

**LETTER OPINION
2002-L-17**

March 25, 2002

Honorable David O'Connell
State Senator
2531 County Road 30
Lansford, ND 58750

Dear Senator O'Connell:

Thank you for your letter asking several questions about the North Dakota Wheat Commission's appointment of a person who is not a Wheat Commission member as a delegate to U.S. Wheat Associates, Inc.

You first ask whether the North Dakota Wheat Commission ("Wheat Commission") has the authority to elect a person who is not a member of the Wheat Commission to serve as a Board member of U.S. Wheat Associates, Inc. This is the same question posed in your October 28, 2001, opinion request. In response to that question, I concluded that the "Wheat Commission has the express authority to appoint agents to conduct its business and affairs in various organizations in which it is actively involved. Specifically, the Wheat Commission, in its discretion, has the authority to appoint Alan Lee as a delegate to U.S. Wheat Associates." 2002 N.D. Op. Att'y Gen. L-02.¹ Thus, I believe my January 4, 2002, opinion resolved this issue.

Your second question asks whether the Wheat Commission offered a false certification to U.S. Wheat Associates when it certified the term of someone who was not qualified under the by-laws to be a director. As you know, this office does not issue opinions on

¹ Your original and subsequent opinion requests and various other correspondence have used varying descriptions of how Alan Lee came to be on the U.S. Wheat Associates, such as "elected", "appointed", "selected", "seated". The description of how Alan Lee was chosen is irrelevant. N.D.C.C. § 4-28-06 expressly grants to the Wheat Commission the power and authority to "appoint, employ, bond, discharge, fix the compensation and prescribe the duties of such administrative, clerical, technical, and other personnel, employees, and agents as it may deem necessary to conduct the business and affairs of the commission." N.D.C.C. § 4-28-06(6).

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questions of fact. 2000 N.D. Op. Att'y Gen. L. 176; N.D.C.C. § 54-12-01(6), (8) (opinions may be issued to state agencies and legislators on "legal questions"). Because this issue involves a question of fact, I cannot respond to it. Instead, I can only defer to the judgment of the Wheat Commission, U.S. Wheat Associates and others on this issue.²

Your third question asks if the Wheat Commission does not have the authority to elect a non-wheat commission member to the Board of U.S. Wheat Associates, whether the Wheat Commission must now elect a qualified member of the Wheat Commission to serve on the U.S. Wheat Associates Board and certify that person for the current term. This question presupposes that the Wheat Commission did not have authority to elect a non-member to the U.S. Wheat Associates Board of Directors. Because I have previously concluded that the Wheat Commission has the authority to appoint Alan Lee as a delegate to U.S. Wheat Associates, your third question is moot.

Your fourth question asks whether the Wheat Commission, as a member of the U.S. Wheat Associates, is bound by U.S. Wheat's by-laws to certify as U.S. Wheat Associates Board members only persons who qualify under those by-laws. Whether a state agency, as a member of a private non-profit corporation, is bound by that corporation's by-laws is a question that must be resolved by that corporation. As I stated in my January 4, 2002, opinion, I cannot render an opinion on an issue that would constitute providing private legal advice to a private, out-of-state corporation over which I have no control. The Attorney General cannot render legal advice or assistance to private businesses or members of the general public. See N.D.C.C. § 54-12-01. See also 2002 N.D. Op. Att'y Gen. L-02.

Your fifth question asks whether the U.S. Wheat Associates' legal counsel's determination that a person is a member of the Wheat Commission can override the North Dakota Century Code definition of a Wheat Commission member. The number and qualifications of Wheat Commission members are set by statute. N.D.C.C. § 4-28-03. The U.S. Wheat Associates' legal counsel clearly cannot override state law. How a private non-profit organization chooses to interpret state laws for purposes of defining its own membership under its by-laws is an issue over which I have no control. Nor may I render an opinion to such private, out-of-state corporation as to how it interprets various state laws for the purpose of following its own internal by-laws. See N.D.C.C. § 54-12-01.

² In addition, this question appears to presume that Alan Lee was not qualified under U.S. Wheat Associates' by-laws. In the January 4, 2002, opinion I issued to you, I noted that, while I could not give a legal opinion on the U.S. Wheat Associates' by-laws, the U.S. Wheat Associates had determined that Alan Lee clearly met the criteria of the U.S. Wheat Associates' by-laws. 2002 N.D. Op. Att'y Gen. L-02.

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Your sixth question contains two parts. You first ask whether the Wheat Commission can elect anyone that a majority of the Commission members desire as a U.S. Wheat Associates Board member. As I stated in my January 4, 2002, opinion, "the authority of the Wheat Commission to appoint representatives to the U.S. Wheat Associates is quite broad." The Commission is expressly authorized to appoint agents "as it may deem necessary to conduct the business and affairs of the commission." N.D.C.C. § 4-28-06(6). Of course, simply because the Wheat Commission has the authority to appoint agents does not necessarily mean that the organization to which the agent is appointed will accept that individual. That decision will be controlled by the by-laws or other internal policies governing the membership and operation of that private organization. In the present example, it is my understanding that the Wheat Commission is allowed up to two representatives on the U.S. Wheat Associates' Board of Directors. Thus, the Wheat Commission, by a majority vote, could appoint up to two agents, who are not Wheat Commission members, and offer those individuals to serve on the U.S. Wheat Associates' Board of Directors.

The second part of your sixth question asks whether the other qualifications for U.S. Wheat Associates' Board members can also be ignored. This question presupposes that U.S. Wheat Associates has, in fact, already ignored its membership qualifications. This matter would be a question of fact, to be resolved by U.S. Wheat Associates, the North Dakota Wheat Commission or other affected individuals. As previously stated, I may not render opinions on question of fact, only questions of law. See N.D.C.C. § 54-12-01(6), (8).

Sincerely,

Wayne Stenehjem
Attorney General

pcg/vkk

cc: North Dakota Wheat Commissioners
Neal Fisher, Administrator, North Dakota Wheat Commission