

N.D.A.G. Letter to Dosch (March 25, 1992)

March 25, 1992

Mr. Ronald M. Dosch
City Attorney
City of Devils Lake
PO Box 1048
Devils Lake, ND 58301

Dear Mr. Dosch:

Thank you for your March 6, 1992, letter inquiring whether an administrator employed by the Lake Region Law Enforcement Center may serve as a city commissioner for the city of Devils Lake in light of the prohibitions contained in N.D.C.C. § 40-09-17.

N.D.C.C. § 40-09-17 contains certain prohibitions restricting members of a board of city commissioners from being eligible for or holding other offices within city government or paid from the city treasury.

Restrictions on members of board. No member of the board of city commissioners shall:

1. Be eligible to any other office the salary of which is payable out of the city treasury;
2. Hold any other office under the city government; and
3. Hold a position of remuneration in the employment of the city.

N.D.C.C. § 40-09-17.

This section is a noncompatibility of office statute applicable to cities with a commission form of government. A similar prohibition exists for cities using the council form of government. See N.D.C.C. § 40-08-09.

Even in the absence of noncompatibility of office statutes, the common law of North Dakota is such that no individual has a constitutionally protected right to hold incompatible offices or employments. This prohibition, if applied to an individual, does not result in an unconstitutional infringement of personal or political rights. Tarpo v. Bowman Public School District No. 1, 232 N.W.2d 67 (N.D. 1975). However, the common law does not apply in any case where the law is declared by the Code. 232 N.W.2d at 70. See N.D.C.C. § 1-01-06. Therefore, in this situation, the determination of whether the office and employment held by the individual are noncompatible is regulated by N.D.C.C. § 40-09-17.

From your letter and from a telephone conversation between a member of my staff and Assistant City Attorney Michael J. Walker, I understand that the Lake Region Law Enforcement Center Board is comprised of seven members. Two of those members are appointed by Ramsey County, one by Benson County, one by Towner County, one by Nelson County and two by the city of Devils Lake. The two board members appointed by the city are also board members of the Devils Lake City Commission. Another member of the Devils Lake City Commission is employed as the administrator of the Law Enforcement Center and was hired by its board. The Law Enforcement Center Board is responsible for the operation of the Law Enforcement Center, and the City Commission of Devils Lake does not have supervisory responsibility for the Law Enforcement Center.

The city commission member hired as administrator for the Law Enforcement Center is not a law enforcement officer, but has management responsibility for the building and is paid a salary for that function. The Law Enforcement Center charges \$30 per day per inmate for housing inmates. The police department of the city of Devils Lake rents space in the Center on a square foot basis. It is my understanding that when the lease contract for the police department is considered by the Devils Lake City Commission, the commission member hired as the administrator for the Law Enforcement Center abstains from voting.

Applying the facts in this case to N.D.C.C. § 40-09-17, it is my opinion that an individual who is the administrator of the Lake Region Law Enforcement Center may serve as a member of the city commission for the city of Devils Lake. The salary of the administrator is not payable directly out of the city treasury, but rather the city remits funds to the Lake Region Law Enforcement Center based on an assessment from the center for the housing of prisoners. Even though city funds help support the Center, the administrator of the Lake Region Law Enforcement Center is not an office under city government nor is it a position of remuneration in the employment of the city.

Sincerely,

Nicholas J. Spaeth

jfl