

LETTER OPINION
2006-L-21

July 24, 2006

Mr. James O. Johnson
Mercer County State's Attorney
PO Box 39
Stanton, ND 58571-0039

Dear Mr. Johnson:

Thank you for your letter asking whether the county landfill manager may also serve as a county commissioner. Based on the following analysis, it is my opinion that the incompatible office doctrine would prevent an individual from serving both as a county landfill manager and as a member of the county commission.

ANALYSIS

You indicate that an individual was appointed in 1995 by the county commission as a supervisor or manager for the County Regional Landfill, a county enterprise. You also indicate that the landfill is self-supporting from dumping fees; however, it is operated under the direction of the county commission. You further indicate that the landfill manager is currently seeking an available seat on the county commission and ask whether this situation would present a conflict of interest for this individual.

As noted in N.D.A.G. 2004-L-49:

There is no general state statute prohibiting [a county officer] from holding more than one office. Cf. N.D.A.G. 93-L-214; N.D.A.G. Letter to Mahoney (Dec. 30, 1992) (although various statutes prohibit a member of a city governing body from holding another paid city position, no similar statutes specifically prohibit members of a county governing body from holding another paid county position).

Further:

The phrase "conflict of interest" "speaks of a situation in which regard for one duty tends to lead to the disregard of another." N.D.A.G. Letter to Rohrich (Apr. 14, 1983). The North Dakota Supreme Court has stated, "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).¹

In discussing this doctrine, I recently noted that “[a]lthough there does not appear to be a specific determination of what constitutes ‘incompatible’ offices, ‘[e]ach case is discussed and decided upon its particular facts.’”²

As the state Supreme Court explained:

“[Incompatibility of offices] is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them. Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. They are generally considered incompatible when such duties and functions are inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both.”³

The court later noted that “[t]wo 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.”⁴

The same test regarding incompatibility must be applied to determine the incompatibility of two positions held by an officer, even though one of the positions is not an office.⁵ Although the county landfill manager or supervisor is not a statutorily recognized office,⁶ it is nevertheless an appointed paid county position. Thus, in Tarpo, the North Dakota Supreme Court, in applying the common-law rule of incompatibility of positions, found employment as a teacher and holding the office of school board member to be

¹ N.D.A.G. 2004-L-49.

² Id.

³ State v. Lee, 50 N.W.2d 124, 126 (quoting 42 Am. Jur. Public Officers § 70).

⁴ Tarpo v. Bowman Public School District No. 1, 232 N.W.2d 67, 71 (N.D. 1975).

⁵ Id.

⁶ See, e.g., N.D.C.C. §§ 11-08-06, 11-10-06.

incompatible since a school board would have the power to appoint or remove a teacher and conflicts could arise relating to salary negotiations and supervision and control of duties.⁷

The board of county commissioners has general and specific duties that would affect the management and supervision of a county landfill department. Section 11-11-11, N.D.C.C., provides as follows:

The board of county commissioners:

1. Shall superintend the fiscal affairs of the county.
2. Shall supervise the conduct of the respective county officers.
3. May cause to be audited and verified the accounts of all officers having the custody, management, collection, or disbursement of any moneys belonging to the county or received in their official capacity.
4. Before March fifteenth of each year, shall have the county auditor prepare general purpose financial statements in accordance with generally accepted accounting principles. Public notice that financial statements have been prepared and are available for inspection must be published in the official newspaper.

Further, the board of county commissioners has the authority:

To control the finances . . . to establish charges for any county or other services, and to control the property of the county.

. . . .

To establish a garbage and trash collection system encompassing all or any part of the territory of the county. The words "garbage and trash collection system" include the operation and maintenance of one or more sanitary landfill sites, or other types of processing sites for the disposal of trash and garbage. The board may operate such system in cooperation with any one or more political subdivisions of this or any other state in accordance with chapter 54-40. . . . [T]he expenses of establishing,

⁷ Tarpo v. Bowman Public School District No. 1, 232 N.W.2d at 71.

operating, and maintaining it may be financed by fees charged to persons receiving direct benefits or by special assessment against the parcels of land properly charged therewith, or by both such fees and assessments. [and]

. . . .

To . . . finance . . . for county employees a group insurance program for hospital benefits, medical benefits or life insurance, and a group retirement program⁸

The primary areas of conflict or potential conflict between the members of the board of county commissioners and the landfill supervisor would relate to the appointment and removal power of the board over the landfill supervisor as well as the board's general power to supervise the fiscal affairs of the county and to control county property under N.D.C.C. §§ 11-11-11 and 11-11-14, and the authority of the board to establish and maintain a garbage and trash collection system under N.D.C.C. § 11-11-14(13).

In the case of a county commissioner and a landfill supervisor, there would be obvious conflicts and incompatibilities between the positions since the commissioner, as a member of the board, would share the power of appointment and removal of the landfill manager. Other conflicts of interest between the two could arise relating to salary negotiations and regulating other terms and conditions of employment such as group health and life insurance and retirement benefits.⁹ Also, conflicts may arise over supervision and control of duties and obligations owed to the public in the operation of the landfill.¹⁰

Determining whether conflicts actually exist involves making factual determinations regarding the extent to which two positions or offices are incompatible, and this office generally refrains from resolving factual issues.¹¹ However, in this case (as in Tarpo) the conflicts between the office of county commissioner and the appointed position of county landfill supervisor are so patent and obvious as to demonstrate incompatibility between the two. Consequently, it is my opinion that the position of county landfill supervisor and the office of county commissioner are incompatible and may not be simultaneously held by a single individual.

⁸ N.D.C.C. § 11-11-14(4), (13), and (16).

⁹ See, e.g., N.D.C.C. § 11-11-14.

¹⁰ See N.D.A.G. 98-L-113.

¹¹ See N.D.A.G. 2004-L-49.

LETTER OPINION 2006-L-21
July 24, 2006
Page 5

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹²

¹² See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).