

**LETTER OPINION
2006-L-36**

November 2, 2006

Mr. Maury C. Thompson
Sioux County State's Attorney
PO Box L
Fort Yates, ND 58538-0529

Dear Mr. Thompson:

Thank you for your letter asking whether a county commission may appoint a county auditor as a part-time county director of tax equalization. For the reasons stated below, it is my opinion that a county commission may appoint a county auditor as a part-time county director of tax equalization if the county commission determines that the positions are not in conflict or incompatible.

ANALYSIS

In your letter, you cite to N.D.A.G. 69-257 (the "1969 Opinion"), which determined that the office of county director of tax equalization could not be held by a county auditor on either a full-time or part-time basis. However, you also noted the later-enacted statute that permits a county to combine any elective county office with one or more functionally related elective or appointive county offices.¹ You also made reference to N.D.A.G. 2004-L-65, which determined that the offices of county auditor and recorder could be combined since they are functionally related within the meaning of the statute. Thus, you question which legal authorities control the situation you describe.

The first question to consider is whether the statute, N.D.C.C. § 11-10.2-01, would permit the combination of an elective county auditor office with a part-time director of tax equalization position, i.e., whether an elective county auditor office is functionally related to the office of county director of tax equalization. As I indicated in N.D.A.G. 2004-L-65, two county offices are functionally related if the duties of those offices have some connection or association with each other. In that opinion, I listed a number of the principal duties of a county auditor as follows:

¹ See N.D.C.C. § 11-10.2-01(1).

The county auditor is the chief financial officer of the county and keeps complete and detailed records of all financial transactions of the county. N.D.C.C. § 11-13-04. The county auditor must receive for filing various documents and bonds, N.D.C.C. § 11-13-02(3), and must preserve documents, books, records, and maps that are to be kept in the auditor's office, N.D.C.C. § 11-13-02(4). The auditor must record in the office of the recorder certain bonds not issued by the state bonding fund. N.D.C.C. § 11-13-02(5). The auditor must also file and preserve all accounts, vouchers, and other papers pertaining to the settlement of any accounts to which the county is a party. N.D.C.C. § 11-13-02(8). When a deed, contract for deed, patent, plat, replat, or auditor's lot is presented to the county auditor for transfer or filing, the county auditor must determine whether there are delinquent taxes or special assessments. N.D.C.C. § 11-13-12. Whenever certain sheriff's deeds or other conveyances of real property are offered for recording, the county auditor enters the transfer and the county recorder records the transfer. N.D.C.C. § 11-13-14. The county auditor also provides information regarding unpaid taxes to mortgagees of lands in the county. N.D.C.C. § 11-13-15.²

In addition, the county auditor has a number of duties related to the correction of assessments of property contained in N.D.C.C. ch. 57-14. These include: the correction of assessment books and tax lists;³ the giving of notice to persons owning omitted property;⁴ the exercising by the county auditor of all the powers of an assessor in discharging duties assigned to the county auditor under the chapter;⁵ the entering of property on tax lists and correcting errors;⁶ the keeping of a roll of omitted property;⁷ the certification of certain taxes to the treasurer;⁸ and, upon completion of a reassessment by the special assessor to the county auditor, the giving of notice to the State Tax Commissioner and other officials.⁹

The county director of tax equalization has a number of duties under N.D.C.C. ch. 11-10.1, including instructing township and city assessors in the preparation of proper use of land maps and property record cards, preparation of assessment books, changes in assessment laws, determination of proper standards of value, and use of proper

² N.D.A.G. 2004-L-65.

³ N.D.C.C. § 57-14-01.

⁴ N.D.C.C. § 57-14-02.

⁵ N.D.C.C. § 57-14-03.

⁶ N.D.C.C. § 57-14-05.

⁷ N.D.C.C. § 57-14-06.

⁸ N.D.C.C. § 57-14-07.

⁹ N.D.C.C. § 57-14-08.

classifications of property.¹⁰ The county director of tax equalization succeeds to the powers and duties of township assessors and cities with a population under 5,000 that do not employ an assessor.¹¹ The county director of tax equalization also succeeded to the powers and duties of the county auditor pertaining to the administration and enforcement of mobile home taxes¹² and, as noted in the 1969 Opinion, assists the county auditor in preparation of assessment lists for taxing purposes and in the correction and omission procedures under N.D.C.C. ch. 57-14 and in spot checking property assessments.¹³

As it is apparent from a review of the statutory duties, the county auditor and county director of tax equalization have some duties which are interrelated or connected. Thus, it is my opinion that the offices of county auditor and county director of tax equalization are functionally related and therefore may be combined under N.D.C.C. ch. 11-10.2 if the offices are not incompatible.¹⁴

Since I have determined the two offices may be combined under N.D.C.C. § 11-10.2-01, I must consider the continuing viability of the 1969 Opinion. The 1969 Opinion was premised on three factors. It first indicated that appointing a full-time county auditor to a full-time county director of tax equalization position or a part-time county director position would be repugnant to the presumption that the office of county auditor is a full-time position. It also noted that the Legislative Assembly had repealed former N.D.C.C. § 11-10-02.2, which had previously permitted the county commission to appoint the county auditor or deputy auditor as supervisor of assessments, thus evincing a legislative intent that the county auditor could no longer be appointed to such an office.¹⁵ Finally, as noted above, the 1969 Opinion made reference to certain duties of the county director of tax equalization contained in N.D.C.C. § 11-10.1-06, specifically the requirement that the director “assist the county auditor in preparation of assessment lists for taxing purposes and in the correction and omission procedures as defined in chapter 57-14,” stating that if the “two positions were held by the same person the county auditor would, of course, receive no such assistance.”¹⁶

¹⁰ N.D.C.C. § 11-10.1-05.

¹¹ N.D.C.C. § 11-10.1-05.

¹² N.D.C.C. § 11-10.1-06.

¹³ Id.

¹⁴ N.D.C.C. § 11-10.1-01 generally requires that the county director of tax equalization hold a current certificate issued by the state supervisor of assessments or, if the county director does not hold a current certificate, that the commission deems the person to be qualified to act as county director of tax equalization by virtue of education, training, and experience.

¹⁵ Id.

¹⁶ N.D.A.G. Letter to Rund (June 18, 1969).

After the opinion was issued, the Legislative Assembly enacted N.D.C.C. § 11-10.2-01, which specifically allows counties to combine elective county offices with other functionally related county offices.¹⁷ Due to this statutory change, the 1969 Opinion is no longer controlling. In certain cases, however, the incompatible office doctrine may prevent an individual from serving both as a county employee and as a county officer, or holding two county offices.¹⁸ Although N.D.C.C. § 11-10.2-01 allows elective county offices to be combined, the incompatibility doctrine prevents a person from, at the same time, holding two offices that are incompatible.¹⁹ Although there does not appear to be a specific determination of what constitutes incompatible offices, each case is discussed and decided upon its particular facts.²⁰

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.²¹

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.”²²

The resolution of whether a conflict or incompatibility actually exists “necessarily involves making factual determinations regarding the extent to which two positions or offices are

¹⁷ N.D.C.C. § 11-10.2-01(1).

¹⁸ See generally N.D.A.G. 2006-L-21.

¹⁹ State v. Lee, 50 N.W.2d 124, 126 (N.D. 1951); N.D.A.G. 2006-L-21; N.D.A.G. 2004-L-49.

²⁰ Id.; see also N.D.A.G. 2006-L-21.

²¹ State v. Lee, 50 N.W.2d 124, 126 (quoting 42 Am. Jur. Public Officers § 70).

²² Tarpo v. Bowman Public School District No. 1, 232 N.W.2d 67, 71 (N.D. 1975).

incompatible, which is an issue that should be resolved at the local level.”²³ Thus, even though N.D.C.C. § 11-10.2-01(1) permits a county to combine an elective county office with one or more functionally related elective or appointive county offices, the doctrine of incompatible offices may still be applicable, and the resolution of whether a conflict actually exists involves the county commission making factual determinations regarding the extent to which the two positions or offices conflict or are incompatible.²⁴

Based on the foregoing, it is my opinion that a county commission may appoint a county auditor as a part-time county director of tax equalization if the county commission determines that the positions are not in conflict or incompatible.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/vkk

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.²⁵

²³ N.D.A.G. 2004-L-49 (citing N.D.A.G. 99-L-59; N.D.A.G. 94-L-327; State v. Lee, 50 N.W.2d 124, 126 (N.D. 1951)); N.D.A.G. Letter to Wold (July 22, 1987).

²⁴ See N.D.A.G. 2004-L-49.

²⁵ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).