

**LETTER OPINION
2015-L-07**

October 29, 2015

The Honorable Rich Wardner
State Senator
1042 12th Ave W
Dickinson, ND 58601-3654

Dear Senator Wardner:

Thank you for asking whether a public entity, specifically the North Dakota State Board of Dental Examiners, may hire a lobbyist with public funds if the authority to hire a lobbyist is not specifically provided by law. It is my opinion that a state agency or political subdivision may not use public funds to hire a lobbyist unless such authority is specifically provided for by statute or if the state agency or political subdivision has authority to promote or advocate in specific subject areas. Also, certain home rule counties and cities may hire a lobbyist if authorized by their home rule charter and implemented by ordinance. Public employees are exempt from the requirement to register as a lobbyist, and may testify before the Legislature on matters within their official capacities.

ANALYSIS

Regarding public funds, the North Dakota Supreme Court has held:

The people and the legislature, through the constitution and laws of this State, have delineated the parameters of the appropriate expenditure of public funds, and any expenditure in violation of those provisions by definition creates a loss to the government.¹

In 1998, this office opined that public moneys provided by a county or other public entities could not be used to pay a lobbyist to appear before the Legislative Assembly in the absence of a statute specifically permitting such an expenditure, and only then if such an expenditure otherwise conformed to the relevant provisions of statutory and constitutional law.² However, this office has also indicated that it might be possible to hire a lobbyist if the state agency or political subdivision has statutory authority to promote or advocate in specific subject areas. For example, in 2002, this office determined that the North Dakota Wheat Commission, which

¹ State v. Blunt, 751 N.W.2d 692, 700 (N.D. 2008).

² N.D.A.G. 98-L-152. See also N.D.A.G. 64-177.

had the statutory authority to promote wheat-related issues, could use wheat checkoff monies to contract with other wheat organizations for lobbying services.³ Also, a county or city with home rule authority allowing it to control its finances and fiscal affairs may pass an ordinance determining that it will hire a lobbyist.⁴

A complete answer to your question must also examine the general laws regarding legislative lobbying found in N.D.C.C. ch. 54-05.1. This chapter requires registration and reporting by any person who attempts to secure the passage, amendment, or defeat of any legislation or the approval or veto of any legislation by the Governor, and also by anyone who attempts to influence decisions made by Legislative Management or an interim committee of the Legislature.⁵ The chapter does not apply to any person who is “[a]n employee, officer, board member, volunteer, or agent of the state or its political subdivisions whether elected or appointed and whether or not compensated, who is acting in that person’s official capacity.”⁶

Also, state laws allow counties, cities, and school districts to expend public funds for the purpose of participating in organizations of counties, cities, or school districts.⁷ Under certain conditions, these organizations’ employees and officers are not required to be registered as lobbyists.⁸ As the law prefers substance over form,⁹ these individuals must be bona fide employees, officers, volunteers, or agents, and not hired lobbyists masquerading as employees, officers, volunteers, or agents.¹⁰

³ N.D.A.G. 2002-L-63 (N.D. Wheat Comm’n contracting with other wheat organizations for lobbying services). See also N.D.A.G. 93-L-187 (N.D. Council on the Arts contracting for lobbying services); N.D.A.G. 93-L-357 (N.D. Dep’t of Human Services’ Div. of Aging Services contracting with the Silver Haired Educ. Ass’n for lobbying services); and N.D.A.G. 94-L-49 (Garrison Diversion Conservancy Dist. paying membership fees to the Greater N.D. Assoc. for lobbying services).

⁴ N.D.A.G. 2011-L-06.

⁵ N.D.C.C. §§ 54-05.1-01, 54-05.1-02(1).

⁶ N.D.C.C. § 54-05.1-02(2)(c). See also N.D.A.G. 2002-L-63; N.D.A.G. 77-58.

⁷ N.D.C.C. §§ 11-11-14(15); 40-05-01(74); 15.1-09-33(18), (33).

⁸ See N.D.A.G. 77-58 (citing Bradley v. Saxbe, 388 F.Supp. 53 (D.C.D.C.1974)).

⁹ N.D.C.C. § 31-11-05(19).

¹⁰ The exception for an agent does not imply that an agent may be hired for lobbying where the state agency is not authorized to directly hire a lobbyist. It has long been held that “the law does not permit by indirection what cannot be accomplished directly.” Langenes v. Bullinger, 328 N.W.2d 241, 246 (N.D. 1982). Cf., N. States Power Co. v. Hagen, 314 N.W.2d 32, 38 (N.D.1981); State v. Skar, 313 N.W.2d 746, 748 (N.D.1981); Paluck v. Bd. of Cnty. Comm’rs, Stark Cnty., 307 N.W.2d 852, 857 (N.D.1981). Further, exceptions to statutes are strictly construed “so as not to extend the exception beyond the ordinary and literal meaning of its language.” Midwest Fed. Sav. Bank v. Symington, 423 N.W.2d 797, 798 (N.D.1988) (citing Knoepfle v. Suko, 108 N.W.2d 456, 458, syl. 3 (N.D.1961)). The exception would nullify the general rule against hiring a lobbyist if it were interpreted as authority, in itself, to hire a lobbyist.

In conclusion, it is my opinion that a state agency or political subdivision generally may not use public funds to hire a lobbyist unless such authority is specifically provided for by statute. However, it might be possible to hire a lobbyist if the state agency or political subdivision has authority to promote or advocate in specific subject areas. Also, certain home rule counties and cities may hire a lobbyist if authorized by their home rule charter and implemented by ordinance.

You specifically asked about the authority of the State Board of Dental Examiners to hire a lobbyist. That board has authority to hire an executive director, attorneys,¹¹ investigative staff, and clerical assistants.¹² A diligent search of all chapters in the Century Code concerning the State Board of Dental Examiners did not reveal any specific authority authorizing that Board to employ a lobbyist. Also, the Board does not have authority to promote or advocate on any particular issues. Thus, only board members and bona fide employees, officers, volunteers, or agents of the State Board of Dental Examiners may lobby the Legislative Assembly or the Governor on the Board's behalf.

Sincerely,

Wayne Stenehjem
Attorney General

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.¹³

¹¹ This power is subject to my constitutional and statutory authority to appoint assistant attorneys general and special assistant attorneys general to represent state agencies. N.D.C.C. § 54-12-08. I have not authorized the State Board of Dental Examiners to hire an outside attorney.

¹² N.D.C.C. § 43-28-06(5).

¹³ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).