

**LETTER OPINION**  
**96-L-174**

October 3, 1996

Mr. Kevin D. Pifer  
Chairperson  
North Dakota Agricultural Products  
Utilization Commission  
State Capitol, 6th Floor  
Bismarck, ND 58505-0020

Dear Mr. Pifer:

Thank you for your letter regarding conflict of interest and the application of N.D.C.C. § 12.1-13-03 to the North Dakota Agricultural Products Utilization Commission (commission).

It is my understanding that a commission member has submitted an application for a commission grant. You have asked what effect N.D.C.C. § 12.1-13-03 has on the commission and its individual members. N.D.C.C. § 12.1-13-03 provides:

1. Every public servant authorized to sell or lease any property, or to make any contract in his official capacity, alone or in conjunction with other public servants, who voluntarily becomes interested individually in the sale, lease, or contract, directly or indirectly, is guilty of a class A misdemeanor.
2. Subsection 1 shall not apply to:
  - a. Contracts of purchase or employment between a political subdivision and an officer of that subdivision, if the contracts are first unanimously approved by the other members at a meeting of the governing body of the political subdivision, and a unanimous finding is entered in the official minutes of that body that the contract is necessary because the services or

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property contracted for are not otherwise obtainable at equal cost.

- b. Sales, leases, or contracts entered into between school boards and school board members of school officers.

The exceptions outlined in subsection (2) do not apply here because the commission is neither a political subdivision nor a school board.

N.D.C.C. § 12.1-01-04(27) defines "public servant" as "any officer or employee of government, including law enforcement officers, whether elected or appointed, and any person participating in the performance of a governmental function." The nine-member commission consists of the director of the Department of Economic Development and Finance, the president of North Dakota State University, the Commissioner of Agriculture, five members appointed by the Governor and one member appointed by the Commissioner of Agriculture. N.D.C.C. § 4-14.1-03. The commission is charged with administering the agricultural fuel tax fund and administering grant programs. See N.D.C.C. ch. 4-14.1. Based on the composition and responsibilities of the commission outlined in N.D.C.C. ch. 4-14.1, it is my opinion that commission members are participating in the performance of a governmental function, and therefore are "public servants" under N.D.C.C. § 12.1-13-03.

The commission is authorized to administer grant programs consistent with the purpose of N.D.C.C. ch. 4-14.1. N.D.C.C. § 4-14.1-03.1. North Dakota Administrative Code § 95-02-04-01(5) provides that following approval of the grant award, a formal grant contract will be executed between the commission and the grantee. There are only two North Dakota Supreme Court cases which interpret N.D.C.C. § 12.1-13-03, both involving contracts for goods and services. See State v. Pyle, 71 N.W.2d 342 (N.D. 1955); State v. Robinson, 2 N.W.2d 183 (N.D. 1942). These contracts are distinguishable from the grant contracts entered into by the commission and its grantees, which govern the terms, conditions, and administration of the grant. However, the grant contracts require the grantees to follow certain procedures and requirements, and perform certain actions, and in return, the commission pays the grantees as outlined in the contract. Accordingly, because the commission members are public servants authorized to enter into a grant contract on behalf of the commission, it is my opinion that N.D.C.C. § 12.1-13-03 prohibits any member of the commission from voluntarily becoming interested in any grant contract of the commission.

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Whether a particular action taken by a commission member is prohibited by N.D.C.C. § 12.1-13-03 depends on whether the member voluntarily becomes interested individually, directly or indirectly, in a contract. This office has previously defined "interest" as a pecuniary or proprietary interest by which a person will gain or lose something, rather than general sympathy or concern. 1995 N.D. Op. Att'y Gen. 21, 27. The decision in State v. Robinson provides a lengthy discussion of the meaning of the terms "individually" and "directly or indirectly" in N.D.C.C. § 12.1-13-03. In Robinson, the Motor Vehicle Registrar of the State of North Dakota approved payment for materials furnished to the Motor Vehicle Registration Department by a corporation in which the registrar was a stockholder and the secretary. Robinson, 2 N.W.2d at 185. The court considered the question of whether the fact that an officer is a stockholder in a corporation made the officer "interested individually" in the contracts of the corporation. The court stated:

The interest contemplated by the statute may be either direct or indirect but it must be an interest that accrues to the officer personally and not in a representative capacity such as that as a receiver, trustee, or administrator. The interest of a stockholder in a corporation is a personal interest. Gains or losses of the corporation may redound to the interest of the stockholder personally. If his interest in the corporation is substantial, it undoubtedly comes within the purview of the statute even though it may accrue through the holding of stock. On the other hand, we do not imply that the holding of one share of stock in a large corporation makes an officer criminally liable in every instance wherein he makes a contract with that corporation. Criminal liability must depend upon evidence as to interest other than the bare existence of the relationship of a stockholder in a corporation. The interest made criminal by the statute is a question of fact that does not depend entirely upon the relationship that a stockholder bears to the corporation in which he owns a share of stock.

Id. at 189. The court went on to conclude that the relationship of a stockholder to a corporation could not, as a legal proposition, form the basis for determining whether a violation had occurred, but that it was a question of fact which must be determined by a jury. Id. at 190. In other words, while N.D.C.C. § 12.1-13-03 applies to officers who are stockholders in corporations, whether a stockholder's interest in the corporation is sufficient to make the stockholder

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interested individually, directly or indirectly, in the contracts of the corporation within the meaning of the statute is a question of fact, depending on the circumstances.

Whether a prohibited conflict exists in these circumstances is a question of fact which I cannot resolve. In addition, it is a long-standing policy of this office not to determine whether a violation has occurred or should be charged or whether a board should grant or deny an application based upon a specific set of facts. It is the commission which serves as the fact finder and decision maker in the exercise of its statutory authority.

However, based on the Pyle and Robinson decisions, N.D.C.C. § 12.1-13-03 applies to officers who are partners in partnerships or stockholders in corporations. The conviction in Pyle indicates that officers who are partners in partnerships are prohibited from entering into contracts in their capacities as officers with the partnerships. Robinson, on the other hand, states that while N.D.C.C. § 12.1-13-03 applies to officers who are stockholders in corporations, the question of whether the stockholder's interest in the corporation is substantial enough to make the stockholder interested individually and directly or indirectly in the contracts of the corporation is a question of fact.

Based on these decisions, it is my opinion that it would not be advisable for a commission member to enter into a contract for a grant from the commission if the commission member was the sole or a substantial investor in the business entity or if the commission member was a partner in a partnership with another person. However, while the Pyle and Robinson decisions clearly establish that single investors or partners with another individual have interests significant enough to warrant a criminal prosecution under N.D.C.C. § 12.1-13-03, the decisions do not specify at what point a person's investment in a larger entity becomes so minor that the interest does not trigger application of the statute. In other words, whether a commission member who holds stock in ADM, with, for example, thousands of other individuals, violates N.D.C.C. § 12.1-13-03 when the commission enters into a grant contract with that business enterprise is a question of fact which depends upon the nature and extent of the member's investment.

The commission may want to establish a procedure requiring commission members to disclose any interest which they may have in enterprises which have or are considering submitting grant applications. The commission could then, prior to taking any action on the application, make a factual determination regarding whether the interest triggers

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N.D.C.C. § 12.1-13-03. As a fact finder, the commission may review the following questions to determine whether the commission member's interest in a business enterprise which has submitted a grant application to the commission is substantial enough to fall within the terms of the statute:

1. The extent of the commission member's investment in the enterprise (number of shares, dollar amount of investment, percentage of shares in the enterprise);
2. Whether the commission member is also an officer in the enterprise;
3. What involvement, if any, the commission member has had in developing or submitting the application;
4. The size and nature of the enterprise;
5. Whether the commission member will receive a personal, pecuniary or proprietary benefit from the grant, if awarded;
6. Whether any benefit to the commission member from the grant, if awarded, exceeds that which will be received by other shareholders or members of the public.

After considering these and any other relevant factors, if the commission determines that the commission member's interest in the enterprise would be problematic under N.D.C.C. § 12.1-13-03, the commission may require that either the application be withdrawn, or that the commission member with the conflict resign from the commission; or deny the application based on the apparent conflict of interest.

In addition, I understand that the North Dakota Department of Agriculture, the North Dakota Department of Economic Development and Finance, and North Dakota State University, or divisions of these agencies, will occasionally submit grant applications. Because each of these agencies is represented on the commission, conflict of interest questions similar to those raised by individual commission members can also arise. However, I also understand that the grants, if awarded, would rarely directly benefit the individual commission member, and that the grants quite often confer benefits on the agencies as a whole, and the members of the public which they serve. Whether the grant application presents a problem under N.D.C.C. § 12.1-13-03 will largely depend on whether the commission member

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will have an "individual" interest in the grant contract, and the commission may use the same or similar questions as those outlined above to determine whether the commission member has a conflict of interest.

Finally, there may, at times, be a question whether the commission member has "voluntarily" entered into the contract with the commission. This issue was addressed by the supreme court in Pyle when the member of the township board of supervisors whose partnership was paid for performing highway work claimed that the services performed were not his voluntary act, but were performed at the insistence of the other members of the board and that therefore he was not guilty under the statute. Pyle, 71 N.W.2d at 344. The Court rejected this argument, stating that there was no evidence that the other members of the board had coerced him, or that he had resisted accepting the contract, and that he had not performed the work under compulsion or coercion. Id. The Pyle case indicates that a member will be considered to have entered into the contract "voluntarily" unless the member was compelled or coerced into, or resisted, entering into the contract.

While this may seem an extreme definition of "voluntarily" and there may be many intermediate levels of involvement between actually submitting the application and entering into the contract and being coerced or compelled to enter into the contract, this is the only guidance for determining whether a commission member has become "voluntarily" interested in the contract. This will also be a question of fact for the commission to determine, keeping in mind the supreme court's definition of "voluntarily" and the nature of the commission member's involvement in entering into the contract. Even if the commission member abstained from voting on whether the commission should enter into a grant contract, there would still be a question whether the member's involvement in the application would be voluntary.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

cgm/vkk