

**LETTER OPINION**  
**93-L-346**

December 6, 1993

Ms. Elaine M. O'Cain  
City Auditor  
P.O. Box 7  
White Earth, ND 58794-0007

Dear Ms. O'Cain:

Thank you for your November 2, 1993, letter requesting an opinion as to whether the mayor may also serve as the tax assessor. You also inquire as to the term of the mayor. Subsequent to the receipt of your letter and pursuant to the request of a member of my staff, you produced a copy of the city minutes authorizing you as the city auditor to request an opinion of this office.

You indicate that the mayor resigned in October of 1993. You ask whether the person the city then appointed as mayor may also serve as your city tax assessor. You also ask how long the appointed mayor serves as mayor, i.e., whether he finishes out the term of the previous mayor or whether a new mayor should be elected at the next regular city election for city council members.

To address your questions, it is first necessary to determine whether the city of White Earth is under the traditional council or the modern council form of city government. You indicated that the White Earth city governing body consists of three members: the mayor and two other council members. You also indicated that the mayor does not vote except in the case of a tie. These characteristics are consistent with the traditional council form of city government. See N.D.C.C. §§ 40-08-03 and 40-08-18. Thus, the city of

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White Earth appears to be operating under the traditional council form of city government.

"[N]o member of the city council shall . . . [h]old any other office under the city government", except for limited purposes which are not relevant here. N.D.C.C. § 40-08-09. The mayor is a member of the city council. N.D.C.C. § 40-08-01. The city assessor is considered an officer of the city. See N.D.C.C. § 40-14-04. Thus, N.D.C.C. § 40-08-09 prohibits the mayor from also serving as the city assessor.

In addition, the North Dakota Supreme Court has determined "'[i]t is a well settled rule of the common law that a person may not, at one and the same time, rightfully hold two offices which are incompatible.'" State v. Lee, 50 N.W.2d 124, 126 (N.D. 1951), quoting 62 C.J.S., Municipal Corporations, 485, c., p. 924. "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." Tarpo v. Bowman Pub. Schl. Dist. #1, 232 N.W.2d 67, 71 (N.D. 1975). The mayor appoints and has the authority to remove the assessor. N.D.C.C. §§ 40-14-04, 40-08-19. In addition, the mayor serves on the board of equalization that reviews the assessments of local assessors. See N.D.C.C. §§ 57-11-01(1), 57-11-03, 57-02-34, and N.D.C.C. ch. 40-19. Thus, based on N.D.C.C. § 40-08-09 and the incompatibility of the two offices, it is my opinion that the offices of mayor and city tax assessor are incompatible.

N.D.C.C. § 40-08-16 addresses the term of the appointed mayor:

If a vacancy occurs in the office of mayor, the city council may . . . , after fifteen days from the date of such vacancy, elect one of its members to act as mayor, the member so elected shall possess all the rights and

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powers of the mayor until the next election  
and until a mayor is elected and qualified.

Thus, the council member elected by the city council to act as mayor acts as mayor "until the next election." This refers to the next city election, whether it is a special election or the general election held in June of every even-numbered year. Letter from Attorney General Robert O. Wefald to John D. Hovey (September 14, 1984); see also, N.D.C.C. § 40-21-03 (month the general election is to be held, copy enclosed). The mayor elected at the next city election acts as mayor through the unexpired term of the mayor who resigned, unless the term of the resigned mayor would have been completed by the election date. See letter from Assistant Attorney General Gerald W. VandeWalle to Floyd M. Geiser (March 10, 1964). If the resigned mayor's term would have been completed by the election date, then the term of the mayor elected at the next city election is four years. See N.D.C.C. § 40-08-14. I have enclosed a copy of N.D.C.C. § 40-08-08 which addresses the manner of filling a council member vacancy other than that of the mayor.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL