

N.D.A.G. Letter to Siegert (April 26, 1990)

April 26, 1990

Ms. Carol M. Siegert
Administrative Assistant
Office of the Governor
State Capitol
600 E. Boulevard Ave.
Bismarck, ND 58505

Dear Carol:

Thank you for your March 28, 1990, letter concerning the ability of a state employee to serve in the North Dakota Legislature.

For many state employees, the federal Hatch Act may be applicable. The Hatch Act, applies to state and local employees of those agencies that receive federal funds. 5 U.S.C.A. § 1501 (West 1977). Not all state and local employees are covered by the Hatch Act. Instead, only those employees whose principal employment is in connection with an activity which is financed in whole or in part by the United States or a federal agency are subject to the Act's provisions.

A determination as to whether a particular employee is subject to Hatch Act provisions is made by reviewing the employee's principal employment. In general, if the principal employment is in connection with an activity financed in any way by the federal government, the Hatch Act applies; if the employee exercises no function in connection with an activity funded by the federal government, the Hatch Act does not apply. The Act also does not apply to employees of educational or research agencies.

If the Hatch Act applies, that employee may not be a candidate for a public elective office in a partisan election. 5 U.S.C.A. § 1502(a) (West 1977). A state legislative election is a partisan election. Thus, a state employee subject to Hatch Act provisions may not be a candidate for the state legislature.

The prohibition applies to election attempts as opposed to simply assuming office. The Hatch Act is also violated if a covered employee takes a leave of absence during the campaign. See State of Minnesota, Department of Jobs and Training v. Merit Systems Protection Board, 875 F.2d 179 (8th Cir. 1989) (employee subject to the prohibitions of the Hatch Act regardless of the employee's leave status).

If an employer is unsure whether an employee's principal employment is in connection with an activity financed in whole or in part by the United States or a federal agency, it would be prudent to contact the office of the General Counsel, U.S. Civil Service

Commission, Room 6H31, 1900 East Street N.W., Washington, D.C. 20415, 202-632-7600, regarding application of the Act.

The remainder of this letter assumes the employee in question is not covered by Hatch Act prohibitions.

The enclosed 1988 letter to Doug Tollefson explains there is no general prohibition against state employees serving in the Legislature. The North Dakota Constitution prohibits only full-time appointive state officers from serving in the Legislature. N.D. Const. art. IV, § 12. The scope of the phrase "full-time appointive state office," as found in the constitution, is not entirely clear and the facts of each case should be reviewed to determine the applicability of this prohibition.

Except for the constitutional prohibition in N.D. Const. art. IV, § 12, the only other obstacle to a state employee serving within the Legislature is the doctrine of incompatible offices. This doctrine prohibits a person from holding two offices at the same time where the duties of both offices involve conflicts of interest or discharge of duties. The enclosed 1986 letter to Jake Gust notes case law from other jurisdictions suggesting that there is no incompatibility where a person acts as a legislator and holds a position in municipal or state government. There are no North Dakota cases discussing the applicability of the doctrine of incompatible offices to persons who are members of the Legislative Assembly.

Regardless of the incompatible offices analysis, the North Dakota Constitution states that each house of the Legislative Assembly possesses the exclusive authority to judge the qualifications of its own members. N.D. Const. art. IV, § 12. Thus, assuming a person elected to the Legislature is not in violation of N.D. Const. art. IV, § 6, it will be up to the respective house of the Legislature to determine whether that person is qualified to serve as a member of that particular house.

I hope this discussion is helpful to you.

Sincerely,

Nicholas J. Spaeth

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Enclosures