in fact is supervising his own actions on the school board.

We note initially that the laws providing for the qualifications of a candidate for the offices of county superintendent of schools and member of the school board nowhere provide that one may not seek, or once elected, may not hold, the office of the other. North Dakota Century Code Sections 15-22-02 and 15-47-05. Any such result must therefore be a consequence of some other statute or rule of law.

The statutes of this state contain several conflict of interest provisions applicable to a variety of specific situations. See, e.g., Sections 15-49-02, 15-29-08(10), 48-02-12 and 11-09-47. None of these, however, are applicable to the situation you present in your inquiry and none of them constitute a generally applicable conflict of interest statute. Our Supreme Court has, we note, adopted the common law rule that a conflict of interest does exist between two public offices when the duties of those offices are incompatible with one another. *Tarpo v. Bowman Public School District No. 1*, 232 N.W.2d. 67, 70 (N.D. 1975); *State v. Lee*, 50 N.W.2d. 124, 126 (N.D. 1951). In the *Lee* case the appellant argued that the duties of clerk of district court in selecting a jury were such as to give the clerk a degree of control over the disposition of a criminal defendant, which the clerk, in his capacity as justice of the peace, had bound over to the district court for trial. The appellant claimed that these two roles were so incompatible that a conflict of interest must prevent the clerk/magistrate from serving in one position or the other. The court examined the statutory duties of the clerk and found that under the scheme of jury selection set forth in the statutes, no unfair action by the clerk was possible and the positions were thus not in conflict, the court citing with approval the language from a Minnesota case holding that "the one (position) is not subordinate to the other, and neither officer can interfere with or has any supervision over the other. There is no such inconsistency in the functions of the two offices as would necessarily prevent one person from properly performing the duties of both."

In *Tarpo* the court refined the theory of incompatibility further in a case in which a teacher at Bowman High School was elected to a position on the school board. While the decision of the District Court in the *Tarpo* case appears to have been based on a violation of the narrow provisions of Section 15-49-02, the Supreme Court based its decision on the common law principle announced in *Lee*. In affirming the rule of *Lee*, the court said:

The 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.

An examination of the statutory duties of the members of a school board and the county superintendent of schools leads us to the conclusion that while conflicts of interest which do appear do not

seem significant when examined individually, taken as a whole we believe the two positions may fall with the language of Tarpo set forth above. We see, for example, that in Section 15-22-12, the county superintendent is directed to visit the offices of the school district to insure proper recordkeeping; that under Section 15-22-13 the county superintendent "shall convene the members and clerks of the several boards of the schools under his supervision . . ."; and in Section 15-22-12 that the county superintendent "shall decide all matters in controversy . . . appealed to him from decisions of school . . . boards". More significant duties and problems arise in connection with the role of the county superintendent in the administration of Chapter 15-40.2 ("Transportation of Students and Nonresident Tuition"). Under Sections 15-40.2-05, 15-40.2-08 and 15-40.2-09, the county superintendent may be called upon as a member of the three person county committee which you refer to as the tuition appeals committee, to hear appeals from his own board in three separate types of cases involving prior decisions of that board. We believe that while one such case or type of appeal may not be deemed a significant conflict, the opportunity for a county superintendent to hear an appeal in any or all of the three types of decisions rendered by his own board under Chapter 15-40.2, especially when coupled with the supervisory duties referred to earlier, may well constitute the "many potential conflicts of interest" cited by the Supreme Court in Tarpo.

In view of our conclusion reached above, we might also note that in Lee the court cited with approval the proposition that acceptance of a second office incompatible with the first vacates the first office. This somewhat arbitrary solution to conflict of interest problems appears to have been tempered somewhat by the Tarpo case in which the court held that the incompatibility could be removed by allowing Tarpo to choose to vacate one of the two positions. While we have no authority to require such a solution in this case, it would nevertheless seem to be an appropriate solution to the problem you have raised.

It is hoped that the foregoing will be of assistance.

Sincerely,

ALLEN I. OLSON

Attorney General